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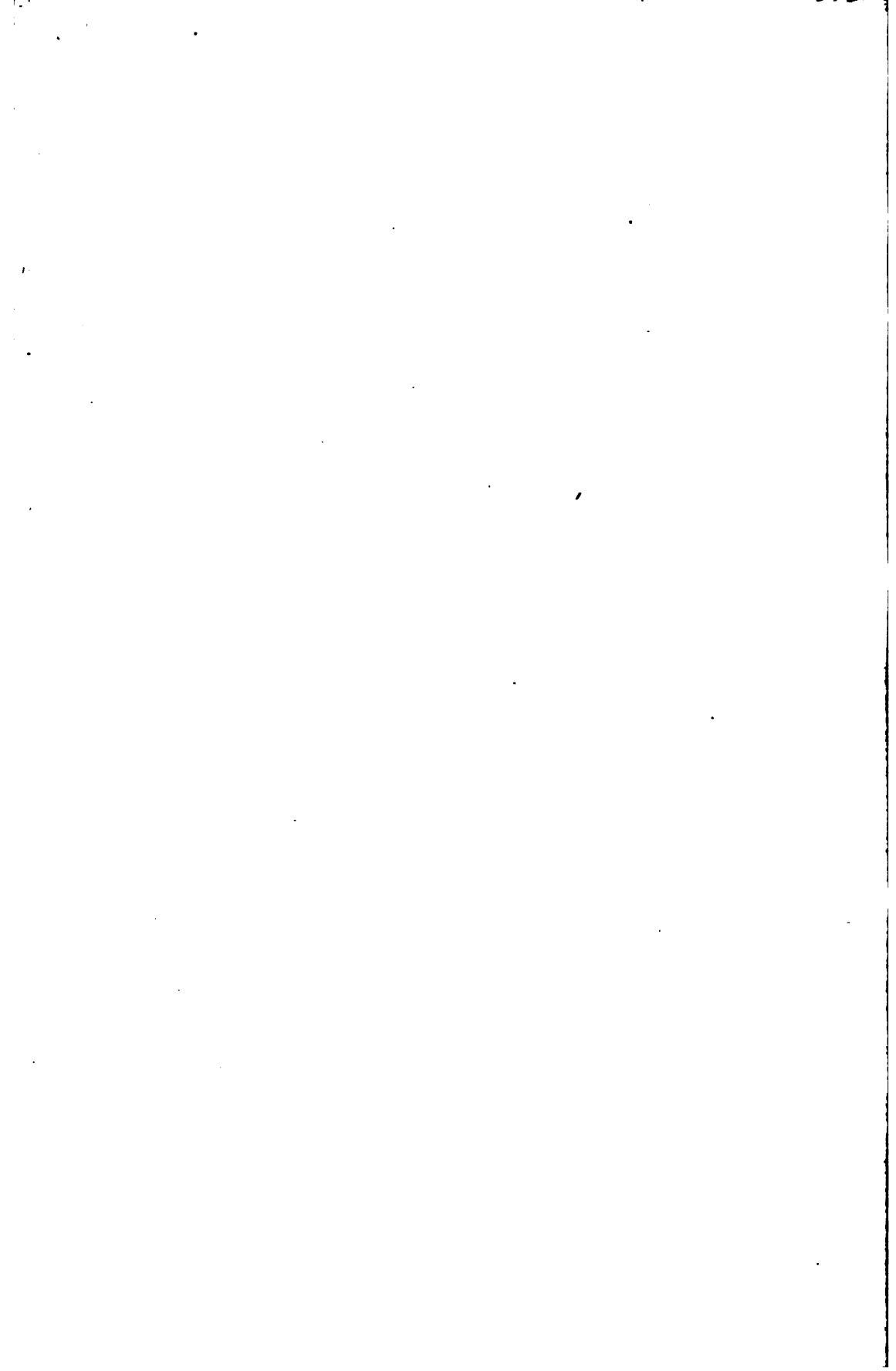
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REPORTS
OF
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• CHATTEL MORTGAGES.

10

[Sandusky Common Pleas, 1879].

MICHAEL FOUGHT v. FREDERICK HIET.

Section 4155 Rev. Stat., providing that "every mortgage so filed shall be void against creditors * * * after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy * * * is again filed," must be strictly construed. And where the year expired July 26, 1878, and the mortgage first filed August 1, 1876, and refiled July 26, 1877, was not again refiled until July 31, 1878, and on May 8, 1879, a levy was made on the property under a judgment rendered in 1876: Held, the levy had priority over the mortgage. Such refileing is not equivalent to a new mortgage, nor can the word creditors be restricted to creditors with existing levies or liens, or obtaining liens during the default.

DOYLE, J.

This is a controversy between lien-holders as to priority of liens on personal property. The plaintiff's claim is based upon a chattel mortgage made by the owner to him July 31, 1876, filed in the proper office August 1, 1876, refiled July 26, 1877, and not again refiled until July 31, 1878. The defendant, as constable, seized the property under an execution issued upon a judgment against the mortgagor, rendered August 24, 1876, the execution being dated May 8, 1879, and the levy made the same day, the property at the time of the levy being in the possession of the mortgagor.

The question involved is, whether the refileing of the chattel mortgage, after the expiration of the year from the date of the last filing, is effective to keep the mortgage in force as against the creditors of the mortgagor, who were creditors prior to such refileing, but who obtained

a levy on the property covered by the mortgage, after the re-filing. It involves a construction, if, indeed, there is any room for construction, of the statute relating to chattel mortgages. It reads as follows:

Section 2. "That every mortgage, or conveyance, intended to operate as a mortgage, of goods and chattels hereafter made, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next section of this act."

Section 4. "Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy * * * shall be again filed," etc.

It is claimed by counsel for the mortgagor:

First—That the re-filing of the mortgage, after the expiration of the year, is an original filing, and has the same effect as to creditors, as if a new mortgage had been executed and filed at that time.

Second—That the term "creditors" used in this statute means "judgment creditors" with valid levies, or attaching creditors, or creditors whose liens upon the property have become fixed by process, while the property is freed from the lien of the mortgage, viz.: during the lapse between the end of the year and the new filing.

The question is an important one, and, in Ohio, is one which appears to be wholly unsettled. It ought not to be very difficult of solution, for the statute is one which leaves very little room for construction; there is no ambiguity in it; its words are express and very plain, and must be taken in their usual and ordinary signification. 4 O. S., 385; 5 O., 65; *Woodbury v. Berry*, 18 O. S., 456.

The mortgage, unaccompanied by possession by the mortgagee, in the first instance, shall be absolutely void as against the creditors of the mortgagor unless the same shall be filed, etc., and every mortgage so filed shall be void as against the creditors of the mortgagor after the expiration of one year from the filing thereof, unless, within a certain time named, it shall be re-filed. A literal reading of the statute refutes both propositions asserted by plaintiff's counsel. Is it within the power of a court to add anything to or detract anything from the act by way of construction?

Upon principle this statute ought to be construed strictly; the whole matter of giving a lien upon personal property by chattel mortgage, without any change of possession, is an innovation upon the rules of the common law.

I think we are required by settled authority to hold to a strict and literal reading of the statute.

The statutes of New York and New Jersey are similar to ours, the only difference being, that where ours says the mortgage shall be void, etc., unless re-filed, their says it shall cease to be valid, etc.

In the case of *DeCourcey v. Collins*, 21 N. J. Eq., 357, the court, in construing their statute, says: "The clear direction of the act is that a prior mortgage, unregistered, shall be 'absolutely void' as against sub-

sequent mortgagees in good faith. We are asked to say that this result shall not follow unless such subsequent mortgagee shall obtain a priority in the registration of his mortgage. But we cannot say this, because the statute says just the reverse. The statute prescribes but a single condition to give a second mortgage priority over a first unregistered mortgage, viz.: bona fides in the party taking it. It is not, therefore, in the competence of the court to require the performance of a second condition, viz.: that such second instrument must be first put upon record. By the true construction of the act in question the first mortgage was entirely void as against the second one, and consequently the omission to record the latter according to law cannot affect the result of this controversy."

In the case of the *National Bank of the Metropolis v. Sprague et al.*, 20 N. J. Eq., 23, the mortgage was filed July 20, 1866, and re-filed May 12, 1867, before the last thirty days of the year, and the court says: "The chattel mortgage to Klous & Hilbourn would be a lien on the chattels, if it were not for the omission to file a copy of it within the time required by law. The act says it shall cease to be a lien unless a copy is re-filed within thirty days before the expiration of the year. The words are plain and positive; there is no room for construction. The object indicated is a sensible one. * * * But it is not for the courts to find a good reason for the enactment, it is enough for them that it is so clearly enacted."

I am aware that the case of *Swift v. Hart*, 12 Barb., 531, holds that "the re-filing of a chattel mortgage after the expiration of a year from the time of the first filing is effectual to protect a mortgagee and his assigns as an execution creditor whose execution is not levied until after the second filing. Such second filing of the mortgage may be regarded in the light of an original filing at the time it is done, and in the absence of actual fraud is good as against subsequent liens."

Johnson, J., dissented from the opinion of the majority of the court in that case, and subsequently in the case of *Newell v. Warner*, 44 Barb., 258, delivered the opinion for the same court, holding a re-filing of the chattel mortgage before the last thirty days of the year, to be inoperative, and, referring to the case of *Swift v. Hart*, supra, says: "It is true that that was the case of the original mortgage, re-filed after the expiration of the time prescribed by statute. But the statute makes the filing of a copy just as effectual as the filing of the original, and if we are at liberty to depart at all from the provisions of the statute, it can make no difference whether the filing is earlier or later than the prescribed time. I dissented from the opinion of the court in the case referred to, and am still entirely unable to see how it is that when the statute says in plain terms that unless a certain thing is done, within a certain time, the mortgage shall cease to be valid against creditors, its validity can be restored or continued by doing the thing at another and different time."

The authority of *Swift v. Hart*, supra, is doubted, and to some extent expressly denied, by the court of appeals of New York in *Marsden v. Cornell et al.*, 62 N. Y., 215, which holds a strict compliance with this statute necessary, both as to the re-filing and the statement of the amount due at the time of re-filing and the court say: "The appellant cites *Swift v. Hart*, supra, which, so far as it is relied upon by him, is not in harmony with the views here expressed. But that case, so far as it conflicts, is not approved by this court."

See also *Ely v. Carnley*, 19 N. J. Eq., 496, and *Peter v. Parmley*, 52 N. Y., 185.

Our own supreme court has, several times, held that a strict compliance with the statute, as to the affidavit made by the mortgagee, is necessary to the validity of the mortgage as against creditors, and certainly the statutory requirements in that regard are not more explicit than those in relation to filing and re-filing of the mortgage.

It is claimed that the word "creditors" in this statute means such creditors as shall have a valid levy on the property at a time when it is freed from the lien of the mortgage; and that as this mortgage was good as between the parties to it, it could be re-filed at any time and thus protect the property against subsequent levies, which is substantially what the court said in *Swift v. Hart*, supra. It is a sufficient answer to say that the statute does not so provide. The mortgage shall be void as against the creditors of the party making the same, not the "judgment creditors," "execution creditors" or "attaching creditors," but all who are creditors at the time the mortgage so becomes void, viz: at the time of the expiration of the year and the failure to re-file.

A mortgage not re-filed within the time required by law, is void as to a creditor at large, whose claim accrues before or while the default continues, though such creditor is not in position to raise the question until he has obtained judgment or process against the property. *Thompson v. Van Vechten*, 27 N. Y., 583; *Hewick v. King*, 19 N. J. Eq., 80.

There are some cases which hold that mortgagees or purchasers cannot take advantage of the omission to refile unless they became such during the existence of the default, *Meech v. Patchin*, 14 N. Y., 71; but they are based very much on the word "subsequent" in the statute which is applied to purchasers and mortgagees in good faith, but not to creditors.

In *Parshall v. Eggert*, 54 N. Y., 18, the court say that in the case of a chattel mortgage, the time when the creditor became such fixed the rights of the parties, and a mortgage not filed was void as to him, though he should not then be in a position at once to attack its validity; and in *Thompson v. Van Vechten*, supra, the court says: "Reading the statute literally, the creditors who may take advantage of the default in re-filing embrace all the creditors of the mortgagor, without regard to the time when the debts were contracted. The language of the statute being direct and positive, embracing all creditors, I do not think we ought to hold that the lien continued as against these executions, after the default in re-filing the mortgage." See also *Dutcher v. Swartwood*, 15 Hun., 31, which seems to cover this point entirely.

We are not called upon in this case to consider what the result would be if the creditor became such after the re-filing, or whether as to subsequent creditors a mortgage may not be re-filed, or newly filed after the year, so as to preserve its lien; nor is it necessary to question the authority of *Wilson v. Leslie*, 20 O., 161; so far as the question actually decided in that case is concerned.

It may be said that the statute law as well as the common law looks with disfavor upon sales of chattel property, or incumbrances upon it, unless there be an accompanying immediate delivery, and a following actual and continued change of possession; it permits a chattel mortgage to except its reprehension only on condition that it is filed and within the time limited re-filed, with certain requirements to insure good faith. To say that this limitation or condition may be so enlarged by construction so as to give preference to this mortgage, is to say, that you can

resort to the statute to give validity to an instrument which would be presumptively void without it; but having once obtained validity from the statute, you may ignore the conditions of the statute, upon which alone it can be kept valid.

I have examined the cases of *Wilson v. Leslie*, 20 O., 161; *Brown & Co. v. Webb*, 20 O., 389; *Seaman v. Eager*, 16 O. S., 209; 4 O. S., 383; and *Woodbury v. Berry*, 18 O. S., 456, and find nothing in them in conflict with the conclusion I have reached. It is true the judges delivering the opinions in those cases use phrases such as "creditors who assert their rights against the property," "execution creditors," "attaching creditors," apt phrases describing the class of creditors before them in those cases, but having no effect as limiting the creditors named in the statute.

See *Kilbourne v. Fay*, 29 O. S., 264, 277, which, to say the least, in its review of these cases, leaves the question I am considering open.

The term "creditors," as used in the statute of frauds, includes all persons who are creditors of the vendor or assignor, at any time whilst the property remains in his possession or under his control. A creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien or a right to a lien upon the specific property, he may not be in position to assert his rights as a creditor. 72 N. Y., 426. The language of the chattel mortgage act certainly in terms, extends equally to the creditors at large of the mortgagor.

It is claimed upon the authority of *Seaman v. Eager*, *supra*, that the purpose of filing the mortgage is only to give notice to creditors and others whose interest may be affected by it, and that the notice was given as well, by its re-filing after the year, as would by obtaining a new mortgage and by filing that, all of which may be true. The legislature might have accomplished its object as well by so providing as it did by the act passed; the trouble is that it has declared this mortgage void, and it is no answer to say that so radical a provision was not necessary to accomplish the end designed.

I feel strengthened in this opinion by a careful examination of the cases of *Hanes v. Tiffany*, 25 O. S., 549, and *Kilbourne v. Fay*, 29 O. S., 264; and for further authority in its support, refer to 43 Ind., 230; 4 Bissell, 134; 26 Ind., 124; 7 Ind., 284; 2 Bissell, 497; *Herman on Chattel Mortgages*, 190, 195.

Judgment for defendant.

Everett & Fowler, for plaintiff.

Lemmon, Wilson & Rice, for defendant.

PROCEEDING IN ERROR.

14

[Hamilton District Court, 1879].

†CHATFIELD & WOODS, Ex'rs of EDWARD I. TOWNSEND, v. SWING & MELLEN, Ex'rs of REBECCA TOWNSEND.

1. It being in error cases, section 676, Rev. Stat., unlike appeal cases, the duty of the plaintiff in error and not of the clerk to file the transcript and original papers, or transcripts thereof, in the reviewing court, a petition in error, where

†See decision of Clermont common pleas, 6 Dec. R. 666 (s. c. 7 Am. Law Rec. 326). See note to that decision.

neither the bill of exception nor original papers or transcripts thereof have been filed, must, on motion, be dismissed, but without prejudice to the filing of another petition.

2. Evidence can not be heard nor statements of counsel received in the reviewing court to add to or strike anything from a bill of exceptions properly taken and filed; such bill is conclusive.

MOTION to dismiss petition in error.

Defendants in error have filed a motion to dismiss the petition in error, for the reason that no proper record or true bill of exceptions has been filed in this court as required by the Code.

JOHNSTON, J.

This motion involves a question of practice. So far as the motion relates to the bill of exceptions not being a true bill, the court must hold, as intimated during the hearing, that where the bill appears to have been, as this does, regularly signed and sealed by the judge who tried the case below, and appears to have been taken and filed within the time fixed by the code, evidence cannot be heard or statements received of counsel in the examining court to add to or strike anything therefrom. Such a bill of exceptions is conclusive upon everything therein contained.

As to the other question raised by the motion, that no proper record has been filed in this court to form the basis of the review sought by the petition in error. This petition refers to the record and bill of exceptions taken below, as having been filed in this court. A dispute appears to have arisen between counsel as to the correctness of the bill. During the argument, it was claimed by counsel for defendant in error that neither the bill of exceptions nor any other record had up to that time been filed in this court. Upon an inspection of the bill, as well as the appearance docket of this court, neither the original papers in the case below, nor the bill of exceptions have been filed here. The bill does not bear any evidence of having been filed in this court. All that appears to have been filed here with the petition in error is the transcript of the docket and journal entries in the common pleas.

Referring to section 6716, Revised Statutes, the plaintiff in error shall file, with his petition in error, either a transcript of the final record or a transcript of the docket and journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of. The statute seems not to have been followed. The original papers not having been filed here, they are presumed to be where they were last filed and used—in the common pleas court. The statute is different as to appeal cases. There it is made the duty of the clerk; after the bond for appeal has been given to deliver the original papers at the office of the clerk of the district court on or before the first day of the term thereof next after the appeal is perfected. (section 5235 do.) It is not, therefore, any part of the duty of the clerk to deliver the original papers to this court in error cases. It is the duty of the plaintiff in error or his attorney. As the bill of exceptions is the record relied upon in the petition in error to exhibit the errors complained of, and it has not been filed in this court, the motion, for that reason, must be sustained. To comply with the statute, all papers required to be used in error cases in this court, whether originals or transcripts of the record or papers below, should be filed, and so endorsed by the clerk, or filed in the district court, with date of filing, as is done in the common pleas.

Motion granted, but the dismissal is without prejudice to the filing of another petition. Meanwhile the parties may be enabled to settle, in the common pleas, all questions of difference as to the bill of exceptions.

Gen. Durbin Ward, for motion.

Wm. Disney and Judge Jordan, contra.

EXTRA FREIGHT CHARGES.

25

[Superior Court of Cincinnati, January, 1880]

LOUISVILLE AND CINCINNATI R. R. CO. v. CHARLES KAHN, Jr.

Under a contract to carry certain car loads to C. for ten cents, but the charge to be thirteen cents if the freight was carried beyond plaintiff's depot at C., a payment of the extra three cents, exacted by the plaintiff, on being ordered to re-ship the goods, is not involuntary and under duress, because the depot of the road on which the reshipment was made was but a little distance from plaintiff's depot and connected with it by tracks. The plaintiff was not obliged to allow the other road to use its tracks to haul away the cars, nor was it obliged to haul them to the other depot itself without extra payment.

FORCE, J.

Charles Kahn, dealer in provisions in this city, purchased in Louisville 2193 tierces of lard, to be shipped to Cincinnati. It appears from the bill of lading, and all the parties agreed, that the contract of shipment was that the lard was to be shipped from Louisville to Cincinnati at ten cents per hundred. There was some dispute as to where the contract was made, whether in Louisville by the chief freight agent of the road with Atkinson & Co., or by Kahn in person with the freight agent here. The only difference would be that both parties in Louisville were aware of the contract that three cents would be charged if the freight went beyond the plaintiff's depot in Cincinnati, and both parties in Cincinnati were ignorant of this arrangement. The freight arrived in Cincinnati, and ten cents per hundred was paid. The agent in Cincinnati first learned of the shipment on the 31st of January, and immediately notified the defendant by telephone, and the agent also finding a telegram stating that if the freight went farther thirteen cents would be charged, and notice of the fact was also given by telephone. Kahn concluded not to dispose of the lard in Cincinnati, but to re-ship, and the plaintiff refused to deliver at the depot of the Little Miami Railroad unless three cents additional was paid, and that was the amount of the check.

The bills of lading were in bank, attached to a draft for \$40,000, which defendant was bound to take up and pay, and not being able to take up the draft unless he could sell for cash in this city, or re-ship and draw against the bills of lading, it was important that he should at once get possession of the lard; and he claims that under the stress of circumstances he gave his check for the extra three cents, under protest, and afterwards stopped payment of the check. So the merchandise went on, and the check has not been paid.

The question of duress does not arise in the case. It is not entirely clear that the notice of three cents extra being charged was given before

the defendant had any knowledge that he would be compelled to sell for cash or re-ship, and it was claimed that the charge was made before the contingency had arisen. If the plaintiff demanded three per cent. extra for something it was under obligation to perform, there was no consideration; but if it was for something he was under no obligation to perform, there was a consideration. The plaintiff having fulfilled its contract to bring the lard to its own depot, and deliver it there, cannot be compelled to deliver at a further point. Though the distance between its own depot and that of the Little Miami Road was small, and it might deliver the freight as easily at the Little Miami Road as at its own depot, that was not the contract it made, and it was under no obligation to do so. It was urged, however, that this was not necessary, nor asked, as it would be sufficient for the trains of the Little Miami Railroad to come into the plaintiff's depot and haul the lard away. That might be done. But the plaintiff was under no obligation to give the use of its tracks and depot to the trains and laborers of another road. It could not be compelled even to give a license for a short time to another road. Hence the plaintiff was not under obligation by its own locomotive and trains to deliver the lard at the Little Miami depot, or to permit that road to come into its depot. It was fair to remember that when the claim for the extra freight was made in the presence of Kahn, he said: "I can haul it by drays for half the price;" to which the agent replied: "Certainly, you have a right to do so." It may be that this was unamiable or under the circumstances oppressive and unexpected, but it was not illegal, and a reason was offered for it, which, although not known to Kahn or Arnold at the time, yet still was a reason which might be sufficient to make so great a charge for so slight a service. A practice had existed for a long time on the plaintiff's road of charging ten cents for hemp shipped at Lexington delivered at Cincinnati, and thirteen cents when delivered East. It was natural there should be surprise and feeling manifested by the defendant in this case, but there was no legal reason why the plaintiff had not a right to demand an extra payment of three cents per hundred as the freight upon the shipment in question. Slight as the actual labor was, the plaintiff had a right to demand it, and the other party was bound to pay it.

Judgment for plaintiff.

E. P. Bradstreet, for plaintiff.

Paxton & Warrington, for defendant.

EXECUTION SALE OF CURTESY.

[Holmes Common Pleas, 1879]

A. S. BAIRD v. D. W. VAN EVRA.

A husband's estate by the curtesy is not protected, after the death of his wife, by the act of March 23, 1866 (S. & S. 391), from sale on execution to pay his debts.

VOORHES, J.

On the 7th day of October, 1879, the sheriff levied an execution issued from this court upon the estate of the defendant by the curtesy

in 185 acres of land. The same was duly approved and sold to Annie and Charlotte Van Evra, who are children of the defendant, for the sum of \$556.67, due return of the sale having been made by the sheriff. The defendant moves the court here to set aside the sale, for the reason set forth in his motion: "That an estate by the curtesy is not subject to levy and sale for any debt against the husband during the life of the wife or any heir of her body."

It is conceded by the parties that the estate levied upon and sold is the estate of the defendant by curtesy in the property of his deceased wife, and that the purchasers are the children and heirs of her body.

Whether or not the estate of Van Evra can be taken on execution and sold to pay his debts after the death of his wife depends upon a clear understanding of what is an estate in curtesy, and a construction of the statute passed and which took effect March 23, 1866, found on page 391 of S. & S. Statutes.

This is an act entitled, "An act to amend sections one and three of an act entitled, 'An act concerning the rights and liabilities of married women,'" passed April 3, 1861. This statute provides that any estate, or interest, legal or equitable, in real property belonging to any married woman at her marriage, or which may have come to her during coverture by conveyance, gift, devise or inheritance, or by purchase with her separate means or money, shall, together with all rents and issues thereof, be and remain her separate property, and under her control, and she may, in her own name, during coverture, make contracts for labor and materials for improving, repairing and cultivating the same, and also to lease the same for any period not exceeding three years.

The act provides that its provisions shall not effect the estate by the curtesy of any husband in the real property of his wife after her decease. But during the life of the wife, or any heir of her body, such estate shall not be taken by any process of law for the payment of his debts, or be conveyed or incumbered by him, unless she shall join therein with him in the manner prescribed by law in regard to her own estate."

It is claimed on behalf of the motion, that this statute exempts this property from being appropriated to payment of the husband's debts, not only during the life of the wife, but also during the life of any heir of her body. If this claim is well made under the statute, then the sale should be set aside; but if the statute does not affect the husband's curtesy after the decease of the wife, then the sale should be confirmed.

In order to properly determine this question, it is important to know what are the respective interests of the husband and the wife in the wife's real estate.

By the common law, where a man married a woman who was seized of an estate of inheritance, and had by her issue born alive, capable of inheriting her estate, he, at her death, became seized of her estate for life as tenant by the curtesy of England. To entitle him to such estate, four requisites were necessary at the common law: marriage, seizure, issue born alive and death of the wife.

By marriage, seizin and issue born alive, the husband becomes a life tenant of his wife's real estate initiate, and the death of the wife made his estate consummate. When he became a complete tenant by the curtesy, during the existence of his estate initiate, he might do any acts to charge the estate of his wife.

The statute of Ohio has adopted the English curtesy, making, how-

ever, the change that three requisites only are necessary to invest the husband with a life estate in his wife's real estate, which are marriage, seizin, and death of the wife. Marriage and seizin make him a tenant initiate, and upon her death he is a perfect tenant for life possessed of her estate consummate.

By the common law, the tenant initiate was entitled to the possession and control of his wife's lands. He has a right to the rents and profits. The right to repair, improve and lease the same, and might make and incur any liabilities that could be made a charge upon the land at law and in equity. And such right of the husband existed at the common law in Ohio, until the passage of the act of April 3, 1861, found in vol. 58, page 54. This act arrested from the husband and confided to the wife the absolute control over her own estate. Exempting it from all obligations and liabilities incurred by the husband, investing in her the rights that by the common law had before been invested in the husband, thereby empowering her to lease, to receive the rents and profits, and to hold the same exempted from the debts of the husband; and the act of March 23, 1866, stripped the husband of all power to make contracts for labor and materials for improving, repairing and cultivating her lands, and invested such power in the wife over her own property.

The legislation concerning the rights and liabilities of married women would appear to be nothing more than to invest the wife with the powers and rights over her own real property, which she had lost at the common law, and providing that no liabilities of the husband should obtain a legal respect against her estate during the life of the wife, or the life of an heir of her body. So far, at least, as she had an estate in her own property, it should remain sacred to her as against the liabilities incurred by the husband, unless she shall join with him in the manner prescribed by law in regard to her own estate.

But the act of March 23, 1866, expressly provides that it shall not affect the estate by the curtesy of any husband in the real property of his wife after her death; at the death of the wife the statute ceases to withhold from the husband any rights which he had to his curtesy consummate. The death of the wife makes a division of her estate, giving to the husband his curtesy for life, and the reversion to her heirs; at her death, the husband's curtesy is received by him unaffected by the legislation of this state. The balance of the estate, the reversion, goes under the laws of descent, unaffected by any liabilities of the husband.

Of these, the statute of March 23, 1866, gave to Van Evra his curtesy in his wife's real estate. What has been sold by the sheriff, his levy and proceedings of the sale show that he has sold his life estate. Then the rights which Van Evra had to hold the real estate of his wife during his life is the interest and estate which has been sold. His estate for life was a freehold estate, not of inheritance. Who, after the death of his wife and during his life, could have preferred a claim to the use and enjoyment of this property superior to his in the law?

We think his estate at the death of his wife was the same that it would have been had not the acts of 1861 and 1866 been passed. And if these acts had not been passed, could there be any doubt but what the estate and interest of Van Evra in the property sold was legally liable for the payment of his debts? We think upon this point the case is clearly at rest upon the authority of the case of *Canby's Lessee v. Porter*, 12 O., 80, and *Lessee of Thompson's Heirs v. Green*, 4 O. S., 216, where

it is settled that a life estate is subject to levy and sale to satisfy the debts of the life tenant.

The motion to set aside the sale is overruled, and the sale made by the sheriff is confirmed, and deed ordered to the purchasers.

MISCONDUCT OF JURY.

28

[Defiance Common Pleas, 1880]

BALTIMORE, PITTSBURGH & CHICAGO RY. CO. v. EDWIN PHELPS
et al.

Where a juror, during the trial of a case, without evil intention, asks of some of the officers of the plaintiff, a railway, who were also witnesses for the company, if the railway would give a church lot at a certain station, and would put up an elevator there, and the officers, without intent to influence him, reply so as to lead him to hope the same, but nothing is said about the case, but the juror believes the officers can speak for the company, a verdict in its favor must be set aside, although the court is not able to find that the juror's judgment was influenced, and though he testifies that it was not influenced; and semble, that he should not be allowed to testify whether he was or was not influenced.

Suit was brought on a guarantee, signed by nineteen citizens of Defiance, to the plaintiff company, of the right of way through the village of Defiance, for the plaintiff's railway about to be built at the time the guarantee was made.

At the May term, 1879, a verdict was rendered in favor of the plaintiff for ten thousand four hundred and forty-four dollars and eighty-eight cents (\$10,444.88). Many exceptions were taken during the trial, and immediately on rendition of the verdict, a motion for new trial was filed, stating, together with other reasons, the following:

"First—On account of the misconduct of the plaintiff during trial.

"Second—On account of the misconduct of the jury during the trial."

All other statutory reasons for a new trial.

On hearing of the motion at the January term, 1880, affidavits were read on behalf of the defendants, and witnesses on both sides were examined orally in the court.

The juror referred to in the opinion of the court was asked, on behalf of the plaintiff: "What effect the consultations he had with Messrs. Keyser, Frazier and Achenheil had upon his mind in rendering his verdict." To which question the defendants objected, but the court overruled the objection, and the juror answered: "None whatever."

The further facts of the case on the motion are sufficiently stated in the opinion of the court:

OWEN, J.

Several grounds are presented by the defendants for this motion. Passing the first and second grounds assigned, I shall content myself with the statement now that upon the best examination and consideration I have been able to bestow upon the other questions presented, I am not able to conclude that there is any error in them which would justify me in setting aside this verdict and granting a new trial.

The more serious and difficult questions are presented by the first and second grounds of the motion, alleging misconduct of the plaintiff

and of the jury during the trial. I find from the affidavits and oral testimony offered upon the hearing of the motion, the following facts:

One of the jurors who tried the case and was an extensive farmer and grain producer, resided at Delaware Bend, a station on the line of the plaintiff's road, in this county. Before he was drawn as a juror, and before it was known that he would be called to sit as a juror in this case, he had expressed to Hill, a former attorney of the plaintiff, and one whose relations to the plaintiff were friendly, a desire to secure for a religious society of which he was a leading member, a building lot at Delaware Bend, and belonging to the plaintiff. Hill assured him that he would take pleasure in introducing him to Keyser, the vice-president and managing director of the plaintiff, and expressed the opinion that Keyser would accede to his desire and give his church a lot at Delaware Bend upon which to build a church.

This juror, as well as two other jurors in the case who also resided at Delaware Bend, were interested in and desirous of securing and having grain elevators erected by the plaintiff at that station, as a matter of common interest and benefit to persons residing in that vicinity.

During the trial of this case, the said Keyser, the vice-president and managing director of the plaintiff, was conspicuously present as a witness for, and the representative of, the plaintiff in all matters requiring his supervision or attention during the progress of the trial.

Frazier, a trusted and influential engineer and employee of the plaintiff, and Ackenheil, a former engineer and employee of the plaintiff, were also present as witnesses in its behalf. While the trial was progressing and being energetically contested, and during a short recess of the court, the juror first named reminded Hill, who was present as a witness for the plaintiff, of his promise to introduce him to Keyser, and requested such introduction. Thereupon, Hill, in the court room, in the presence of other jurors, while the presiding judge was on the bench, and several other persons, including a number of the defendants, were standing about in the court room, gave Keyser an introduction to said juror, who at once requested Keyser to give his church society a lot at Delaware Bend to erect a church building upon. Keyser received the proposition kindly and favorably and referred him to Frazier, the engineer before mentioned, as one who was better acquainted than himself with the property of the plaintiff at Delaware Bend, upon whose report and recommendation he, Keyser, would act in the matter. The juror then sought and had an introduction to Frazier, at the entrance of the court room, and made known the desire of his church. Frazier told him he thought Keyser would give him a lot for his church, and that he, Frazier, would recommend that he do so.

A few minutes after this, the same juror, in conversation with Frazier, in the presence of Ackenheil and at least one other of the jurors trying the case, a resident near Delaware Bend, at the entrance of the court yard, stated to Frazier that the people at Delaware Bend were interested in having and would like to have the plaintiff erect grain elevators at that station, and asked if the plaintiff was not going to build elevators there. He was assured that the plaintiff would, if there was "no preventing Providence," put up elevators at that place the next year. As a result of the conversations, this juror was lead to hope for and expect a church lot from the plaintiff for his church society, and also that elevators would be erected at his station. Not a word passed in any of these

conversations about the case on trial; but they attracted attention and critical comments, and remarks by observers, especially some of the defendants.

This was evidently a juror of influence among his fellows on the jury. His appearance and manner were decidedly in his favor, and marked him as a man of intelligence and integrity. He testifies that these conversations had no influence upon his judgment in rendering his verdict, and that he never thought of his being a juror at the time. This portion of his testimony was received over the defendants' objection, and it is earnestly contended that it ought not to be considered by the court, and the decided weight of authority seems to be against the admissibility of it. If it were a new question, however; I should quite strongly incline to the opinion that the infirmity of this class of testimony was in its weight rather than its competency. It is contended from these authorities that the juror may not know—cannot know—whether any or what influence the conversations or like agencies may have produced upon his mind. He would certainly be a strange juror who, under such circumstances, would acknowledge that his judgment or verdict was influenced at all by such means. For the purpose of the practical consideration of this motion, this statement of the juror may as well be excluded from my consideration, as it probably should have been at the hearing.

The counsel for defendants disclaim all imputation of intention on the part of Hill or the officers and agents of the plaintiff corruptly to influence the action of the juror.

Do these facts constitute sufficient ground for setting aside the verdict and granting a new trial?

For the purposes of this question we may regard Keyser and Frazier as plaintiffs, and that what they said and did, the plaintiff said and did; for this juror considered them as speaking for the plaintiff.

The verdict of a jury of intelligent, fair-minded men (as this jury certainly appeared to be), ought not to be disturbed upon slight grounds. That the verdict was not justified by the evidence in the case is not seriously urged. But it does not alone satisfy the jealous demand of the law that the verdict be right in itself. It should come unsoiled from the hands of the jury. It should come free from every taint of reasonable suspicion. The fountains of justice should at all times be preserved, not only pure in themselves, but above all reasonable suspicion of corrupting or vicious influences. Even the appearance of evil or improper influences should be shunned with a doubly-guarded vigilance. Not that the courts are to bow before the idle mutterings of gossip, or halt at the approach of every threatening scandal; but in all their proceedings justice should be utterly untrammelled and her deliberations unembarrassed by the suggestions of selfish considerations, or the encroachments of influences from without the case itself.

It is urged that in all these conversations by this juror, not one word was said concerning the cause on trial, and that this should be conclusive against the suspicion of improper influence. It would seem that improper influence may be brought to bear upon the mind of a juror in many forms with no word about the cause on trial being spoken. Let us suppose that while a juror is engaged in hearing a cause, some plausible but officious meddler approaches him with insidious suggestions that the defendant is worthy and honest, but poor and in distress, and so by an unseen influence generates in the mind of the juror (all unconsciously

to himself) a sentiment of sympathy—not arising from the case itself. Is the influence thus exerted any the less dangerous or improper because no word was spoken about the case on trial?

Suppose, again, that the suggestion is that the plaintiff in the case on trial is a heartless usurer; a wrecker of poor men's homes; a cold-blooded speculator upon the ill-fortunes of his distressed neighbors. Is this not as likely to prepossess the juror, in spite of himself, and to stimulate in him a desire to favor the defendant, as if the talk were about the case itself? It will not dispose of the question to say that nothing was said about the case by this juror.

Let us again suppose that while the jury was being empanelled for the trial of this cause, this juror had been challenged on the ground of suspicion of prejudice or partiality, and upon inquiry of the juror the same facts had been made to appear which have been shown upon the hearing of this motion. Would it not have been a brave court that would have overruled the challenge and allow the juror to sit? And why? Simply because no mortal man can say how far the juror may be influenced by what had passed between himself and the plaintiff. Of course, a very different rule obtains in the two cases of a challenge to the favor and a motion to set aside a verdict. But so far as the probable influence upon the mind of the juror is concerned, the cases are, in a degree, analogous.

The vital inquiry which underlies this motion is: Was an improper influence in the consideration of the case brought to bear upon the mind of this juror by what has passed between himself and the plaintiff? And I cannot lose sight of the fact, as I proceed, that this juror was evidently one of influence among his fellows. Now, to be frank about it, if the question were squarely put to me: "Do you find as a fact from the evidence offered upon the hearing of this motion, that this juror was so improperly influenced, or influenced at all, in his judgment as expressed by this verdict, by the conversation narrated?"

I should feel constrained to answer: "No, I do not so find as a fact." It may be urged that this is all there is of it; this ought to be decisive of the motion. Unfortunately, it is not all there is of it. On the contrary, it brings me to the most embarrassing feature of the subject. To be just as frank as before, if the inquiry was propounded: "Do you find as a fact from the evidence that the judgment of this juror was not influenced by his interviews with the plaintiff?" Again, I should be forced to respond: "No, I do not so find."

I do find that what passed between this juror and the plaintiff was a thing in its nature calculated to inspire the juror with the reasonable expectation of favors and benefits, slight as it may be, from the plaintiff; with a consequent sense of obligation and gratitude of the plaintiff; influences as real, if not as potent, as those born of outside appeals to his sympathy or his prejudice; and in the weakness of our frail natures, how can we find or say that these sentiments were utterly neutralized by the solemn obligations of a juror, and that they were banished from his mind the moment he entered upon the consideration of his verdict?

The chief ground upon which the great burden of authorities put the exclusion of the testimony of a juror as to how far influence from without the case operated upon his judgment as a juror is, that he cannot know—he cannot say himself—how far his judgment may have been

warped by such influence. Well, if he cannot tell, who on the earth can? I am sure I cannot.

What, then, should I do? Here is a verdict which, we shall assume, is abundantly justified by the evidence. It proclaims upon its face the deliberate concurrence of twelve intelligent minds. It brings with it the grave sanction of twelve jurors' oaths.

It is not a thing to be sacrificed or strangled by the mere caprice of a single judge who has already declared that he does not find as a fact that any improper influences contributed to its formation. If it perish, it must be because one juror of the twelve (innocently, we will say,) asked during the trial and was given to expect slight favors, advantages and benefits at the hands of the plaintiff, and the natural and reasonable consequence of this was to affect, to the prejudice of the defendants, that thoroughly impartial judgment which both parties had a right to ask of each juror; and because the court cannot say that his judgment was not so influenced to the prejudice of the defendants, would it seem a hardship that the deliberate determination of the eleven jurors should be sacrificed to the indiscretion (to use no stronger term) of the one juror?

To test this delicate question, let us suppose that the court had tried the case and found the facts in favor of the plaintiff and against the defendants; that before judgment, upon the finding, a motion had been interposed to set aside the findings, and for new trial; upon the hearing of which it had been made to appear that during the trial of the case the presiding judge had been seen to approach the chief officers and agents of the plaintiff and request, through them, of the plaintiff, a building lot for his favorite church, and also the erection of grain elevators at the station of his residence, a thing in which he had selfish and pecuniary interests in common with his neighbors who were likely to be benefited by such improvement, in that it would afford increased market facilities and better prices for farm produce; and he was given assurance by the plaintiff that his requests should be honored. The judge concedes that all this is true, but asserts that his judgment was not at all influenced by this harmless little stroke of diplomacy, and thereupon renders judgment for the plaintiff for over \$10,000! Is it not likely—would he not have a right to anticipate—that after his departure from this court he would be to each of these nineteen defendants "though lost to sight, to memory dear."

What judge with any sense of delicacy, or judicial delicacy, would hesitate (though none more innocent) upon such disclosure, to set aside his finding of fact, and let another judge try the case over again?

It may be said the cases are not parallel; that in the one case the entire tribunal is involved in suspicion, while in the other but one of the twelve is affected. It should be remembered that the jury is a whole. When one juror is disqualified or falls by the wayside, from that moment there is no jury. If the whole panel of twelve were involved in the same circumstances as this one juror, the case would not be, upon principle or in law, one whit stronger than it is. We may suppose, as a fair legal test, that the whole twelve were subjected to the same influences as the one. Would the application to set aside the verdict be seriously resisted? I think not.

Yet the moment the juror is shown to have been improperly influenced, that moment the jury as a whole, passes under a cloud of judicial suspicion and distrust. From that moment the jury, as a tribunal, is

powerless to return a lawful verdict. The enemies of the jury system are on the alert. No opportunity is neglected to give it a stab. Its friends (and I am one of them) should avoid, if possible, placing in the hands of its enemies any new weapons of attack.

It is because this juror was exposed, innocently it may be and in spite of himself, to a temptation to bias and favor, and I cannot say the temptation was resisted; because the verdict is tainted with a just suspicion; because it is designed to prove the fruitful source of judicial scandal; because a judgment upon it would be one borne of a strongly suspected proceeding; because an execution to be issued upon it would go soiled and distrusted in the hands of the officer; because it is as important that the final process of this court should be clean, innocent of every appearance of vicious or suspected agencies, as that it should be just in itself, that I bow not only to what, by the superior weight of authority, I conceive to be the spirit of our law, but to the equally strong demands of judicial propriety, and allow the motion, set aside this verdict, and grant a new trial of the case.

Messrs. Scribner, of Toledo; Train, of Zanesville, for Co.

Messrs. Latty & Peaslee, of Defiance, and Messrs. Pratt & Bentley, of Bryan, for defendants.

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TALESMEN JURORS.

[Columbiana Common Pleas, February, 1880]

DANIEL ROGAM v. I. P. MALEY.

The code provision, Rev. Stat., section 5173, that a special venire must be issued by the court for talesmen jurors on demand of a party, is one of the provisions applicable to a justice's court by section 6705, Rev. Stat., and the provision of the justice's code, that where from challenge or other cause, the panel is not full, the constable may fill it in the same manner as the sheriff, by calling talesmen from the bystanders, is subordinate to the right to demand a special venire.

This was a proceeding in error to reverse the judgment of a justice of the peace. The original action was replevin, prosecuted by Maley against Rogam. A jury had been demanded and selected and summoned. On the day of trial there were but two of the six selected jurors present, and a full panel was demanded by both parties. Maley asked that the constable fill the panel from the bystanders. Revised Statutes of Ohio, section 6553. Rogam requested the justice to issue a special venire for four jurors to fill the panel. Revised Statutes, section 5173. By order of the justice the panel was filled by the constable from the bystanders, to which Rogam objected and took a bill of exceptions.

LAUBIE, J.

Section 6705 of the Revised Statutes provides that the provisions of the code of civil procedure in the courts of common pleas, "which are in their nature applicable to the proceedings before justices, and in respect of which no special provision is made in the justice's code, are applicable to the proceedings before justices of the peace;" and the question is whether the provision of section 5173, of the Revised Statutes, in regard

to the issuing of special venires for talesmen jurors governs in such cases in trials before justices of the peace. Section 5173 referred to confers upon parties to suits in the court of common pleas the right to have the court select the talesmen, and to issue a special venire for them, and no similar or other provision as to a party's right to make such demand is found in the justice's code.

The provisions of this section are undoubtedly just as applicable, in their nature, to proceedings before justices, as to proceedings in the courts of common pleas, and, therefore, when a party, as in the present case, demands of the justice that he shall select the talesmen and issue a special venire for them, the justice should do so, and if he refuses and directs the constable to fill the panel from the bystanders, it is error. This right thus given to parties to suits is a substantial one, and its applicability to proceedings before justices of the peace is in no manner affected by the provisions of the justice's code, that where from challenge or other cause, the panel shall not be full, the constable may fill the same in the same manner as is done by the sheriff in the court of common pleas, that is, by calling talesmen from the bystanders. This is to be done by the constable only upon the order of the justice, and the right to so direct the constable to fill the panel from the bystanders is subordinate to the right of either party to have a special venire issued, if demanded in proper time. This was done in this case, and the proper exceptions taken to the refusal of the justice to issue the venire; and the judgment of the justice must be reversed, at the cost of defendant in error, and the cause set down in this court for trial. I do not consider the point of error presented, that the justice entered judgment for costs of both parties against defendant below, as the defendant here proposes to permit judgment for all costs improperly included in such judgment.

J. W. & H. Morrison, for Rogan.

J. G. Moore and J. H. Wallace, for Maley.

BUILDING ASSOCIATIONS.

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[Superior Court of Cincinnati, O., January Term, 1880].

PATRICK McKEOWN v. IRISH BUILDING ASSOCIATION NO. 2.

1. Where settlements with and release of members of a building association by allowing payments in advance, or otherwise, is contrary to the constitution, such payments and release, though made in good faith, will not release members where it turns out that there will be a deficiency as to non-retiring members.
2. Where the constitution of a corporation provides that a certain article should in nowise be changed or amended, any amendment of it not unanimously adopted is void.

FORAKER, J.

This case was reserved upon the evidence. It is an action for the appointment of a receiver to take charge of the assets, and for an adjustment of the affairs of the defendant. The admitted and proven facts show that the defendant was incorporated June 12, 1871, under the building association laws of Ohio for the general purposes of a building associa-

tion; that its capital stock was divided into shares of \$300 each, to be paid in weekly installments of fifty cents each, such payments to continue until they, together with the fines, premiums, earnings, and profits of the association should be sufficient to pay each shareholder the sum of \$300 for each share of the stock of the association held by him.

Article 11 of the constitution of the association provided that the members of the association might borrow therefrom the estimated value of the shares held by them (paying for preference such premium as the money might command) upon satisfactory real estate mortgage security for the repayment of the same, which mortgage was "to be in force until every member shall have received satisfaction of his claims for all money which he might be entitled to receive from the association."

Article 14 of the constitution provided that "no member shall have the privilege to give up his membership before the expiration of one year. A member who wishes to withdraw after this time shall notify the Board of Directors, who shall give him a certificate that the association has a certain sum of money from him in possession. This money will be paid him as soon as the member whose turn it is to receive his proportion is satisfied. If a member who has drawn money wishes to sell his mortgaged property, but the purchaser refuses to become a member of the association, such member may pay back the money drawn, \$300 per share, to the association, and his mortgage shall be cancelled."

By article 19 of the constitution it is provided that "article 11 shall in no wise be changed or amended." There were no other provisions in the constitution than the foregoing for the withdrawal of members from the association.

Non-borrowing members had therefore but one way provided by the constitution whereby they could withdraw from the society, and that was by giving notice, after the expiration of one year, of a desire to withdraw, and, in their proper turn thereafter receiving back from the association the money they had paid in.

The borrowing members had no way of withdrawing before the expiration of the association except in the event of a sale of their mortgaged property to a purchaser who refused to become a member, and then they could withdraw only by paying back to the association the money that had been advanced, "\$300 per share." In neither case did the retiring members receive any profits whatever.

In accordance with the provisions of article 11, the form of mortgage adopted and used by the association contained among its conditions of defeasance a requirement that the mortgagor should pay to the association the weekly dues upon each share advanced to him, together with the interest upon the same as it accrued, "until said share shall have been paid in full, * * * and the said association have been dissolved, and until every member of the said association shall have received payment in full for his or her share or shares according to the constitution and by-laws of said association."

The plaintiff in August, 1871, borrowed from the association \$2,100 upon seven shares of its stock held by him, and afterward, in June, 1872, borrowed the further sum of \$900 therefrom upon three other shares held by him, and gave to the association mortgage security therefor of the form, and conditioned as aforesaid.

During the first years of the association quite a number of members, both borrowers and non-borrowers, withdrew therefrom, under and ac-

cording to the provisions of the constitution above quoted. But in 1876 (the exact date not shown by the evidence) the board of directors came to the conclusion that it would facilitate the winding up of the affairs of the association if they could then commence to redeem its shares.

They accordingly sought to do this by offering to pay to non-borrowing members a premium to induce them to draw out from the association the money they had paid in, and surrender their shares for cancellation.

This offer was made by a simple resolution adopted by the board of directors. The amount of premium offered was regulated by what was claimed to be a fair estimate of the profit each share was entitled to, and the payment of the premium was in the nature of a distribution of the profits. The premium first so offered was \$10 upon each share, and this amount was shortly thereafter, by another similar resolution, increased to \$20 per share; and in like manner the amount was again increased on the 18th of June, 1877, to \$35 per share; and again on the 7th day of January, 1878, it was in the same way increased to \$50 per share.

All these resolutions related only to non-borrowing members, but in the meanwhile, on the 4th day of December, 1876, the board of directors adopted a resolution providing:

"That any purchaser of shares might have the privilege of paying dues and interest on same for two years and six months from that date, and having their mortgage canceled; the purchaser in such case forfeiting all right to the premiums on said shares, and to withdraw from membership in the association."

This resolution was adopted by the board of directors on the faith of a calculation made by them, showing that the association would expire in about seven years and six months from the time it commenced to do business, and that, consequently, it would end several months before June 1, 1879, which was the date fixed by the resolution (two and one-half years from December 4, 1876), to which all withdrawing under the resolution were to pay.

The provisions of this resolution were, by another resolution adopted by the board of directors on the 11th day of March, 1878, extended to the non-borrowing, or book account, members.

Under these various resolutions a great number of the members of the association, both borrowers and non-borrowers, withdrew therefrom prior to May 6, 1878, at which date there was a proposed amendment to article 11 of the constitution voted upon at a regular meeting of the shareholders, and by only a majority vote adopted, whereby it was provided that any member who had not drawn his money should, on application therefor, be paid by the association the sum of \$300 upon each share held by him, less the amount of dues that he would have been required to pay had he remained in the association, between the date of his said application and the 1st day of June, 1879, and such amount of interest as the association would be entitled to for the advancement of the money; and all members of the association who had drawn their money should, on application therefor, be allowed to pay to the association the whole amount of dues and interest, less a rebate on account of interest to them for such advance payment, that would become due and payable from them to the association, should they continue members of it from the date of such application until the 1st day of June, 1879, and thereupon

have their mortgages cancelled, and that after all who thus made such voluntary application had been satisfied, the name of such as still remained in the association should be put in a wheel and drawn therefrom "one at a time," and that in the order in which their names were so drawn the remaining members should be compelled to comply with the terms of said amendment.

In accordance with the provisions of this amendment to the constitution, all the members of the association at the time of its adoption withdrew therefrom prior to June 1, 1879, except eleven members, holding seventy-three shares, who had drawn their money and given their mortgages therefor—and eleven members, holding thirty-one shares, who had not drawn their money.

Foreseeing there would be a deficiency, some of the members stopped paying before June 1, 1879—others continued to pay until then; all quit at that time. On account of some stopping payment before June 1, 1879, there was a deficiency at that date, which still remains, of about \$2,900. Had all paid until then there would have been a deficiency of about \$1,200.

The plaintiff in this case was one of the mortgagor members whose mortgage has not been cancelled. Some time before June 1, 1879, he applied to the association for permission to pay until that date and be released, as provided by the said amendment of article 11 of the constitution; but it being then apparent to the officers of the association that there would be a deficiency, they refused to allow him to so pay and be released. While it does not appear that anyone was allowed to so withdraw after permission to do so was refused the plaintiff, yet it does appear that a large number were permitted to withdraw prior thereto, but after it had become known to the board of directors that there would be a deficiency. The deficiency was occasioned by a shrinkage on real estate belonging to the association; and which, in good faith, had been overestimated in the calculation made to determine when the association would expire, and the only reason given for not ceasing to permit members to retire from the association, on the terms of the amendment, as soon as the deficiency became known, was that, some having gone out on that basis, others claimed the same right, and the directors "did not know how they could deny it to them."

The constitution provides for an annual election by the stockholders of the officers of the association, but that the "board of directors may fill all vacancies in the board or among the officers except in case the vacancies constitute a majority of the board, when they must be filled by a special election."

The last regular election of officers was in June, 1878. The official terms of the officers then elected expired June, 1879. Since June, 1879, the affairs of the association have been managed by some of the officers whose terms then expired, continuing on their own motion to hold over, aided by other persons selected as officers by some of the old board of directors, who continued to thus hold over and to act as a board of directors, to fill the vacancies occasioned by the neglect or refusal to act of some of the old officers.

There are no assets of the corporation except such claims as may exist in favor of the corporation against the shareholders.

By direction of those assuming, in the manner stated, to act as the officers of the association, suits have been brought in the corporate name of the association to foreclose the uncanceled mortgages, and it is claimed,

on behalf of the association, that inasmuch as by the terms of these mortgages it is provided, as we have seen, that the mortgagors are to continue to pay their weekly dues and interest "until the association shall have been dissolved, and until every member of the association shall have been paid in full," they should be required to pay, not only till June 1, 1879, the date when all the others stopped paying, but as much longer as may be necessary to make up the deficiency and to pay off all the unpaid non-borrowing members.

If this claim be maintainable, then the petition of the plaintiff should be dismissed, and the association should be allowed to proceed in the foreclosure suits that have been commenced to collect from each mortgagor such sum as would be his proper proportion of the amount necessary to make up the deficiency stated, and enable the association to pay off the non-borrowing members who are still unpaid. But is it maintainable? It is true that each one of these mortgagors whose mortgage is uncanceled, has, by its terms, as above set forth, expressly bound himself to continue to pay his dues and interest until every member of the association has received his full share of \$300. And that according to the strict letter of the contract as it is set forth in the mortgage—looking no further than the mortgage—he has not yet complied with his undertaking. And it is also true that if each mortgagor whose mortgage is uncanceled should be required to continue to pay until the deficiency would be made up and all non-borrowers paid off, he would not, even then, have been required to pay back the full amount of money advanced to him by the association. He would still have some profit left on each share of his stock, but not so much as those who were fortunate enough to have withdrawn upon the basis of the association expiring January 1, 1879. But while all this is true, yet it seems to us too plain to admit of question that the contract of the mortgagor must be construed in connection with the constitution of the association to which it refers. In fact, that is made expressly a part of the mortgage. By article 11, as we have seen all mortgagor members, except such as sell their mortgaged property to persons who will not become members of the association, and on that account are allowed to pay back in full all they have drawn out and retire, are required to pay until every non-borrowing member has been fully paid. Then, and not until then, all are to have their mortgages cancelled at the same time. It would seem that this provision was expressly intended to prevent exactly what has here occurred; and it would also seem that those who framed this provision held it in just appreciation from the fact that they further provided, that it should not be, at any time, in any manner altered or amended.

It was a part, therefore, of the contract between the association and each mortgagor, not only that he would continue the stipulated payments until every non-borrower was paid, but that every other member of the association who drew out money and gave his mortgage therefor should also, in like manner, make such payments. In other words, all were to stand upon the same terms; all were to pay alike, and for the same length of time. No one was to have the privilege of getting out until all got out. And not only was it thus agreed that all should go out together, but it was further stipulated that this agreement should not be changed.

This provision of article 19 of the constitution, prohibiting any

amendment of article 11, was never altered or changed. It was still in full force and effect when the association undertook to amend article 11. The result is that that amendment, not having been unanimously adopted, was itself unconstitutional and void. And if it was not competent to thus amend article 11 of the constitution, much less could it be competent to set aside and nullify its provisions by the mere adoption of a simple resolution by the board of directors, but such was the resolution of December 4, 1876, providing for the withdrawal of mortgagor members and the cancellation of their mortgages on what was called "the eight years basis." It was equally as invalid as the attempt to amend the constitution. But this resolution and the so-called amendment to the constitution are all the authority there was outside the constitution for the withdrawal of any mortgagor member before the time fixed by the constitution, viz.: when all had been fully paid. These being invalid, it would follow that the association had no authority to release any mortgagor member (except in the one case noticed), until it expired by reason of every member getting his full share, and, consequently, that all such withdrawals and releases are invalid and of no effect, and all such mortgagor members are yet, notwithstanding their pretended releases and withdrawals, members of the association, and liable, equally with those who did not obtain such releases, for their equitable proportion of the sum necessary to pay off the liabilities of the association.

And what is true in this regard of the borrowing members is equally true of the non-borrowing members. For while there was nothing in the constitution that prohibited an amendment of its provisions as to the withdrawal of non-borrowers, as there was in the case of borrowing, or mortgagor members, yet the amendment as to non-borrowers was coupled with the amendment as to borrowers, and the whole was proposed and voted upon as an amendment to article 11, and for that reason failed to have any legal effect. The resolutions that were from time to time adopted by the board of directors, providing for the withdrawal of non-borrowers, and offering them premiums to withdraw, were also invalid, because not only unauthorized by the constitution but in conflict with it; and hence it is, as already said, that in the case of non-borrowers, all the withdrawals and releases under the so-called constitutional amendment and the various resolutions mentioned, were illegal and void, and such members are still legally members of the association, and bound equally with the others for their equitable proportions of the liabilities. And this we hold without regard to whether or not these settlements between the association and its retiring members were made in good faith, although it is clear that all made after the deficiency became known were not in good faith. Since, although the supreme court has decided in the case of *Ohio ex. rel Colburn v. Oberlin Building and Loan Association*, 35 O. S., 258, that such settlements are not prohibited by the statute, and may be upheld when made in good faith, yet manifestly that is true only where such settlements are authorized, or are, at least, not in conflict with the constitution of the association, as we have found them to be in this case. And this suggests the remark that the question before us in this case, unlike those presented in the *Colburn* case, is not as to the authority of the corporation under the statute, but as to the contractual obligations of the parties and their rights thereunder.

What each shareholder's equitable proportion may be of the liabilities of the association can be determined only by taking an account.

This arises from the fact that all who were improperly released were not so released upon the same terms.

All who went out on what was termed the "eight years basis" received a profit of \$92 per share, while a number of non-borrowers, who went out under the first resolution, got a profit of only \$10 per share; others got \$20, while some got \$35, and still others \$50 per share.

It is manifest that all who were allowed \$92 per share received an excess of profits from the association, and, having received it illegally, they should be required to refund such excess for the benefit of those who have been improperly deprived of it. Whether or not any others, and, if so, what others, have received an excess, and should also be required to refund, and also to what extent there may be an additional liability cast upon all who are solvent by reason of the possible insolvency of some who may be liable, only an account can determine. But we say this more to show the necessity for an account than the nature and the basis of it, since, as the action now stands, only the corporation being a party, an account cannot be ordered.

We are clearly of the opinion, however, that this state of facts, together with the fact that the organization of the association has practically fallen to pieces, makes out a case where the appointment of a receiver is not only proper, but necessary. A receiver, being appointed, can proceed to bring all proper parties before the court, have an account taken, the liability of each shareholder fixed, and do all other things necessary to fully work out the rights involved in this controversy.

Force and Harmon, JJ., concurred.

John J. Desmond, for the plaintiff.

Mannix & Cosgrove, for defendant.

LICENSES BY THE MAYOR.

73

[Hamilton District Court, February, 1880]

STATE OF OHIO *ex rel.* SNELBAKER *v.* C. JACOB, Jr., Mayor.

The power of licensing theaters, shows, etc., being vested in the council of a city (Rev. Stat., section 2669), that body, being a legislative body, cannot delegate the function to the mayor, so as to be a discretionary and not ministerial duty by him.

AVERY, J.

The relator is proprietor of the Vine Street Opera House in this city. His petition, in substance, is that it is not an indecent, lewd, lascivious or otherwise improper place of entertainment, and that he has made application to the mayor for a license in conformity to the ordinance, but that the mayor has refused. Mandamus is prayed against the mayor to compel the issue.

The ordinance in question was passed December 26, 1879. It is entitled "An ordinance to amend and reduce into one the ordinances in relation to theaters, shows, etc., and to repeal the ordinances and parts of ordinances therein named." Before its passage the provisions on the subject were contained in two ordinances, one passed November 16, 1849, prescribing the form of licenses and penalties for exhibiting without

license, and declaring that it should be the duty of the mayor to issue a license on the order or resolution of council, but that a license should only be granted upon written application, accompanied by recommendation of twelve respectable householders. Merrill Ordinances, 520. The other passed July 9, 1856, defining the power and duties of the mayor of Cincinnati, and among other things providing that he might in his discretion grant licenses at a rate from \$100 to \$500 a year for theaters, but that he should make a monthly return of the same to council, and if approved by council, the license so issued should be of full force and effect, and if not approved, the amount paid should be refunded and the license annulled. Merrill Ordinances, 268.

As indicated by its title, the present ordinance was designed to amend and reduce the provisions of these two ordinances into one. The provision that it should be the duty of the mayor to issue a license on the order or resolution of council was omitted, and only the provision that he might grant licenses in his discretion was left remaining, and this was made to read, "grant and issue" and the requirement that they should be returned to council and if approved by council should be of full force and effect, but otherwise should be annulled, was dropped.

Thus, as it formerly stood, the power of the mayor was merely to issue, for while the words were "may grant," the ordinance went on to say the license "so issued," and further made provision that only upon approval by council should the license be of force and effect as a grant. But as it stands now, the provision is: The mayor may in his discretion "grant and issue," and to leave no doubt of what is meant, the requirement that council shall take action upon the license has been dropped, and the exercise of the power by the mayor made final.

The power to license belongs to that branch of the sovereignty of the state termed the police power. The exercise of the power within the limits of Cincinnati is confided by the legislature to the common council. "The council of any city or village may license all exhibitors of shows and performances of every kind not prohibited by law, and in granting such license may exact and receive such sum of money as it may think expedient." Rev. Stat., section 2669. From the first charter of the city under the state government this has been confided to council. It is a function involving judgment and discretion, and devolves upon council legislative power.

The rule is that legislative bodies are not competent to delegate their functions. The delegation by the state legislature to municipalities is not an exception, since the power is retained to legislate for the state at large. In respect to municipalities themselves, they are subject to an additional restriction growing out of their subordinate character, and the authority conferred on them must be strictly construed and closely followed.

The principle is a plain one, that public powers devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. Dillon Municipal Corp. section 60; Cooley Cons. Lim. 204; Sedgwick Stat. and Const. Law, 395.

Thus the charter of a town provided that the council should have power to restrain, prohibit and suppress tippling houses and dram-shops. An ordinance was passed that licenses might be granted to proper persons for not more than one nor less than six months, and at an amount not less than \$50 for six months, to be determined by the city treasurer in

each case, and he might reject any application for longer than one month, and, with concurrence of the Mayor, any other application. The ordinance was held bad. *E. St. Louis v. Whering*, 50 Ills., 28.

In the *City of Kinmundy v. Mahan*, 72 Ill., 461, there was a like ruling. By the charter power to license traffic in spirituous liquors was conferred upon the city council; by the ordinance it was delegated to the mayor.

In *Darling v. City of St. Paul*, 19 Minn., 389, the charter empowered council to license and regulate selling by sample.

The ordinance was that, by paying \$5 for every three days, a license might be obtained from the city clerk. The court construed the effect of this to be that so long as a person saw fit to go on paying the \$5, he would be able to determine for himself the length of the license, and the ordinance was held bad. The rule announced was that when by charter power to license a particular occupation within the city limits is given to council, such power must be exercised exclusively by council, and cannot be delegated in whole or part to any other authority.

In *Day v. Green*, 4 Cush., 433, where power to issue licenses was conferred upon the mayor and aldermen, it was held that the board of aldermen could not delegate the power to the mayor alone.

In *St. Louis v. Clemens*, 43 Mo., 395, it was held that a city council cannot delegate a duty plainly and expressly devolved upon them to the mere discretion and caprice of a single individual. The provision of the charter was that council might cause sewers to be constructed of such dimension as should be prescribed by ordinance. The ordinance was they should be of such dimensions as might be deemed requisite by the city engineer. In *Ruggles v. Collier*, 43 Mo., 353, there was a similar ruling. The charter was that where council should deem necessary, it should cause repairing to be done. The ordinance was that in a certain part of the city, giving its boundaries, the mayor should be authorized to cause repairing with wooden pavement whenever he should deem necessary. In *Thompson v. Schermerhorn*, 6 N. Y., 92, a like principle was applied. In *Ould & Carrington v. City of Richmond*, 23 Gratt., 376, it was conceded that legislative discretion could not be transferred, but the case was distinguished. An ordinance for taxing certain trades and professions had classified lawyers into six classes, and had referred it to a committee to determine to which of the several classes the individual members of the profession in the city belonged. But, as the court, held, this duty was merely to classify according to a certain rule fixed by council itself, and was a ministerial duty, the same as that performed by a tax assessor.

These cases illustrate the maxim. *delegata potestas non potest delegari*. The licensing power is in the council and has always been since the first organization of the city. It is not competent for council to delegate the power to the mayor. Not that terms and conditions may not be prescribed by ordinance upon which the license may be left to the mayor to issue, but that, when only some terms and conditions are prescribed, and the rest left to discretion, it must be the discretion of council, and not of the mayor. This is the fault in the ordinance passed December 26, 1879.

The earliest printed ordinance of the city provided that licenses might be obtained from council upon application to that body itself. The only power the mayor had was to issue licenses during recess of council, to last

only until the next meeting. After remaining in force for thirty years, this was succeeded by the ordinance of November 16, 1849, prescribing that it should be the duty of the mayor to issue licenses on the order or resolution of council. This ordinance continued until expressly repealed by the ordinance now in force. Meanwhile an ordinance defining the powers and duties of the mayor was passed June 30, 1852, making it his duty to grant licenses upon petition of twelve householders, and to return the petitions to council at the first regular meeting in each month, when, if approved by council, the license should be of full force and effect, but if rejected, should be annulled. This was repealed by the ordinance of July 9, 1856, leaving it discretionary with the mayor to issue the license, but, when issued, still requiring the approval of council to give it effect. The present ordinance dispensed with this, and repeals all inconsistent ordinances and parts of ordinances. The radical difference is that the grant of the license by the mayor is made final. Nor does it prescribe a rule, leaving him simply to inquire whether there is compliance with the rule. It provides that the license shall only be granted upon written application accompanied by recommendation in writing of twelve householders, and that the exhibition or performance shall be in nowise indecent, obscene, lewd, lascivious, immoral or otherwise improper. But these are negative clauses. What else may be required is declared not by council, but is left to the undefined domain of the discretion of the mayor.

The court is clearly of opinion that discretion vested by the state in the common council itself, cannot be delegated to the mayor, and that the ordinance, so far as it provides he may grant and issue licenses, in his discretion, is void. Whether the penalties prescribed are also void is a question not presented by the case. The ordinance may be invalid to the extent of the delegation of licensing power to the mayor, and yet the other parts may be valid as a regulation by the common council itself, under the general power to regulate, restrain, or prohibit shows and theatrical exhibitions, Rev. Stat., section 1692. At the same time it cannot escape attention that the penalties are for not obtaining from the mayor a license under an ordinance which, in so far as it empowers the mayor to grant and issue the license, is void. But the discussion would involve further questions of construction not necessary to the case, and that would arise only upon prosecution for the penalties, where the matter should be left to be determined by the ordinary process of law, and upon which no opinion is meant to be indicated by the court.

The ordinance being invalid to the extent that power to license is given to the mayor, it follows not that the mandamus prayed by the petition is to be allowed, but that it must be refused. The power devolving upon the mayor under the ordinance was to be exercised in his discretion, and has not become a ministerial duty to be enforced by mandamus, because of the ordinance being inoperative to confer upon him discretion. Except as leaving it to his discretion, the ordinance has not provided for granting licenses. They shall only be granted upon the recommendation of twelve respectable householders; that is to say, not unless there is such recommendation; and further provided that the exhibition is in nowise indecent, obscene, lewd, lascivious, immoral, or otherwise improper. But these, as already observed, are negative clauses, not to enable but to restrict the granting of the license.

It is the duty of the mayor to sign all licenses granted by authority

of the council, Rev. Stat., section 1746; but except as involved in the void delegation of discretion to the mayor, council have not exercised their authority. The result is the same as if the provision for licensing contained in the ordinance had not been enacted at all. In this view, however, the question occurs whether the former ordinance of July 9, 1856, upon the subject is not left in force. That ordinance provided, as has been said, that the mayor might issue the license, but its force and effect was made to depend upon approval by council. It is not named as repealed, except as falling within the general clause of repeal of "all ordinances and parts of ordinances inconsistent herewith." Upon principle, where a repeal is made to depend on the inconsistency of a former act with subsequent provisions, and the subsequent provisions are void, the repeal must fail. And to this effect are the authorities: 6 Wis., 605; 11 Wis., 51; 14 Mich., 276; 18 Ia., 261; 10 Bosw., 366.

The majority of the court are somewhat disposed to question the validity, even of this ordinance of July 9, 1856, in that it leaves the matter to the mayor in the first instance, and only provides for approval by council where he has issued the license, without compelling the performance by him of that duty. But if it is in effect the same as if council before granting the license had required the mayor to recommend it, in my own opinion, at least, it is nothing more than one of the terms and conditions which it was competent for council to prescribe. In either event, however, whether that ordinance is valid and in force or whether it is not, and mandamus must be refused. If valid, the issue of the license in the first instance is a matter of discretion; if void the reasons for not allowing the mandamus already noticed in respect to the present ordinance apply.

Petition dismissed at costs of relator.

Tilden, Buchwalter & Campbell, for relator.

Kumler, Crosley & Ampt, for respondent.

EVIDENCE OF DISCHARGE IN BANKRUPTCY.

76

[Hamilton District Court, February, 1880]

BERNARD BERLAND v. HERBERT BELL.

A certified copy of a certificate of discharge in bankruptcy is admissible as proof of such discharge, without proving the loss of the original, or offering an explanation of the whole record.

Berland, prior to the enactment of the bankrupt act, obtained a judgment against Bell in one of the courts of this county. Bell obtained what he claims to be his discharge in bankruptcy against this claim. Two years after Berland instituted an action to revive the judgment against Bell, that in the meantime had become dormant. Bell answered the action of revival, setting out in substance his discharge in bankruptcy against all claims provable against him under the bankrupt act. Upon the case coming up for trial, it was admitted by Bell that Berland had obtained a judgment against him, and that it had not been paid, and admitted on the part of Berland that the judgment was not of that character that forbade it being proved as a valid claim. Bell offered in evi-

dence a certified copy of the certificate of discharge, to which Berland objected, claiming that where a bankrupt is sued on a claim existing prior to the filing of his petition in bankruptcy, the only record or matter that can be pleaded in bar is the original certificate of bankruptcy issued to him by the United States court under the certificate of the clerk of that court. In this case it appeared that he offered to introduce a certified copy of the certificate of discharge, and not the original paper. The court below overruled the objection, and received what purported to be a certified copy of the certificate of discharge. That being introduced, the plaintiff offered evidence tending to impeach its validity, and this being objected to by Bell, the objection was sustained.

JOHNSTON, J.

The certificate of discharge is virtually the order of discharge, and it is the order of discharge that discharges the bankrupt from the payment of all debts provable under the act against his estate, that the discharge in bankruptcy and the certificate thereof are in fact convertible terms.

The act provides that after the bankrupt shall have filed his petition and taken certain steps, showing that in fact he was a bankrupt, he is entitled to the discharge. The act provides further that the court shall give him a certificate of his discharge, which is set out in words in the act itself, not to be signed by the clerk, or deriving its character on that account, but a certificate signed by the judge of the court alone under his seal. It is also provided in the bankrupt act that all the papers in a case in bankruptcy shall be numbered and kept on file, and that it is not necessary to have the proceeding or contents of the papers spread at large on the minutes; but an abstract shall be noted in the journal, and that a certified copy thereof, under the seal and attestation of the clerk, shall become presumptive evidence of everything therein contained.

This clearly implies that the record shall not be considered as an integral record, but that each proceeding or step taken in the case may be certified by itself under seal by the clerk, and when so certified shall be presumptive evidence of every fact therein contained. There was an obvious reason, perhaps, in thus enacting the law, for when a bankrupt gets through his difficulties, ordinarily he has not the means to pay for an exemplification of the entire record, in the event that he should lose his certificate, nor would it be policy that he should be put to the expense of paying for the entire record, when the important matter was that he had filed his petition, was adjudicated a bankrupt, and had been discharged. It was claimed by plaintiff below that Bell having offered a certified copy of his discharge, he should in any event have proven the loss of the original, and having proven it, could then successfully plead a defense, only by producing an exemplification of the entire proceedings in bankruptcy. This the court below held not to be the law, but that he was entitled to produce a certified copy of his discharge, and that that was sufficient. The court is of opinion the court below ruled correctly on that point. The paper given to the bankrupt originally is nothing more than a copy of the certificate signed by the court, and derives its name as a certificate not from the fact that the clerk certifies it as such, but from the fact that the judge signs the paper which the act of congress designates as a certificate before the name of the clerk is ever attached to it. This was the ruling in 55 Ind. The late Judge Perkins, announcing the opinion, held that the paper the bankrupt received from the clerk of the court was only a copy of the certificate signed by the judge. The

discharge is spoken of as one thing in the decree, and the certificate thereof as a different thing, namely: a copy of the discharge, under the hand of the judge, authenticated by the seal of the court.

The court is of opinion that upon principle as well as authority, all that a bankrupt or other person interested in pleading his discharge is required to do, if the original certificate be lost, or be not at hand, is to obtain a certified copy from the records of the court, and that being produced is as good a defense in an action against the bankrupt as though the original paper issued to him by the court, certified by the clerk, were pleaded and offered in evidence.

Judgment affirmed.

C. L. Mitchell and M. Holmes, for plaintiff in error.

Thompson & Maxwell, for defendant in error.

[Hamilton District Court, February, 1880]

77

CITY OF CINCINNATI v. W. W. SCARBOROUGH.

For opinion see 6 Dec. R., 874 (s. c. 8 Am. Law Rec., 562).

LIABILITY OF STOCKHOLDERS.

79

[Hamilton District Court, February, 1880]

WILLS, OSBORNE, LEWIS et al. v. H. S. REED et al.

1. It is unnecessary in enforcing the liability of stockholders for the debts of the corporation that a judgment should first be had against the corporation, when the corporation has made an assignment for benefit of creditors, and has not paid in full.
2. A corporation cannot buy its own stock, and where a corporation bought in the stock of certain dissatisfied members, the sale is void, and such stockholders are liable for debts afterwards incurred.

ERROR to the Superior Court of Cincinnati.

The defendants here instituted a suit to recover against Wills and others the amount of certain debts remaining unpaid, contracted by a corporation known as the "New Era Shoe Manufacturing Company," of Cincinnati, of which the plaintiffs below claim they were stockholders. The petition charged that the corporation having become insolvent, it assigned for the benefit of creditors; that the assignment has been duly administered in the probate court, and that thirty-six per cent. of the indebtedness was paid out of the assets, and that the defendants being stockholders were liable for the balance. Wills and others denied any liability, for the reason, first, that they had sold their stock before these debts were contracted; and, secondly, that no judgment had ever been recovered upon the claims against the corporation.

JOHNSTON, J.

The order of the probate court directing the assignees to pay thirty-six per cent. thereon was a sufficient liquidation or adjudication. As to the validity of the claims of Reed and others, it is the right of a stockholder before he can be called upon to pay, that the corporation shall either be insolvent, or that nothing can be made on execution at law

against it. That the corporation had become insolvent, that it had failed to pay its debts in full, the defendants below were certainly well advised. The proceeding in the probate court, a court of record, was notice to them of these facts.

As to the other question, it appears from the testimony, embraced in the bill of exceptions, that while the defendants did sell their stock in the corporation, it was after a resolution had been passed by the directors, authorizing one Logan, a ruling spirit therein, to buy in the stock of certain dissatisfied members, at not less than fifty cents on the dollar. The defendants, Wills and others, sold their stock after the passage of this resolution.

It appears that there was evidence tending to show that the funds of the corporation were used to effect these purchases. Objection was made thereto by certain of the stockholders, these stockholders embracing a number of professional gentlemen, it seems some of the prominent members of this bar.

It has been well settled in this state that a corporation may not purchase its stock, and it is the right of any stockholder to object thereto, and it is a part of the organic law existing between stockholders that while each stockholder is severally liable to all the creditors, as between themselves, each stockholder is bound to pay off the corporation indebtedness in proportion to the amount of stock held by him, and as between stockholders an equity exists that while one stockholder may be sued alone, he has the right to bring in all the stockholders and compel a general account. So blended are the relations that it has been held that one creditor cannot sue all the stockholders, but that all the creditors as well may be brought into the general account. That has been done in this case.

This equity existing between the stockholders, the unpaid creditors have the right to avail themselves of that equity, and through the stockholders enforce the payment of the balance of their claim. The right to enforce payment against the stockholder belongs exclusively to the creditors. It is fairly to be gathered from the record, that the stock of Wills et al. was purchased for the corporation, and paid for with its funds. That sale was void. They remain stockholders, notwithstanding the sale attempted to be made to the corporation, and being stockholders, and this claim having been contracted while they were stockholders, they are liable. All the stockholders except the plaintiffs in error have settled their liability with the creditors, and in the opinion of this court, the judgment of the superior court was correct, and must be affirmed.

F. Coppock, for the plaintiffs in error.

Wilby & Wald, contra.

NOTARIAL ACTS BY U. S. CONSULS.

101

[Superior Court of Cincinnati, February, 1880]

CHARLOTTE BRUCE v. JOHN B. GIBSON.

Under the United States laws a U. S. Consul is ex-officio a notary public, but his signature is not official as such, unless he affixes the words "notary public," or, if he uses the word consul after his name, adds the words "and ex-officio notary public."

The case is on an alleged breach of promise to marry.

Motion to strike the answer of the defendant from the files.

FORCE, J.

The motion is on the ground that the answer is not properly verified. It was sworn to by the defendant in Amsterdam before the U. S. consul, and is certified to, the consul signing his name as consul. The statutes of the United States confer upon consuls authority to administer and certify to any oath required to be taken or administered in the United States. But this does not determine the question. The laws of Ohio regulate the course of procedure in the courts of Ohio, and determine whether or not pleadings shall be sworn to, before what officer and how the oath shall be authenticated. The Code provides that the affidavit may be taken before certain named officers, among them before a notary public.

The question in the case is whether or not a United States consul is also a notary public. The statutes of the United States authorize consuls abroad to perform any notarial act that may be required to be done by any notary in any of the United States. But this presents another question, analogous to the one considered by the supreme court of Ohio in *State v. Judges*, 21 O. S., 1: "Do these words merely add another function to the office of consul or do they annex another office to the office of consul?" Statutes may and often do annex one office to the tenure of another office. One statute declares that the clerk of the court of common pleas of Hamilton county shall be clerk of this court; another statute provides that the prosecuting attorney shall be fee commissioner. In this case where one is elected clerk of the common pleas, he becomes at once, by virtue of the statute, also clerk of the superior court of Cincinnati. The language of a provision in the constitution of Texas approaches nearer to the phraseology of the act concerning consuls. It provides that every justice of the peace shall act as notary public, and this provision, the supreme court of Texas says, makes every justice of the peace ex-officio a notary public.

The language of the act concerning consuls "to perform any notarial act" is not as effective as the phrase "to act as notary." But there is another provision in the statutes. They provide that the President of the United States shall furnish to consuls necessary and appropriate seals. Now it appears from the answer in this case that at least one seal so furnished to the consul is a seal to authenticate notarial acts, for the seal bears the inscription, "Amsterdam Consulate Notarial." Hence, the statute clothes the consul with every notarial function, and authorizes him to authenticate his acts by a notarial seal.

As at present advised, I hold that these provisions together make the consul ex-officio notary public. But the Code provides that the cer-

tificate of the officer must be signed officially. Now, though the clerk of the common pleas is ex-officio clerk of the superior court, he could not be said to sign his name officially to a writ issued from this court, if he signed it "clerk of the common pleas." Every officer signing his name officially ought to sign it with some designation of the office in virtue of which he is acting. Hence, as I am now advised, though I hold the consul had the authority to administer the affidavit as a notary public, I do not hold it is signed officially in his capacity as notary public, unless he affix to his name the words "notary public," or else writes after the word "consul" the words "and ex-officio notary public."

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[Hamilton District Court, February, 1880]

STATE OF OHIO ex rel. BECKER v. SOCIETY FOR SUPPORT OF THE SICK, in Reading, O.

For opinion see 6, Dec. R., 899 (s. c. 8 Am. Law Rec., 627).

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GOOD WILL—TRADE MARK.

[Superior Court of Cincinnati, February, 1880]

SARAH E. SMITH v. RUDOLPH KERNAN et al.

1. One may acquire, at least against his own servants, the manager of whom was paid by a share in the profits, and was therefore a sort of a partner, property rights in established routes or lists of customers, so as to be entitled to injunction against a conspiracy by such servants to leave their employer and divert his trade into a rival establishment started by them.
2. The name "Domestic" applied to bread, may become a trademark the piracy of which will be enjoined.

DEMURRER to Petition.

HARMON, J.

This case comes up on demurrer to the petition which alleges that, in 1862, Daniel E. Smith, the husband of the plaintiff, began in this city the manufacture and sale of a certain kind of bread known as Dan Smith's Salt Rising Bread, and, to protect his rights and those of his customers, adopted the word "Domestic" either alone or in connection with the words "salt rising bread" as a trade mark, that word being stamped upon most of the loaves of bread, at least upon all whose shape would permit it; that the bread became known and famous under that name; that this trade mark is a very valuable one; and upon the death of her husband became the property of the plaintiff. The plaintiff further avers that she employed the defendant Kernan, who had been the employe of her husband, to manage the business for her for a portion of the profits; that he continued to do so for some time when, in the month of May, 1879, he, Rudolph Kernan, entered into a conspiracy with the other defendants, his fellow employes, and in pursuance of the conspiracy, took all the bakers, drivers, and even the hostler and office boy, who went off in a body and started a rival establishment, leaving the plaintiff without any employe whatever. That they are now running this establishment and holding themselves out as making the same bread formerly made by the plaintiff, and are using the trade

mark "Domestic;" that most of the business of the plaintiff was done by means of wagons driven by various of the defendants on established routes and selling bread to regular customers known to the drivers but unknown to the plaintiff; that these drivers, in pursuance of the conspiracy, are now taking the bread manufactured by the defendants and marked with the word "Domestic" and selling it to these customers; that this is a fraud upon her, and that it is working irreparable injury. She asks that an injunction may be issued against their further using her trade mark, against their so interfering with her customers in the business, and for an account for the damages already done.

The demurrer being a general one, admits the truth of these allegations. But it is claimed, on behalf of the demurrer, that this is not a trade mark which the court can recognize, and secondly, that these defendants had the right to leave her employ and enter upon the business for themselves, and to compete in the manner in which they are competing with her.

Both counsel have filed with the court elaborate briefs which do great credit to their research, and I have examined all the authorities cited and others upon my own account. As this is simply a preliminary hearing, I will not take the time to review the authorities, but simply state my conclusions.

The cases upon the subject of what may become a trade mark are very conflicting, some of them going so far as to hold that the mere name of an individual may become a trade mark, and others to the contrary. It seems to be settled, however, that a man cannot adopt as a trade mark a word necessarily descriptive of the qualities of an article the manufacture of which is open to the public. It is claimed in this case that the word "Domestic" is a word of that class. But I am quite clear, from the authorities and upon general principles, that the trade mark of the plaintiff is a valid one; that the word "Domestic" does not describe qualities of the bread as "salt rising" might. A man could not make a trade mark out of the words "salt rising," because anybody has the right to make salt rising bread, and the right to call it what it is. But the word "Domestic" does not describe bread or any quality of it, but was adopted simply as a name attractive to the public; and certainly under the allegations of this petition, it has become a trade mark which the plaintiff is entitled to have protected.

A more difficult question is presented upon the second point, as to whether the plaintiff is entitled to any relief against the defendants for so interfering with her customers and so competing with her. Many cases have been cited upon the question of good will. The law is well settled that where a person sells the good will of a business and starts a rival one, he will be enjoined from making any direct appeal to customers to leave the old establishment and come to his, or from holding out that he is continuing the identical business which he sold. But this is not exactly the case of good will, although it might be said that Kernan, one of the defendants, was a quasi partner because he was interested in the profits. It might be that as to creditors Kernan would be held to be a partner.

But there are analogous questions which have arisen in the courts of this county in cases in which interests in dairies were involved, and one of the judges of this court informs me that he had a case in which he obtained an injunction, while at the practice, against the driver of a milk

wagon who left his employer and hired to a rival, and then undertook to run the wagons of the rival over the exact route of his former employer and take the customers from the one and give them to the other. And I myself was connected with a case of a similar sort. In fact, almost the entire value of an established dairy business consists in having certain routes of customers, in which the courts ought, and as I have said, have recognized the right of property. There is nothing which prevents a man from buying milk from any one he pleases; yet, as I have said, the courts have enjoined the direct attempt to take bodily the customers established by a long course of dealing from one person to another.

Another case of which I have a very distinct recollection is where the subscription list of the Times newspaper, in 1869, I think, was taken by one of the company's employes, and he was proposing to sell it to the Enquirer, when this court, by Judge Storer, I think it was, granted an injunction, and held that where a newspaper had established a route or trade, they had a property right in it which would be protected in the same way that the rights of the man who delivered the newspapers would be protected. These routes are valuable, and frequently sell for large sums of money. Now, can it be said that a man employed by a carrier, who may be sick for a week, to go over his route, could take advantage of having ascertained who his customers were, and in an underhand manner deprive the owner of the custom which it had taken years to build up? Certainly these decisions, local and unreported though they be, are entitled to great weight, as they seem consonant with justice.

The question is new, and I find nothing in point exactly, although there are some cases cited by counsel for the plaintiff where managers have gone off and set up rival establishments. Those cases seem rather to have turned upon the fact of holding out the new business as identical with that of the former employer's, than upon the question of attempting to deprive a person of a trade of this kind.

It is an important question, and feeling clear upon the principle that there is a right here which ought to be protected, I shall follow the decisions to which I have referred, and leave it to the court of final resort to pass upon the question. I therefore find that the demurrer is not well taken; that the plaintiff, if upon the trial it shall appear that the allegations of the petition are true as admitted by the demurrer to be, is entitled to have the defendants enjoined from using her trade mark, and also from attempting to carry bodily from her to the rival establishment of Kernan, who, as I said, was a quasi partner at least, the business of the concern. They might as well have taken the counters and the tools and the wagons as to take what alone makes them of any substantial value—the established business, and if the court will interfere to protect a trade mark on the ground that a person has established a business which people have become accustomed to by seeing a certain word stamped on the manufactured articles, certainly where a person has established a route on which wagons call at certain houses and have done so for many years, where people are in the habit of buying, he is entitled to protection from such a conspiracy to capture it as that disclosed here.

Demurrer to the petition overruled.

Hoadly, Johnson & Colston, for plaintiff.

W. L. Granger, for defendant.

LEVI C. GOODALE v. JAMES G. HUNT.

For opinion see 6 Dec. R., 897 (s. c. 8 Am. Law Rec., 624). It was affirmed by the supreme court without report, February 12, 1884.

INJUNCTIONS—REMOVAL OF BUILDINGS.

[Superior Court of Cincinnati, 1880].

†L. B. HARRISON et al. v. SAMUEL D. CRAIGHEAD et al., Trustees.

1. One owning land on both sides of a private way, not dedicated to the public, common to all the abutting proprietors, can not be compelled by such proprietors to remove a building erected over, but so far above the way as not to obstruct the right of passage.
2. Interlocutory mandatory injunctions, or provisional injunctions, prohibitory in form, but in substance requiring some positive act to be done, are so well established in chancery that they will not be understood to be prohibited by the code, unless clearly inconsistent therewith. The code defines an injunction as a command to refrain from a particular act (see section 5571, Rev. Stat.) and as the continuance of an act is not the same as a repetition of the act, there is no inconsistency.
3. Time will not be prevented from running in favor of adverse occupancy of a private alley by the fact that for an intermediate time it was used as an alley by parties not entitled to the use of it.

APPLICATION for Mandatory Injunction.

FORCE, J.

I think I have arrived at a conclusion in this case, and it is not worth while to hold it any longer to make any elaboration of it further than to state what is the conclusion to which I have arrived.

This case grows out of the ownership by John Baker of inlot No. 162. In 1832 he owned the whole of inlot No. 162. That was a piece of ground one hundred feet on Walnut street, lying ninety-nine feet south of Fourth street, and extending back two hundred and two feet. The front hundred feet deep on Walnut street was taken up by lots on Walnut street. That left in the middle of the block a lot one hundred and two feet by ninety-nine feet, bounded on the south by Baker alley, and on the north by inlot No. 163. From this lot, it seems, he took off a specific, given strip, twelve feet wide, on the east side, making an alley way. And then subsequently, at a date which is not precisely determined, but sufficiently so, about 1832, he cut another strip off the exterior of this lot, making a way of the same sort around the lot. He took ten feet off the south side to add to Baker alley, and then took a strip ten feet wide on the north side for a way of the same character, making a continuous alley on all sides. This was sometime in 1832, for at that time he evidently had something in his possession that was called a plat. Whatever that was, it was never put on record. It is referred to in some of the deeds. It was a plat of some sort which he had in his possession and which he used as a memorandum to be shown by him to his grantees of certain lots, for the information of those grantees.

†For opinion in this case, on motion for temporary injunction, see ante 4 Bull. 500.

This lot, so surrounded, was apparently sold off by him in three separate parcels. The lot on the west was sold by him by deed, the description of which was a lot beginning on the north side of Baker alley at a point ten feet east of the west line of inlot No. 162, thence running twenty feet east, thence north seventy-nine feet, thence west twenty feet to the west line of said lot, and thence south seventy-nine feet to the place of beginning, this last line being the west line of said lot and the east line of said alley.

Now, as to the description of that deed, the two copies of it offered in evidence vary. In one the description was 20 feet to the west line of inlot 162, and in the other, twenty feet to the west line of said lot; but, taking the deeds down to the recorder's office and comparing them with the records, I find the correct description is running twenty feet west to the west line of said lot. Now, that being the description, a lot twenty feet wide lying east of this alley, the west line of said lot being the west line of said alley, that deed was a conveyance of twenty feet only, and not a conveyance of the fee of the ten feet said to be covered by the alley; for it is true that where land is described as bound by a stream, or a ditch, or a canal, or a street, or an alley, or a road, or what-not, being bounded by such, such bounding object is supposed in law to be a line, and, being a line, the center line of such object is to be the line, and the courts go very far, especially the courts of Pennsylvania, in construing land abutting on a street or alley, to extend to the center of the street. But it is equally well settled that the description of a deed can be so explicit as to exclude the bounding object. So it has been held by the supreme court of the United States as regards the Ohio river in reference to the boundary of the states north and south of it, and also as regards the Chattahoochie river in Alabama, and also in our own state, as to the boundary of small streams, that, where land is said to bound upon the bank of a stream, or on a certain definite edge of a stream, or to bound on the outer boundary line of any object, the deed does not convey anything within the object, but only what is outside of it. The description of this deed is so explicit that it cannot be held to convey the fee of any part of the land bounded by the alley, but only a right of way over the adjoining alley.

There was a subsequent conveyance of twenty feet east of this lot. It was described as running back to a ten-foot alley and bounding on the ten-foot alley. There was still another subsequent conveyance to Winthrop B. Smith, conveying forty feet, where the conveyance was definite. It was not described as running back and being bounded by the alley, but as running eighty-nine feet, with the proviso that the rear ten feet must be taken with such encumbrances as Baker had put upon it. But that was a conveyance of the whole lot, not describing the rear part as an alley, but Smith took the rear part subject to the incumbrance that might have been put upon it by Baker, whatever that was. And there was an earlier deed from Baker to Sylvanus Wright, who owned a lot on Fourth street running back to this alley, that expressly granted to him the right to use as an alley so much of this ten-foot passage way as was in the rear of his lot, with the covenant that, if the alley should ever be opened further to the west that the right of user should extend westward along with the alley.

Now, there were no other grants by Baker giving a right to this alley, or declaring or constituting this as an existing alley. A plat of it was never put on record. There was no dedication of it as an alley, either

statutory or otherwise. A graded way was made, and in the deed to the four persons concerned in these four lots it was specified to these grantees that there was an alley there and therefore this graded ten foot way was in existence for the use of these four grantees; but there was no alley there to the rest of the world, and no other persons beyond these grantees and their heirs and assigns had any right in that alley, or had any right to claim that it was an alley in existence. It being therefore a private alley, so far as it was an alley; subsequently after the burning of Pike's Opera House the Baker heirs conveyed to Pike the fee in this western arm of the alley. Pike at that time being the owner of Pike's Opera House, and the lot first mentioned bounded on the east side of this ten foot strip; being thereby the owner of the lots on each side of this strip and the owner of the fee in this way, and that way being only a private way, he had a right to the entire lot subject, as far as it was encumbered by the right of passage, to the right of these four persons and their successors.

That mere statement disposes of a part of the case, because Pike and his heirs having stopped up the way, the plaintiffs asked to have it thrown open all the way, not merely on the surface of the ground, but up to the sky. That is the prayer of the petition—that a slice should be cut through the house from the bottom to the top cutting off the stage from the auditorium; but that claim was abandoned during the progress of the case. But, inasmuch as Pike was the owner of lots on both sides of the strip, and was the lawful owner of the alley way, at all events he had the right to use that ground in any way not interfering with the right of passage over it, as has heretofore been decided in this county in the case of the Marietta & Cincinnati R. R. Co. against the Cincinnati & Spring Grove Avenue Co., in the court of common pleas, a decision that was affirmed in the district court, the case never being taken to the supreme court, but being followed in cases of that character since. Pike built twenty feet above the ground in the air. But the building was built on his own ground. So far, therefore, I think there is no ground of relief.

The case then remains whether Pike's heirs and representatives have a right to persist in obstructing the passage over this ten foot way as they do now obstruct it. Now, part of the case may be defended, at all events, by this mere statement of the effect of the deeds. No right of passage ever existed except in favor of these grantees in these deeds and their heirs and assigns. There cannot now be claimed any right of passage over that way except by those original grantees and their successors, and hence, so far as Clarke's book store and the Wheeler Sewing Machine Co. are concerned, they, of course, have no right of use, and no claim can be made on their behalf in this case. The claim to use this way must be a claim on behalf of persons who have the right to use it. Mr. Harrison, not in the right of these stores, but by virtue of his right as owner of a lot south of the ten foot way, fronting on Baker alley, and Messrs. Hinkle and others, as owners of a lot fronting on Baker alley, and Mr. Smith, as successor of Sylvanus Wright in the one lot north of the alley way, are the persons in whose behalf the claim must be made, and the question is then as between these persons and the Pike heirs, devisees and trustees.

Now, I think, by the statement of the case, that it appears clear, at all events so far as these persons are concerned, a right to user did exist in the alley as laid out, and the testimony is that it was used in 1832;

how much subsequently it does not appear. It does not appear evidently to have been used very much; but it was used in 1832 and some time subsequently, namely, by carts taking wood (for in those days they burned mostly wood), and domestic supplies to the dwelling houses that had their rear fronting on this way. If it were never used much, still it was used some. If the use ceased at some time, what time? We cannot certainly fix it, but certainly earlier than 1852, for there was then a brick wall built across this ten-foot way which was in existence not as a new wall in 1852, and while, as to the various dates, there is a great discrepancy in the recollection of the various persons called to testify with reference thereto, thereby showing the fallibility of memory as to dates long past, yet that date seems well fixed for two reasons: Mr. Keys says it was in the spring after his marriage that his father-in-law, Mr. Baker, wishing to consult with him about the locality, took him along the alley, and he saw the situation of the property, and he then saw this wall standing across the alley, and being apparently a portion of the wall of the house that used to be called the James House, and afterwards the Whaley House. That was the house that was built twenty feet east of the ten-foot strip.

Now, that wall, which was in existence some time prior to 1852, how much prior we do not know, certainly continued down in existence and standing until the opera house burned in 1866, and the debris from that fire fell on it and covered it up. So, at all events for these fourteen years the alley was disused, and how much prior to that fourteen years we do not know.

Now, since the fire what has been the condition? When the debris was removed this wall was removed with it, and the space remained open, and over this open ground, this alley way or yard or what-not, when Robert Clarke & Co., moved their book store in February, 1867, wagons moving them carried their books along the way to the rear of their store, and then passed out over this ten-foot strip. So that in February, 1867, this strip was used for the purpose of Clarke's book store, and, at the same time, it appears that, in one or two instances, it was used by other parties. This use was stopped shortly afterward, first, by Pike's watchman pushing back teams that proposed to pass along it, and, next, by placing obstructions of different sorts, one after the other, in the alley, which finally ended with the placing of a great box filled with bowlders at one end of it, and also by the construction of a massive iron gate at the entrance of it where it joins Baker alley, thereby preventing the use of the alley. So that this temporary use of this way was a use while the space was open, by parties not entitled to the use of it, but by others. Such use by strangers could have had no effect upon the right to the alley.

The obstruction was replaced and continued from that day down to this. So that for some time prior to 1852, down to the present day, this space has not been used as an alley, but its use as such has been discontinued, except during the interval of disorder ensuing upon the destruction of Pike's Opera House.

But, it is not the case of a mere disuse, or omission to use; for the wall, taking the probabilities of the testimony, not the certainties into consideration, when originally constructed across the alley, seems to have been constructed as a part of the James building, and the James building seems in all probability to have been west of the wall. The owner of that lot was one of the grantees entitled to use this alley, and, if so, it was not

an exclusion by other parties, but a renunciation and abandonment by James, so far as he was concerned, for he put it up. At all events, in 1858, when Whaley rebuilt the house, he repaired and somewhat remodeled that brick wall. So that, at all events, in 1858, so far as Whaley, the owner of that property, then, is concerned, by the construction of that wall there was an express renunciation or abandonment of the right to use the alley.

Whaley testified that at the time he constructed his building, he did it in concert with Mr. Smith, who was then the owner of the lot which Messrs. Wilson, Hinkle & Co. now own, and it was an acquiescence by the owner of that lot in this express renunciation and abandonment. And further, when Mr. Smith or Sylvanus Wright anew the building on the north side of the alley, this wall was then standing. The rear wall of this building was withdrawn some ten or fifteen feet back, north of this ten-foot way, so as to make a wide court in which vehicles could come up and turn around and go out again. So that there was an express acquiescence in this wall and stoppage by the occupant of the lot on the north side of the alley. So that by the acts of Whaley and Smith and the owners of the lot on the north, there was an express renunciation and abandonment of this right of way and acquiescence in the wall.

Now, then, where a party comes into a court of equity to ask for a mandatory injunction to remove obstructions and open an alley way to which he claims to be entitled, if he has been guilty of laches for twenty-eight years, that would disentitle him to such relief; but, if it is a case not merely of laches, but of express renunciation and abandonment, lasting nearly as long, there is no ground, in such a case, for him to stand upon, and, undoubtedly, there could not be any difficulty in the case.

There is one matter which has introduced the only real difficulty in the case, and that is the testimony given by Mr. Keys of the conversations between him and Mr. Pike. Mr. Keys states that, the opera house having been burned, Mr. Pike came to him to get from him and the other heirs of Baker, Mr. Baker having died, a conveyance of this strip constituting this alley way. Mr. Keys testified that, in that conversation, Mr. Pike recognized the existence of the alley and promised to keep it open and unobstructed for the passage of vehicles, and that Keys, at some length, told Pike that the Baker heirs did not claim any equitable right remaining in this ground, and that John Baker, in making the conveyances formerly, had given these parties a right of way over the alley, but that this right of way was a right of way limited only to certain persons named by him as grantees, and that he had always been careful to restrict its use to them, and he therefore agreed to see the heirs and get them to make the agreement.

Now, upon this a claim is presented in two aspects: first, that this declaration of Pike's was a parol declaration of a trust that he would, while holding the fee, hold the fee for himself, but for the benefit, also, so far as the right of way was concerned, of the persons who should be entitled to it, or certain persons who were declared to be entitled to it.

Now, undoubtedly it is true that in Ohio, as it is true in most of the states, we have omitted to re-enact the seventh clause of the Statute of Frauds. It is held that a trust in land may be manifested and proved by parol. The proof in the case, of course, must be very explicit. This declaration or statement does not appear however, to be quite so much in the nature of a trust as it is in the shape of an admission against interest.

But, if it be an admission against interest, still, an admission against interest is held to qualify and restrict the title of the owner of land, and these defendants, not being purchasers for value, but being volunteers, they hold the land as Pike held it, subject to any restrictions or qualifications to which it was subject in his hands, if there were any such. So that the case of the plaintiffs therefore, does in fact hang upon this reported conversation between Messrs. Keys and Pike, and, that being the case, it is necessary to consider that conversation with much care.

It is unfortunate that we have but one report of that conversation, for not only from our own experience, but the experience in cases generally, it is clear that our memories, the memories of the best of us, are sometimes inaccurate, faulty or colored as to the details of matters which happened some time in the past. But it must also be said that Keys seems to be quite clear in his recollection, and is obviously testifying precisely according to his recollection as he has it. There is this, however, to be said, that while we have only his recollection, and therefore must have only that to go by, unless it is controlled or modified by other circumstances, yet one item as to which Mr. Keys is positive as any other, per aps more positive, is that this conversation took place subsequent to February, 1867, and he is enabled to fix that date, because, about that time, he was residing in New York, and he returned in February, 1867, and this conversation happened after his return. But the conversation, as he gives it, is a conversation between him and Mr. Pike at the time the old opera house lay in ruins, before the rebuilding had been begun, while Mr. Pike was considering what his plans should be, and this conversation was held with Mr. Keys for the purpose of settling one matter of the plans to be adopted for the purpose of rebuilding the opera house. That being the case, the conversation could not have been later than the spring or early summer of 1866. So that, at all events, in one matter, perhaps not important, but such as it is, in one matter in which his testimony is as positive as any, his recollection is at fault.

Now, take the statement of Mr. Pike with the conversation between the two persons as it was given. A very slight change in the phraseology would make it a conversation of this character—a statement by Pike that he had been unfortunate; that the fee of the alley belonged to the Baker heirs, and he desired a conveyance of it to be safe in erecting his opera house, and that he replied, as he says he did reply, that the Baker heirs claimed no equitable right in that way encumbered by conveyances heretofore made, and therefore they could not convey more than what they had. It would require a very slight change in the phraseology of the conversation to make the conversation of that character. If that change were made, the entire import of the conversation would be changed, the effect asked for it would be all gone.

But we have a report of the conversation as it is. We have, also, the acts of the parties. Now, when Mr. Pike did begin the rebuilding of his opera house, in the very beginning he constructed a wall over this way. Iron staples or stanchions or what-not, were built into the wall, on which was hung a heavy iron beam. As soon as the house was well under cover and built, his watchman began to exclude from this way vehicles which, during this period of disuse, began to make use of it as a way. A massive iron gate was fastened and locked at the entrance of this way, and at the other end obstructions, varying in character, but continuous, one after the

other, were put up. So that the use of this strip as a way has been prevented ever since.

Now, the deed which the Baker heirs made to Pike was executed in October, 1867, certainly more than a year after the date of that conversation between Keys and Pike, and after Pike had taken exclusive possession of this way and had excluded from the use of it all persons who desired to use it or claimed the right to use it.

There is this further: Mr. A. H. Hinkle, who has testified in the case, testified that he, as owner of a printing establishment located on the alley and the owner of the lot on which it was situated, which lot abuts on this alley, was, on one occasion, advised by his drayman that Pike's watchman would not allow him to go along the alley, but he was excluded. Mr. Hinkle replied, well, it is no matter; I don't care to use it. So that, at the time that deed of the Baker heirs was executed, the opera house had been built, and this way, instead of being used as an alley, was used as a private court or private yard for the exclusive use of Mr. Pike, and all other persons were excluded from it; and that being the condition of affairs, in fact, the Baker heirs, when they came to make their deed, made a deed which conveyed by quit claim a strip of ground by metes and bounds simply, there being no reservation for themselves or for others, nor any allusion anywhere in the deed to circumstances indicating a right to an alley, easement, passage or way in favor of their ancestor's grantees.

So that the conduct of the parties was such that I think we must conclude, at least it seems to me now that we must conclude, that Keys, in recollecting the conversation, after this lapse of many years, simply does not recollect it in the precise language used, which is a thing that happens every day in giving testimony of conversations after such length of time; or else, if the conversation was in the precise phraseology now given, then the parties changed their minds before the time came for the execution of the deed.

I do not find, therefore, that such a state of things which is claimed to be made out by this reported conversation exists. The case, therefore, stands on the other testimony of a right of way once created many years ago for the benefit of the few named persons, but which right of way has not been used for nearly thirty years and the right to which was expressly renounced and abandoned by all the parties entitled to it nearly as long ago, and under this state of affairs the rules of equity do not admit of the allowance of a mandatory injunction in favor of those parties.

The finding will, therefore, be for defendants, and the bill will be dismissed.

McGuffey, Morrill & Strunk, and Sage & H., for plaintiffs.

Hagens & B., for executor.

R. D. Jones, for heirs of S. N. Pike.

ATTACHMENT FOR CONTEMPT.

[Hamilton, Common Pleas, 1880].

Ex parte MICHAEL HEISTER.

Where a justice issues subpoenas for witnesses in a criminal case to another county under Rev. Stat., section 7132, assuming that the justice may attach the witness for contempt on refusal to obey, the issuance of the attachment to the marshal of a village is void, and an arrest by such officer is unauthorized.

HABEAS CORPUS.**AVERY, J.**

Michael Heister, of Hamilton county, Ohio, was subpoenaed to appear before Rufus Fite, a justice of the peace of Brown county, Ohio, to testify in behalf of the state of Ohio in a criminal action then pending before said justice against one Joseph Kable.

This subpoena was served by the marshal of the village of Georgetown, Brown county, Ohio. Heister refused to obey the subpoena. Thereupon an attachment was issued against Heister by said justice for contempt, which writ of attachment was issued to and served by said marshal, who arrested said Heister and threatened to carry him to Brown county by force.

Heister applied to said court for a writ of habeas corpus.

Upon the hearing of said cause Heister claimed:

1. That said writs of subpoena and attachment were invalid, because said justice had no power to issue writs to, and said marshal had no power to serve writs in any foreign county.

2. Because it did not appear by said writs that the cause pending before said justice was of a character greater than a misdemeanor.

3. Because it did not appear that said Rufus Fite was a justice of the peace.

4. Because the writs should have been issued to and served by a constable of Hamilton county, and not to the marshal of the village of Georgetown in said county of Brown.

The court, in deciding the case, said: The statute confers power upon justices of the peace to issue subpoenas for witnesses in a criminal case to another county. Section 7132, Rev. Stat. From the form set out in the statute the subpoena is apparently to issue to a constable of the county. Assuming, without deciding, that process might in like manner issue for enforcing obedience to the subpoena, there is one objection to the arrest in the present case which is fatal to it. The attachment was issued to the marshal of the village. A marshal is the ministerial officer of a mayor's court. Section 6706, Rev. Stat. The constable is the ministerial officer of a justice's court. Sections 6688, 6699, Rev. Stat. Process from a justice of the peace to the marshal of a village as such is without warrant of law. The officer at least could have no authority to arrest the petitioner, and he is accordingly discharged.

F. Vogeler, for petitioner.

M. Sater and M. Whitaker, contra.

EFFECT OF AMENDMENT TO STATUTE.

287

[Trumbull District Court, 1880.]

DARIUS M. McCLURG, Adm'r. v. JOHN COLE, Adm'r.

Where a cause of action, for the wrongful taking of personal property, arises under a statute of limitations of four years, a subsequent amendment of such statute, by providing that the cause of action shall not be deemed to have accrued until discovery of the wrong doer, is prevented from applying by section 2 of the act of 1866 (S. & S. 1) that a repeal or amendment shall not affect existing causes of action.

PETITION in Error to reverse judgment of common pleas.**SHERMAN, J.**

In 1863 the plaintiff's decedent, Woodford, in his lifetime, was robbed or had taken from him wrongfully, the sum of \$1,000 in paper money, and \$500 in gold coin, which was then worth \$800.

It is alleged at the time of the wrongful taking, the wrong doer was not known.

After the death of Woodford his administrator brought suit against the administrator of the decedent Smith, alleging that in 1876 it was for the first time ascertained by, and known to the administrator of Woodford, that Smith, with two confederates, perpetrated the wrongful act by which this property was appropriated for the benefit of Smith in his lifetime. The petition bases the action on the wrongful taking. In an amended petition the plaintiff undertakes to raise a trust out of the transaction to avoid the statute of limitations: but no trusts could have been raised under the allegations of the petition.

Three defenses are made; first, the statute of limitations of four years; second, that of ten years; and third, there is a denial of material facts.

When this cause of action accrued, section 15, of the act of 1853, was in force, and provided that actions for the recovery of personal property wrongfully taken must be commenced within four years after such taking.

The question is whether this action is barred by this limitation of four years. In 1867, this 15th section was amended by adding: "Provided, that in an action for the wrongful taking of personal property the cause of action shall not be deemed to have accrued until the discovery of the wrong-doer."

On the part of the plaintiff it is insisted that this statute, as amended, affects and governs the action.

The defendant claims that the action shall be governed by the law of limitations, as it was when the cause of action accrued. The case presents in many respects a very difficult question to determine; and we are not positively sure that we are right in our decision of the case.

There would be no difficulty if it were not for the statute of 1866, amending section 2 of the statute of 1856, in these words: "That whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal; nor causes of such prosecution or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

This statute of 1866 was in force when this amendment of 1867 was passed. It is said this statute of limitations is purely remedial, and is not retroactive. The constitution very wisely provides that the legislature shall not have power to enact retroactive laws. A retroactive law is one that reaches back and affects a cause of action somewhere in its essence, and is not remedial unless it affects the remedy. The question arises whether this amendment of 1867 was in any respect more than a remedial law, so far as it operates on the cause of action in the petition.

It is a rule of construction, and a rule wisely adhered to by the courts, that in construing a statute, it shall be construed so as to have a prospective operation only, and not affect rights pending when it was enacted. Does the amendment of 1867, in any manner, affect causes of action existing before it was passed?

We have been referred to many authorities, and we have examined them, but they give us but little light in the construction of this statute.

When an action is barred by the statute of limitations, the legislature cannot pass a statute and revive it. It has not the power. The cause of action of this case had nearly become barred under section 15 of the act of 1863, when it was amended in 1867, by adding the proviso before referred to. It must be conceded that the cause of action had accrued under the original section 15; and that when the statute of limitations begins to run, it runs to the end, unless there are exceptions made by the statute itself.

The plaintiff claims that this amendment of 1867 did not affect the cause of action that before subsisted.

The amendment of 1866, above quoted, says when any statute is repealed or amended, such repeal or amendment shall not affect any existing cause of action.

This amendment of 1867 does not affect the plaintiff's cause of action that was subsisting under the original section 16, in regard to the limitation, by declaring that the cause of action shall not be deemed to have accrued until the discovery of the wrong-doer, while section 15 simply provided that the cause of action shall be barred in four years from the time of the wrongful taking. We think this cause is governed by section 15.

Judgment of the common pleas court affirmed.

GARNISHMENT.

288

[Trumbull District Court, 1880.]

M. BENTLY & SONS v. C. P. STRATHERS.

Money in the hands of an administrator, before an order of distribution, cannot be garnished in an action against the distributee.

ERROR to common pleas.

SHERMAN, J.

The plaintiff undertook to garnish money due the defendant from an administrator before an order of distribution was made.

This cannot be done, as there is no indebtedness between the administrator and the defendant (who was an heir) until after the order of distribution is made.

Judgment affirmed.

DEED AND LEASE BACK.

319

[Superior Court of Cincinnati, Special Term, May, 1880.]

†SARAH K. MILLER v. W. P. HULBERT et al.

1. Where there is an absolute conveyance, and a lease back with the privilege of purchase, executed at the same time, or so nearly at the same time as to be

†This decision was reversed by the district court. See opinion 6 Bull. 199.

substantially so, the presumption is that both instruments are to be considered together as parts of the same transaction.

2. There is not, however, in such case, any presumption that the transaction was a mortgage.
3. The transaction in such case must be held to be what it shows on its face, until it has been shown by evidence that the parties to it intended differently.
4. Before it can be held that the parties intended such a transaction to be a mortgage, it must appear from the evidence that the relation of debtor and creditor existed between them.
5. As to whether the debt must be one that the grantee can enforce against the grantor by personal judgment—*quare?* But there must be a debt enforceable against the property at least.
6. Accordingly held in this case that a deed, absolute on its face, made by Coleman to Taylor, on the 22d day of December, 1841, and a lease upon the same premises made by Taylor to Coleman, on the 23d day of December, 1841, should be construed together as parts of the same transaction.
7. It appearing by the terms of the lease that it was for the term of ninety-nine years, renewable forever, with privilege of purchase to Coleman, at any time after thirteen years from date, on the payment of \$20,000. It was further held that by the terms of the agreement between the parties, Coleman had an election to pay or not, as he saw fit, and hence there was no debt on account of the money originally advanced, that could be enforced by Taylor against either Coleman or the property.
8. There being no evidence inconsistent with the transaction as the parties made it, held that it was a conditional sale, and not a mortgage.

FORAKER, J.

The plaintiff seeks in this suit to obtain a decree finding that there is due her, as the devisee of Griffin Taylor, deceased, certain installments of rent, under a lease of certain described real estate, situated on Main street in this city, which lease was made by Griffin Taylor to John W. Coleman, February 28, 1853, and to have the same charged upon the premises, and, in default of payment, the premises sold.

The defendant, Hulbert, is a trustee under the last will and testament of Coleman, who is also deceased, and his co-defendants are the widow and children of Coleman.

The defense to the action is that the transaction of 1853, whereby Taylor gave the lease sued upon to Coleman, was but a renewal of a former transaction between the same parties, had on the 22d and 23d days of December, A. D. 1841, and that the transaction of 1841 was simply a loan of money by Taylor to Coleman, and the pledge of property, in legal effect, by way of mortgage, by Coleman to Taylor for the repayment of the loan.

It is claimed, first, therefore, that Taylor was only a mortgagee, entitled to a lawful rate of interest upon his money; and, secondly, it is claimed that the interest that has been paid him as rents was in excess of a lawful rate, and hence usurious, and that—proper credit being given for the usury so paid—there is nothing due to plaintiff, either as interest or principal; but that, on the contrary, they have overpaid, in a large amount, for which they ask judgment. Prayer also for a decree requiring a reconveyance.

While it is well settled that a court of equity will not hear evidence to show that a conveyance, on its face a mortgage, is in fact a deed, yet it is equally well settled that it will hear evidence to show that a deed, absolute on its face, is in fact but a mortgage.

In pursuance of this right, the defendants, who had the open and close, offered evidence upon which the court is asked to decree as in their cross-petition prayed. The plaintiff offered no evidence.

From the evidence I find that, in 1841, John W. Coleman was the owner in fee simple of the premises described in the petition, and certain other premises in the vicinity of the same, all of which, on the 22d day of December, 1841, he conveyed by deed, absolute on its face, to Griffin Taylor. That on December 23, 1841, Griffin Taylor executed and delivered to John W. Coleman a lease of the same premises for a term of 99 years, renewable forever, with privilege of purchase at any

time after 13 years from the date of the lease, on payment of \$20,000, the lessee, his heirs and assigns to pay all taxes, assessments, etc., and an annual rental of \$2,100, in equal quarterly installments of \$525 each, \$25 from each installment to be deducted for prompt payment.

I find also that this rent so reserved was the equivalent of ten per cent. per annum on \$20,000, and that it was regularly paid by Coleman down to May 15, 1850, at which time he had fallen behind one year in his payments. That by an agreement of that date this \$2,000—year's rent—was made an additional charge upon the premises under the lease, and thus carried along until the lease of February 28, 1853. That by this transaction of 1853, the \$2,000 so due and unpaid was added to the original amount of \$20,000, and, the old lease being surrendered, a new lease, the one here sued upon, was given, in terms similar to the old, with a privilege of purchase at any time after January 1, 1855, on payment of \$22,000—rent payable quarterly in equal installments of \$550 each. That at the same time this lease was given, Coleman also gave to Taylor a mortgage on certain property then owned by him on Fourth street, and also a strip of ground 2½ feet wide on Main street, the condition of which mortgage recited the lease of that date, and provided that it was given to secure the payment of rents reserved in the lease and the performance by Coleman of his covenants in the lease, and then provided further that on payment by Coleman of \$10,000 of the purchase money named in the lease, the mortgage should be cancelled as to the Fourth street property, and that whenever all the \$22,000 named in the lease had been paid, the whole mortgage should be released. On the 3d day of February, 1862, Coleman, having sold the Fourth street property, paid Taylor out of the proceeds of the sale \$10,000, with interest thereon from January 1, 1862, to that date, and thereupon Taylor cancelled the mortgage as to the Fourth street property, and credited Coleman on the lease with the payment of \$10,000, and recited therein that in consequence the rent due on the lease was thereby reduced to \$1,200 per annum.

Afterward, on the 16th day of April, 1862, by agreement between Coleman and Taylor, the rent of said premises was reduced to \$960 per annum for the period of five years from and after July 1, 1862, in consideration whereof Coleman relinquished his privilege of purchase until after the expiration of "five years."

That rent has, ever since this reduction, been paid at the reduced rate of \$960 per annum.

I find also that from time to time, under the old lease of 1841, as Coleman had opportunity to sell parts of the property covered by the lease, Taylor deeded the same back to him for an express consideration of \$1.00 by quitclaim deed, and thus permitted Coleman to sell off his property and to apply the proceeds of such sales to his own uses.

I find also that in all the receipts given by Taylor to Coleman for money paid under these leases, it is spoken of by him as ground rent, except one dated February 3, 1862, in which he speaks of \$1,650 that day paid him in full for interest to January 1, 1862.

All the foregoing facts I find from documentary evidence.

I find further, from oral testimony, that the property conveyed by Coleman in 1841 was worth at the time \$55,000. Also that Taylor told W. P. Hulbert that he had loaned money to Coleman on mortgage. Such are the facts of this case, so far as it is material to state them. Are they sufficient to make out the defense?

Looking first to the transaction of 1841, and viewing it in the light of all that then transpired, and all that subsequently occurred, what effect shall be given it?

Where there is an absolute conveyance, and a lease back with the privilege of purchase, executed at the same time, or so nearly at the same time as to be substantially so, the presumption is that both instruments are to be considered together as parts of one and the same transaction. Hence, the deed of December 22, 1841, from Coleman to Taylor, and the lease back from Taylor to Coleman of December 23, 1841, may fairly be presumed to have been parts of the same transaction.

There are some cases that seem to go to the extent of holding that in such a case the presumption will go further, and hold not only that both papers are a part of the same transaction, but that the transaction was a mortgage.

But the great weight of authority is clearly the other way—that the presumption is no more than that the two instruments are part of the same transaction; *Marshall v. Stewart*, 17 O., 356, properly construed, goes no further than this.

It follows from this that the deed of December 22, 1841, and the lease of the following day, should be construed together as belonging to the same transaction, but that the transaction should be held to be just what those instruments show it to have been, until by evidence it is shown to have been different from what they make it appear to be. They show on their face that Coleman conveyed to Taylor certain

real estate, and that Taylor leased it back with privilege of purchase at any time after thirteen years from that date. Coleman sold his property, but reserved a right to buy it back. In other words, on the face of these papers, the transaction of 1841 was a conditional sale, and not a mortgage.

Such transactions are lawful. Parties have a right to make sales upon condition, and upon such conditions, if they be legitimate, as they may see fit to agree upon. A court will not undertake to say what, in such a case, the conditions should have been. It will only inquire whether or not it was such a sale, and what the conditions were. The single question here presented is therefore whether or not the evidence shows the transaction of 1841 to have been, not a conditional sale, as the papers purport—but a mortgage. The rules to guide the court in the examination of this question are well settled. By all authority the question is, what was the intention of the parties? If they intended it to be a mortgage, the court will so decree, no matter what form they may have given the transaction. In determining whether or not they intended it to be a mortgage, the inquiry is, in another respect, whether or not by the transaction a debt was created, or if a debt already existed, whether or not it was kept in existence, since there cannot be a mortgage without a debt, and hence a mortgage could not be intended unless there was a debt. While there is a great deal of conflict of authority as to whether or not this debt must be a personal debt, that can be enforced against the debtor or mortgagor by action at law, yet it is universally held that there must be a debt which can be enforced at least against the property. In short, there must be the relation of debtor and creditor between the parties, and sooner or later there must come a time, conditionally or absolutely, when by the terms of the agreement made by the parties, the lender shall have the right to proceed at least against the property to appropriate it to the payment of a debt due him. It may be that he has bound himself to look no further than the property, but it must be that he has a right to go at least that far, and because there is a debt due him.

If, on the other hand, the agreement be that the grantor may repay or not at his election, and failing to repay, and also failing to pay the rent or interest, or whatever it may be called, gives to the grantee no right of action against him or the property to enforce payment, then the transaction is a conditional sale by all authority. Thus in 2 Edwards Chancery, p. 144, it is said:

"Where, by the terms of the agreement, the money advanced is not paid by way of loan so as to constitute a debt and a liability to repay it, but by the terms of the agreement the grantor has the privilege of repaying or not at his election, there it must be decreed purchase money, and the transaction will be a sale upon condition."

Applying these rules to the evidence in this case, I am unable to decree the transaction of 1841 a mortgage.

And for the simple reason that I am unable to find from the evidence that the parties so intended.

It is insisted by the defendants that the facts I have found show it to have been such.

They say it is apparent that only a loan and mortgage were intended, from the fact that the property conveyed for \$20,000 was worth \$55,000.

Also from the fact that the privilege of purchase was denied for thirteen years, showing it was a loan for that time. Also from the fact that the rent reserved was exactly ten per cent. per annum on \$20,000; and from the fact that in one of the receipts given by Taylor he spoke of the money paid as interest, and the further fact that a mortgage was taken at the time of the second lease, February 28, 1853, on the Fourth street property, with conditions as recited above. And from the fact that Taylor once told Hulbert he had loaned Coleman money on mortgage, and, in short, without naming each fact of the case in detail, it is insisted that every feature of the case indicates a mortgage to secure a loan of money. If we had before us all the facts of the case except the instructions executed by the parties at the time of the transaction, the inference insisted upon by the defendants might very well be drawn.

But having those instruments before us, and seeing what they show the transaction to have been, our first inquiry must be, not whether the inferences claimed by the defendants can be drawn from the facts shown, but whether the facts are consistent with the transaction as it appeared on its face. For if all the facts of the case are in harmony with the transaction as the parties made it on paper, we certainly are not at liberty, in the absence of evidence to the contrary, to construe the transaction to be something else than it seems, simply because the facts would admit of such construction.

Are, then, the facts found consistent with the theory that the transaction of 1841 was a conditional sale?

The fact that the property was worth \$55,000 is not inconsistent therewith. Coleman, by the transaction, did not part with the \$35,000 of value that was in the property over and above the \$20,000 he received as the consideration of the sale, as has been contended. His privilege which he reserved of purchasing the property, was a privilege of purchasing \$55,000 worth of real estate for \$20,000. Hence his privilege was worth \$35,000. The denial of the exercise of this privilege for thirteen years from the date of the transaction does not show that the money was to be then repaid, but only that it was not to be paid before that time. The release by Taylor of property at different times to enable Coleman to sell it, and allowing him to use the proceeds of such sales, does not show necessarily anything more than that Taylor considered the remainder sufficient security for all the interest he had in the premises. As to the mortgage on the Fourth street property, the most natural inference is that by reason of the increase of the privilege of purchase to \$22,000, and the decrease of the security held therefor by reason of the releases given by Taylor of a part of the property originally conveyed, Taylor wanted additional security, but it does not follow from this, nor from any of these things, that Coleman was liable, or to become liable, at any time to repay the money obtained from Taylor. All these things are entirely consistent with the transaction as it appears on the face of the papers. For while, by that transaction, it appears to have been the intention of Coleman to borrow upon his property \$20,000, and it also appears further to have been the intention of Taylor to furnish him the money, yet it also appears equally clear that the parties did not intend that the money should be furnished as a loan that Coleman was bound at any specified time to repay. Whether the reason of this was the usury law, or what not, it is unnecessary to inquire. Had the transaction been a loan to be repaid, then the question of interest would have been material; but the first question is whether or not that was the transaction. And this question I must answer, as I have said, in the negative, since, by the terms of the agreement the parties made, it is provided that Coleman was not only to have the money, and have it for thirteen years, but he was to have it as much longer than thirteen years as he might elect to keep it. In other words, Coleman was under no obligation to ever repay it. If he was under no obligation to repay, Taylor could never enforce payment, either against Coleman personally or against the property. All Taylor could do was just what his devisee is seeking to do here, viz.: proceed under the lease to enforce its covenants, or to have it forfeited. Taylor never had any right to proceed against Coleman personally, or against this property, to enforce payment of the money advanced. His right was to sue for rent, if not paid, and, if necessary, have the leasehold, which had been carved out of the property, sold. But if Taylor could not enforce payment of the money advanced, there was no debt, and, if no debt, there could not have been a mortgage.

If Taylor and Coleman were here to testify about the transaction, or anyone else for them, and by such testimony it could be shown that the intention was different from what they have expressed, that intention would prevail. But there is no one to so testify, and the only question is, therefore, whether or not the papers that are before us, and the acts and conduct of the parties as they appear therefrom, are sufficient to show such intention. For the reason stated, viz.: because these papers and the acts and conduct of the parties as shown therefrom are consistent with the transaction as the parties made it on its face, I cannot hold that they intended differently from what they have provided, no matter how much these facts may appear to be consistent at the same time with some other view.

In coming to this conclusion I have not overlooked the fact that the rent reserved was equal to the rate of ten per cent. per annum: nor that Taylor, in one of the receipts given by him, spoke of it as interest: nor that he once spoke to Hulbert about having loaned money to Coleman on mortgage.

It is doubtless true that the rent was fixed upon the basis of ten per cent. per annum on the amount of money advanced by Taylor to Coleman, but that circumstance cannot change the fact that the parties intended that Coleman should have an election to pay, or not, as he saw fit. And for the very reason that the rent was fixed with reference to a rate of interest, it was not unnatural and should not have so destructive an effect upon the transaction as to overturn it, that Taylor should have used the word "interest" as he did. And so, too, when we bear in mind the true character of the transaction, and thus remember that while it was a sale, yet it was a conditional sale: a sale on condition that Coleman did not elect to purchase; a sale, therefore, which might be defeated by an exercise of the right to purchase, and thereby turned into an investment of money upon real estate security, bearing, I say, all this in mind, the transaction bore such a near resemblance, as all such transactions do, to a loan upon mortgage, that in a careless conversation Taylor might so have spoken of it without necessarily showing it to have been a mortgage

in fact. The near resemblance of such transactions to mortgages is recognized by our supreme court, in *Slutz and Larue v. Desenberg et al.*, 28 O. S., 371, 376, where it is said that "A mortgage, when in form a deed absolute, and a conditional sale are frequently so nearly allied to each other that it is sometimes difficult to say whether a particular transaction is the one or the other. The distinctive difference, however, appears to be this: The former is a security for a debt; the latter, a purchase of land for price paid, or to be paid, to become absolute on the occurrence of a particular event, or is a purchase accompanied by an agreement to resell in a given time for a given price. It is this latter kind that traverses so nearly the boundary line of being a mortgage."

The transaction of 1841, being not a mortgage, but a conditional sale, it is not necessary to consider the transaction of 1853, further than to say that I find from the evidence, as it is admitted and claimed by all the parties hereto, that it was in legal effect but a renewal of the transaction of 1841, made necessary by the sales that had been made of some of the property and the non-payment of the year's rent, which was then added to the privilege of purchase. Neither is it necessary in this view of the case to consider the question as to usurious interest.

The decree will, therefore, be in favor of the plaintiff for the amount due her, and that the same shall be a charge upon the premises.

Judge Stanley Matthews and Judge M. B. Hagans, for plaintiff.
Judge J. A. Jordan and Hon. Durbin Ward, for defendants.

328 AMENDMENT OF ERRORS IN ORDER OF SALE.

[Pickaway District Court, April Term, 1880.]

Minshall, Tarbell and Cowen, JJ.

WILLIAM E. BOLIN v. WILLIAM M. ANDERSON.

1. Where an order of sale of land was "ordered that H., the sheriff of this county, proceed to advertise and sell," and the order issued by the clerk was directed to H., as special master commissioner, and the return of sale was signed, "H., sheriff, by S., deputy," and the advertisement was signed, "H., sheriff and special master," the discrepancies were merely clerical errors and amendable.
2. It is not necessary that the amendment should be actually made: it will be regarded as actually made.

Anderson filed a petition in the court of common pleas of said county to foreclose a mortgage executed to him by said Bolin. An order was made that the land should be sold, and it was "ordered that C. F. Hartmeyer the sheriff, of this county, proceed to advertise and sell," etc. The order, issued by the clerk, was directed to "C. F. Hartmeyer, of said county, as special master commissioner. The return of sale was signed, "C. F. Hartmeyer, sheriff, by William Schlayer, deputy." The advertisement was signed, "C. F. Hartmeyer, sheriff and special master commissioner."

A motion was made by Bolin to set aside the sale, on account of these discrepancies. The motion was overruled in the court of common pleas, and a petition in error was filed.

The court held: 1. The discrepancies between the order of sale and subsequent proceedings were merely clerical errors, and were amendable. In *Campbell v. Stiles*, 9 Mass., 216, a writ directed to the sheriff of Franklin county was served and returned by the sheriff of Hampden, and the court permitted the writ to be amended, as a mere mistake of the clerk. In *Simcoke v. Frederick*, 1 Ired., 27, a direction to the sheriff was amended by order of court, and the coroner substituted. In *Hayan v. Hoyt*, 37 N. Y., 300, the name of a referee was substituted in a decree of fore-

closure in place of the sheriff, after sale was made. Similar cases may be found in Herman on Executions, p. 55, sections 66-68.

2. It is not necessary that the amendment should actually have been made; it will be regarded as actually made; Herman on Executions, section 66; Sibila v. Bahney, 34 O. S., 399; 2 Penn. St., 336; 45 Barb., 123; 54 Penn St., 1; 53 Id., 390; Ins. Co. v. Kelly, 24 O. S., 345.

A. R. Bolin, for plaintiff.

Page & Abernethy, for defendant.

APPEAL BOND.

328

[Pickaway District Court, April Term, 1880.]

Minshall, Tarbell and Cowen, JJ.

M. L. HAYS et al. v. JACOB RUSH.

An appeal bond, with the attorney of the appellant as surety, in violation of a rule of court against receiving attorneys as sureties, is not void, and the appellants will be allowed to put in a bond with other surety.

In this case a motion was made to dismiss an appeal, because the surety on the appeal bond was the attorney for the appellants. There was a rule of this court, directing that "no attorney should be received as bail or surety in any case." The appellants moved the court to allow them to substitute another surety in place of the attorney.

The court held that the bond was not void; that the motion to dismiss should be overruled, and the appellants allowed to put in an appeal bond, with other security.

CONTRACTS FOR INTEREST.

348

[Cuyahoga Common Pleas, May Term, 1880.]

†UNITED STATES MORTGAGE CO. v. ELIZABETH L. SAFF et al.

1. A bond given for a loan of money running five years, drawing interest at the rate of eight per cent. per annum, payable semi-annually, and the semi-annual installment of interest also drawing interest at the rate of eight per cent. per annum, is usurious.
2. The first section of the act of May 4, 1869, is not intended to restrict parties in contracts for interest, except as to the amount that may be contracted to be paid in any one year.
3. Contracts to pay interest at the rate of eight per cent. per annum, payable semi-annually, are not usurious.

BARBER, J.

This action is brought on a written contract between the plaintiffs, Ann, Leo. W. and Elizabeth L. Saff, July 2, 1875, by which they agreed to pay the plaintiff \$7,000 on October 1, 1880, and pay interest thereon at the rate of 8 per cent. per annum, to pay interest semi-annually, and in case the interest was not paid when due, then to pay interest thereon at the rate of eight per cent. per annum.

A stipulation in the mortgage gave the plaintiff the option to declare the principal due and collectable, if the interest was not paid within thirty

†A holding contra to that in the first paragraph of this syllabus is found in Taylor v. Hiestand, 46 O. S., 345.

days after due, and under this stipulation the foreclosure was commenced, as the mortgagees failed to pay the interest. The defendants plead usury, which the plaintiff denies.

The only question is whether or not this contract is usurious; if it is not, plaintiff is entitled to the full amount of his claim; if it is, he is entitled only to interest at the rate of six per cent.

The statute allows a contract for any rate not exceeding 8 per cent. per annum, payable annually.

The statutory provisions necessary to be noticed are as follows:

Section 3179, Rev. Stat.

Section 3179. The parties to a bond, bill, promissory note or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for payment of interest upon the amount thereof, at any rate not exceeding 8 per cent. per annum, payable annually.

Section 3180. Upon all judgments, decrees or orders, rendered upon any bond, bill, note or other instrument of writing containing stipulations for the payment of interest in accordance with the provisions of the preceding section, interest shall be computed till payment at the rate specified.

In cases other than those provided for in the two preceding sections, when money becomes due and payable upon any bond, bill, note or other instrument of writing hereafter made, * * * the creditor shall be entitled to interest at the rate of six per cent. per annum, and no more.

Is a contract to pay 8 per cent., payable semi-annually, and that the semi-annual installments shall also bear interest at the rate of 8 per cent. usurious?

Fobes & Adams v. Judson Cantfield, 3 O., 17, is cited by the defendant.

The syllabus of that case is as follows:

"Agreement to pay interest upon interest after the interest has accrued is not usurious." The facts in that case were, the defendant in 1801 was indebted to the plaintiff. In 1807, the principal and interest being unpaid, the principal and interest at that time were added together, and that sum by agreement made a new principal on which defendant agreed to pay interest annually. In 1812 the whole still remaining unpaid, simple interest was computed to that date, and note and mortgage given for the new principal thus made, interest to be paid annually from that time. The court held it was not usurious under the laws of Connecticut. The statute under which that decision was made was in substance as follows: "When a debt is due and the creditors pressing for the money, and it is agreed in consideration of forbearance to pay more than six per cent. interest, and a new security is taken, it is a reloaning of the money and brings the case within the statute." The above is only an exposition of the statute by Swift in his Digest, and is cited by the court in this case.

The question before the court was whether, when money was due, including interest, the adding interest and principal together and giving a note therefor with interest at the legal rate was usury; or in other words, was it usury to agree to pay interest on interest that was already due? The court held it was not.

This is not that case. Here, at the time the money is loaned, it is agreed that the semi-annual payments of interest, if not paid at maturity shall draw interest at the rate of 8 per cent.

Monnett v. Sturges, 25 O. S., 384, is next cited by defendant.

The syllabus is as follows:

"An agreement to pay interest semi-annually at the rate of ten per cent. per annum is not usurious within the meaning of the act of March 14, 1850, allowing parties to contract for any rate of interest not exceeding ten per cent."

The statute referred to reads as follows: "Parties to any bond, bill, promissory note or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest, * * * at any rate not exceeding ten per centum yearly."

"The court held the limitation in the statute is upon the rate of interest, and not upon the periods of its payment. An agreement to pay ten per cent. per annum semi-annually is not an agreement to pay more than at the rate of ten per cent. per annum."

Dunlap v. Wiseman et al., 2 Disney, 398, is next cited by defendant.

The question in that case arose on a note given April 14, 1853, under the ten per cent. law, providing for the payment of "ten per cent. interest yearly from date to be paid at the end of each six months." The court held, on the authority of *Watkinson v. Root*, 4 O., 373, that the semi-annual installments of interest would draw interest at the rate of six per cent. after they came due. The court says: "We are disposed to give the statute a strict construction. If the parties had agreed by the terms of the contract to pay interest at the rate of ten per cent. on the interest as it matured it would be a contract for that sum." Although that question was not in the case, the court indicates that if the agreement had been to pay interest at the rate of ten per cent. on the semi-annual installments it would have been legal.

This case was decided by a judge of the superior court of Cincinnati, a court of co-ordinate jurisdiction with this court, and is entitled to no greater authority than the opinion of a judge of this court. Judge Spencer was a learned judge, and as to all questions examined and passed upon by him is entitled as is the opinion of any judge to careful consideration.

It is said, and on the authority of one of the attorneys in the case who is now a judge of this court, that in the case of *Irwings v. Walker*, tried in the common pleas of this county several years ago, Judge Foote held that such a contract would be usurious—and as the question was an issue in this case, and was considered and passed upon by the very able judge who decided it, this opinion of Judge Foote is entitled to greater weight.

Brown's Assignee v. Haskins, superior court Montgomery county, Ohio.

Judge Haynes held "that the present law in regard to interest only regulates the rate of interest, and not the terms of payment. A note drawing interest at eight per cent. payable quarterly or semi-annually is not usurious."

This court has also held that the mere fact that the interest is payable quarterly or semi-annually does not render the note usurious.

I am also referred to the opinion of the late Hon. Sherlock J. Andrews. This opinion is given upon the sole question as to whether a note at eight per cent. interest, payable semi-annually, is usurious. The opinion reviews all the authorities and is exhaustive on the subject, and the holding is that the limitation of the act of May 4, 1869, apply to the rate per cent., and not to the time of payment, and that such note is not usurious—a conclusion in which I fully concur.

The case of the Marietta Iron Works v. William Lottimer, 25 O. S., 621, is cited by defendant.

The second paragraph of the syllabus is as follows:

"Under section 1 of the act of May 4, 1869, a note made payable three years after date with interest at the rate of 7 per cent. per annum, payable quarterly, is not usurious.

In this case the court only decide that the limitations of the act apply only to the amount of interest that may be taken, and not to the time of payment, and that the interest may be taken on the semi-annual instruments of interest if the whole amount provided for in the contract does not exceed the limitations of the statute. There was nothing else in the case. The notes drew interest at 7 per cent., payable quarterly, and if the interest was paid upon the installments the sum of all the interest to be paid or recoverable in any one year, would not exceed 8 per cent. per annum, payable annually.

The late decision of the supreme court in Ohio ex rel. Lasky v. Board of Education of Perrysburgh, 35 O. S., 519, does not decide this question. In that case the board of education had agreed to borrow a sum of money at an aggregate rate of interest of 15 per cent., in manner following: For the amount borrowed bonds were to be issued bearing the authorized rate of interest, 8 per cent., and for the excess of interest orders on the treasury were to be issued payable at the same time as the legal interest. The power to borrow money and issue bonds was given to the board by statute, S. & S. 710, and they were authorized to issue bonds at a rate of interest not exceeding 8 per cent., payable semi-annually. The court hold that when the power to contract is conferred by statute, and has been fully executed, and something additional not authorized by statutes is stipulated to be done which is clearly distinguishable from the rightful execution, the execution of the power so far as authorized is good, and void as to the excess; that the giving of the orders on the treasury for the excess of interest is clearly distinguishable from the issue of the bonds, and is without authority and void, but that the bonds are not void, and the reason is obvious. The board had no power to act at all except as it was derived from statute, and because they attempted to issue orders on the treasury for illegal interest which they had no power to do, the issue of the bonds, which power was given by statute, was not affected thereby. The power of a natural person to contract is not given by law, but is an inherent right. The law only puts a limit upon it, in contracts for interest, for the good of the borrower.

The case is not in point, and decides nothing at issue in this case.

The point made in this case is not covered by any of the opinions cited, and I am not aware that it has anywhere been decided. This contract is not only to pay 8 per cent. interest in semi-annual installments, but to pay 8 per cent. interest on the semi-annual installments. In every year one semi-annual installment would be due at the end of each six months, and for the six months following would draw interest at 8 per cent., by the terms of the contract. The face of the note is \$7,000. Eight per cent. per annum is \$560.

| | |
|--|----------|
| 1st semi-annual installment..... | \$280 00 |
| $\frac{1}{2}$ year interest at 8 per cent..... | 11 20 |
| Add last semi-annual interest..... | 280 00 |
| | <hr/> |
| | \$571 20 |

which exceeds 8 per cent. per annum on the note by \$11.20. Is this a violation of the statute so as to taint the note with usury?

It is claimed that the semi-annual installment is due at the end of the half year. If the plaintiff had his money he could invest again at 8 per cent., and that it can make no difference whether he invests it with the maker of the note by a contract made at the time the note is given, or after it matures. And, at all events, if the semi-annual payments are legal, the amount due at the end of each half year will draw interest until the end of the year, under the provisions of the third section of the statute, and that this interest at 6 per cent., added to the two installments, would exceed 8 per cent. per annum, and hence the law could not be intended to limit a contract for a special rate of interest on the semi-annual installments. It is not necessary to decide in this case whether or not 6 per cent. can be collected on the semi-annual installments. What the law aims at is to limit the amount of interest that can be contracted for in any one year, and it seems to me that it is pretty effectually accomplished by the language used, "not exceeding 8 per cent. per annum, payable annually." What is meant by this act is that parties may make such contract with respect to interest and its time of payment as they please, subject only to the limitation that the total amount of interest contracted for shall not exceed in any year 8 per cent. on the principal sum loaned. The contract in this case calls for a sum exceeding that amount by \$11.20. The contract is therefore usurious, and by the well-settled law in regard to usurious contracts, the plaintiff is only entitled to recover 6 per cent. interest on the note payable semi-annually. As more than this amount had been paid up to the commencement of this action, the petition must be dismissed.

I am not informed as to whether any of the defendants are entitled to dismiss on their cross-petitions. If they are, the rights of the plaintiff can be protected in the decree in accordance with this opinion.

M. R. Kjeth, for plaintiff.

C. F. Morgan, for defendants.

PARTNERSHIP FUNDS.

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[Pickaway District Court, April Term, 1880.]

Minshall, Cowen and Tarbell, JJ.

SCOVIL and REBER, Assignees, v. S. W. STAGE et al.

Where the debts of a firm were between \$55,000 and \$71,000, and its assets but \$3,900, and the individual debts of the only partner who owed anything or had any property was \$68,000, and his property \$58,000, the joint creditors must be confined to the partnership fund, and the individual creditors take the whole individual fund. The court cannot say there is no partnership fund where there is \$3,900.

On the 23d of September, 1875, Samuel W. Stage, being insolvent, executed and delivered a deed to the said Scovil and Reber of all his property in trust for his creditors. At about the same time Samuel Marfield, Jr., and the said Samuel W. Stage, being partners under the name of Marfield & Stage, and also being insolvent, executed and delivered a deed of all their property to the said Scovil and Reber in trust for their creditors. The amount realized out of the individual property of the said Stage was

\$58,097.94, and his individual indebtedness was \$67,852.49. The liabilities of the firm of Marfield & Stage, \$70,812.38, but of that sum \$24,183.92 were rejected by the assignees and were in litigation. The total assets of the firm for distribution were \$3,900. During the existence of the said partnership, said Stage was the owner of a large amount of personal property and a valuable tract of land consisting of about 700 acres. The said Samuel Marfield had no separate property during the existence of the said firm and was not owing any individual debts. The petition was filed by the assignees in this case to obtain the direction of the court in regard to the distribution of the funds belonging to the two estates. The creditors of Marfield & Stage presented their claims to the assignees of Samuel W. Stage, and claimed that the said assignees should distribute the individual property of the said Stage pro rata among all the creditors of the said Samuel W. Stage, and of said Marfield & Stage. This claim was resisted by the individual creditors of the said Samuel W. Stage.

The court held that the joint debts were payable out of the joint estate, and the separate debts out of the separate estate. That, as it was admitted that there would be no surplus from either estate, it was unnecessary to make any decree in that regard. It was ordered that the separate property of Samuel W. Stage should constitute a fund to pay his individual debts, and the joint property of Marfield & Stage should be applied in payment of the debts of the firm of Marfield & Stage. The court would not be justified in saying that there was no partnership fund in a case where it was admitted that there was a partnership fund of \$3,900.

Walters, for the partnership creditors, cited: 15 Am. Law Reg., N. S. 214, and insisted that there was no partnership fund for distribution in contemplation of law.

B. H. Bostwick and Henry F. Page, for the assignees, cited: *Rodgers v. Meranda*, 7 O. S., 179; *Brock v. Bateman*, 25 O. S., 609; *Parsons on Partnership*, 483—note; *Collier on Partnership*, sec. 920-926; *Bissett on Partnership*, 114; *McCulloch v. Dashiell*, 2 H. & G., 106.

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WIFE'S ACKNOWLEDGMENT.

[Hamilton District Court, May, 1880.]

B. H. MOORMAN v. MARTIN SCHWEIN et al.

A certificate of acknowledgment of a wife, to a deed, must show both that she acknowledged it separately or jointly with her husband, and that she declared on separate examination that she voluntarily acknowledged, signed and sealed the mortgage, and that she was still satisfied therewith.

It was claimed in this case that Peter Schwein, one of the defendants, had advanced a certain sum of money to a building association having a mortgage prior to one held by him upon the property of the defendant, Martin Schwein, and that to the extent of the advancement he was to be subrogated in the place of the association.

COX, J.

A question raised in this case was as to the sufficiency of the acknowledgment made by the wife of Martin Schwein in the mortgage to Moorman to bar her right of dower. The acknowledgment was in this form: "Be it remembered that, on the 14th of May, 1874, before me, the sub-

scriber, a notary public, personally appeared Martin Schwein, the grantor in the above named deed, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the use and purposes therein mentioned. And the said Phillipoena Schwein, wife of the said Martin Schwein, being examined by me separate and apart from her said husband, and the contents being by me made known and explained to her as the statute directs, declares that she did voluntarily sign, seal and acknowledge the same, and is still satisfied therewith, as her deed for the uses and purposes therein mentioned."

It was claimed upon the part of Mrs. Schwein that she did not, in fact, acknowledge the mortgage before the officer, but simply acknowledged that she had voluntarily signed and sealed it, and was still satisfied therewith.

Questions in regard to the taking of acknowledgments have come up very repeatedly in our supreme court in almost every phase in which they can be raised. That court has settled the principle that the requirements of the statute must be substantially complied with. This acknowledgment does not set forth that she acknowledged it either separately or jointly with her husband. It sets forth only that she made the acknowledgment separate and apart from her husband—that she voluntarily acknowledged, signed and sealed the mortgage, and that she was still satisfied therewith. It was not a compliance with the law. There was no acknowledgment by her in the presence of the officer as contemplated by the statute.

The case comes within the decision of *Ward v. McIntosh*, 12 O. S., 231, and of *Ludlow v. O'Neil*, 29 O. S., 183. In the latter case the court says, "of course, the deed is not binding on her till executed by both, and, of course, the certificate must show, both that she acknowledged the 'signing and sealing,' and also that she was separately examined, and made the declaration required by statute."

Another question arose as to whether this defect could be corrected. There was no prayer in the cross-petition of the mortgagee asking a reformation in this respect, nor did the testimony make out a case which would require the court to reform it. It is admitted that the notary, if here, would testify that the husband and wife were both present when the acknowledgment was taken; but the agreement does not show that he could state that she acknowledged the deed as signed in the first clause of the certificate.

Decree will, therefore, be entered reserving the right of the wife to her inchoate right of dower.

R. B. Wilson and H. E. Randell, for plaintiff.

F. J. Biddle, for defendant.

SETTING ASIDE JUDGMENT FOR FRAUDS.

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[Hamilton District Court, May, 1880.]

MARY A. FACKLER v. BAVARIAN RELIEF SOCIETY.

A petition to set aside a judgment on the ground that the plaintiff, as administratrix, was sued on a liability incurred by her decedent as surety on a bond, and that she had pleaded to that state of facts, whereas he was only a witness on the bond, which she did not know, the bond being in German and counted in En-

glish, and she relying on the statements in the petition, does not state a case of fraud.

COX, J.

This was a petition in error by the plaintiff as administratrix of her husband, George Fackler, to set aside a judgment of the superior court on the ground of alleged fraud of the prevailing party, of which she had no knowledge until after the term of court at which the judgment was rendered. It that case suit was brought by the society against one Cluck, its treasurer, and against Fackler and August Sieckman as securities upon his bond. The alleged fraud consists in the fact that the bond was in German, but the society in its petition counted upon it as in English, and relying upon the statement in the society's petition that Fackler was a surety, she pleaded to that state of the case, whereas, in fact, he was only a witness to the bond.

The court held that there was no error in the proceedings to set aside the judgment; that the plaintiff had as full an opportunity of defending in the original case as parties usually have; that, if she had called for the original bond, before pleading, or after pleading, or during the trial of the case, she would have been put in possession of the same facts of which she was now put in possession. It did not appear what evidence the court had before it in the original case, and it is to be presumed after judgment that there was sufficient evidence to warrant the judgment. Not having done so, she could not complain that the court refused to open up the judgment.

Judgment affirmed.

[Hamilton District Court, May, 1880.]

Avery, Cox and Johnston, JJ.

BRADSTREET, Admr., v. JOHN A. SHANK, Guardian.

Where an administrator of an estate, in order to save the homestead from sale to pay debts, wishes to sell realty in another state, and by arrangement with the adult heirs and guardian of the minor heirs it is sold at guardian's sale, and the guardian refuses to comply with his agreement to pay the proceeds to the administrator, the latter may maintain a suit to compel him to do so.

This case came up on appeal from the common pleas court. A. B. Carpenter died some eight years ago, leaving a widow and several children. It was the desire of all parties that the old homestead of the family be saved, but unless real estate owned by Carpenter in Illinois could be sold to pay the debts, the homestead here must go under the hammer. Accordingly Mr. Bradstreet, administrator, tried to sell the Illinois property, but found the law on the subject of foreign administrators' sales so tangled up that nobody considered a title acquired at such a sale good for anything. A guardian, however, might sell without trouble. Accordingly it was agreed that J. T. Demar, who was then guardian, should sell the land, as guardian, pay over the proceeds to Bradstreet, administrator, in consideration of which Bradstreet should refrain from selling the homestead. Before the sale things became so mixed that Mr. Demar became dissatisfied and resigned. John A. Shank was appointed guardian, and, as the plaintiff claims, made the same agreement as Demar.

The property was sold for \$1,650, which everybody expected would bring \$10,000. Three years ago Mr. Bradstreet asked for these funds from Mr. Shank, as guardian, according to contract, but Mr. Shank declined to pay over on the ground that he had not made such a contract, and he denied the right to subject any of this money to pay the debts of Carpenter, deceased, as the right to do so had become barred by the statute of limitations of Illinois. The adult heirs made the same defense.

JOHNSTON, J.

Two things are clearly developed by the evidence: That Carpenter died much indebted, the homestead being heavily incumbered by mortgage; and that he did not leave sufficient personalty to pay his indebtedness.

The administrator is a trustee for the creditors, and as such holds the property of his intestate. Upon failure of personal property, he may resort to the realty. He has the right to elect what real estate he will sell, where there be several tracts. The heir is not entitled to anything from the estate until the debts are paid. He proceeded to sell the property in Chicago, at the request of the defendants, to save the homestead that covered their heads. They were without any ready means of support—four of them being minors, and two adult heirs. The guardian consented for his wards, and the adults were well advised, and consented to the agreement throughout, until it was found that the property did not realize as much as anticipated. Now, if this was an action to compel the guardian to go forward and sell the property, as agreed, relief could scarcely be granted. What was agreed upon, however, has been accomplished. The guardian did sell the property, and he has brought the proceeds here within this jurisdiction, and all the parties reside here and are before the court. The fund is the representative of the property sold. It is, as was the real estate from which it was derived, chargeable with the debts of the deceased. The statute of limitations does not apply. By the decisions of Illinois, whether the administrator "is barred in any case, depends upon the fact whether he has been diligent in prosecuting the settlement of the estate." The administrator in this case seems to have exercised all proper diligence, and the claim that the administrator cannot maintain this character of action—being purely equitable—is untenable. That he can maintain this action we think is fairly sustained by the decisions of our supreme court in case of Douly's Admrs. v. Shields, 14 O., 359, 364, and of Calkins v. Johnston, 20 O. S., 549.

As there seems to be no dispute as to the amount of this fund, a decree for the plaintiff will be entered in accordance with the prayer of the petition, and the decision made.

Long & Biddle, for plaintiff.

McGarry & Shank, for defendant.

JURY FEES.

[Hamilton District Court, May, 1880.]

Avery, Cox and Johnston, JJ.

STATE OF OHIO ex rel. ATKINSON v. CAPPELLER, Auditor.

1. A juror in the police court, on the trial of a misdemeanor, is entitled to his fees out of the county treasury, by Rev. Stat., section 1785. Sections 1306 and 1307 do not apply to jurors.
2. But the mandamus against the auditor, to compel payment, will be refused where the certificate of the clerk of the police court does not show whether the juror was a regular juror or a talesman, the fees of whom are not the same, but merely say he is entitled to two dollars (the fees of a regular juror).

J. V. Atkinson served as juror in the police court, in the prosecution of John Cunningham for exhibiting gaming devices. He received from Samuel Smiley, the clerk of that court, a certificate that he had served as juror in that case; that it was in the trial of an offender against a state law, and that he was entitled to two dollars from the county treasury. The certificate was presented to the auditor, who refused to draw his warrant for the amount. This application was for a mandamus to compel the auditor to draw his warrant for the amount of two dollars.

The counsel for the auditor interposed a demurrer to the petition, and the case was presented to the court on the statement of the facts in the petition,

The counsel for the defendant relied upon sections 1306 and 1307 of the Revised Statutes as a justification for refusing to draw the warrant. Section 1306 provides that all fees of witnesses, justices of the peace, constables, sheriffs, etc., in the trial of felonies, shall be paid out of the county treasury. Section 1307 provides that in no other case than felonies shall such fees be allowed out of the county treasury. These two sections, it is claimed, are conclusive of the question.

JOHNSTON, J.

As the word juror does not appear in section 1306 or section 1307, which is inhibitory, it could not be put in by implication that under section 1785, Revised Statutes, the police court is a court of record; that its jurors are treated in the statutes just as those of the common pleas; that, under the statute, they are to receive the same fees as in the common pleas court, and that these are to be payable out of the city treasury in the trial of offenses against city ordinances, and out of the county treasury in the trial of offenses against state laws. It appeared by the certificate of the police court clerk that the trial was of an offense against the state law, a misdemeanor, and therefore he became entitled to the same fees as a common pleas juror.

A mandamus, however, is not a writ of right. It only issues when the relator makes a clear case for its application. Jurors are of two classes, or grades, so far as fees are concerned; regular and talesman. Under the statute, the former is entitled to two dollars per day, while the latter is only entitled to one dollar. The certificate does not state whether Atkinson served as a regular juror or as a talesman. It only certifies that he is entitled to two dollars. Now, it is not the clerk's business to fix the amount of the fee, but only to state the length and character of the services. Without sufficient data before him, therefore, Mr. Cappeller rightly refused to draw his warrant. It may be that he was only

a salesman. If, however, the certificate is amended so as to state whether Atkinson served as a regular juror or a salesman, the mandamus will issue, if the auditor should then refuse to draw his warrant.

John F. Murphy, for the relator.

Asa W. Waters, for respondent.

BUILDING ASSOCIATION MORTGAGES.

364

[Hamilton District Court, May, 1880.]

WINDISCH, MUHLHAUSER & BRO. v. KORMAN et al.

Dues, interest and fines should be included, up to the date of the decree, rather than to the first day of the term, and dues and interest, but not fines, would continue to the date of confirmation, but interest on these installments would in turn bear interest from the time fines ceased to be computed. To this must be added, on confirmation, the present value of the future dues and interest to the time of dissolution, and only the present value. This may be ascertained by summing up the successive weekly installments, for the probable future duration of the society, and discounting the amount for the mean or average time between the first and last installment. Thus, if the probable future duration is 122 weeks, the average time is $61\frac{1}{2}$ weeks. Now, if the dues are \$5 per week, and the interest \$2.50, \$9.10 is the entire amount of future dues and interest, of which the present value is \$854.36, for that at interest for $61\frac{1}{2}$ weeks would produce \$915. (Rule in German Building Association v. Flack, 1 C. S. C. R., 468, not followed.)

AVERY, J.

The question for determination arises under a mortgage to the Eureka Building Association. The mortgage was in the usual form of building association mortgages, securing the payment of \$5.00 weekly dues, and \$2.50 weekly interest, with all fines. In the decree for sale in the court of common pleas, the dues, interest and fines up to the first day of the term were calculated, and in default of payment sale was ordered. Upon the sale the plaintiffs in the action became the purchasers, and the sale was confirmed and distribution ordered. From the order of distribution the building association appealed, and the question before us is the amount due under the mortgage.

The amount due up to the first day of the term was found by the decree of sale. This included dues, interest and fines up to that time, although they should have been, we think, computed up to the date of the decree. But from the time to which they were taken and on until the confirmation of the sale, the dues and interest would, under the allegations of the cross-petition of the building association, continue to accrue. Fines would not be included, for the reason that by taking the decree for sale, interest had been made to begin running on dues, and the association could not have interest on dues and fines both. But each weekly installment of dues and interest, meanwhile accruing, would in turn bear interest. This interest, as well as interest on the amount found by the decree of sale, being calculated to the date of confirmation, and the whole summed up, the only other amount to be ascertained is the present value of the future dues and interest up to the time the association shall be dissolved. The mortgage was conditioned to secure such dues and interest, but only their present value is to be taken, since the property having been sold, the amount is to be paid without waiting. The present value of an amount payable in future installments is the sum of

the installments, less interest upon each for the time it would have to run—in other words, such sum as when put at interest in several portions according to the period fixed for each installment, would produce the entire amount. The present value of the future dues and interest under this mortgage in such sum, therefore, as when put at interest would meet each installment up to the time the association is dissolved. It may be ascertained by summing up the successive weekly installments for the probable future duration of the association, and discounting the amount for the mean or average time between the first installment and the last. That is, the probable future duration from and after confirmation being one hundred and twenty-two weeks, the mean or average time is sixty-one weeks and a half, and \$915 being the entire amount of future dues and interest, the present value is \$854.36, a sum which, at interest for sixty-one and a half weeks, would produce \$915.

The whole account may then be stated:

| | |
|--|-----------|
| Amount found by order of sale..... | \$ 229 50 |
| Interest to confirmation, May 13, 1879..... | 4 65 |
| Dues and interest, 18 weeks from order of sale to confirmation | 135 00 |
| Interest on above, average time..... | 1 48 |
| Value of future dues and interest from date of confirmation | 854 36 |

\$1,224 99

In this computation, the day of confirmation, and not of the sale, is taken as the period at which to determine the amount, for the reason that the mortgagor would have until that time to redeem. And although the distribution has been delayed by the appeal, no question is made as to that by the building association, the only party who could be affected by it.

We are aware that the computation of the value of future dues and interest is not according to the rule laid down in *German Building Association v. Flach*, 1 Sunr. Court Reporter, 468, 477, but we are unable to adopt such rule. Distribution, therefore, will be made: \$1,224.99 to the building association, and the balance to plaintiffs.

A. F. Carr, for building association.

Baldwin & Bruner, contra.

DOWNER—JUDGMENT.

[Cuyahoga Common Pleas, June, 1880.]

CLEMENT STOLTZ v. LOUISA BOLTZ.

An action may be maintained against a widow, to subject to the payment of a judgment against her, the dower interest she holds in lands owned by her deceased husband, before the dower has been set off to her.

This is a proceeding in equity, in the nature of a creditor's bill, to subject the dower interest of the defendant in certain lands owned by her deceased husband in his lifetime, and during her coverture with him, before the same has been set off to her, to the payment of a judgment obtained by the plaintiff against her. It is averred in the petition that the

husband of the defendant died intestate, seized of certain real estate, leaving the defendant, his widow and six children, who are in possession of the said estate, receiving the rents and profits thereof; that no dower has ever been set off, or assigned in any way to her, according to law, and that she purposely refrains from having it assigned, to avoid its being reached on execution. The petition also avers plaintiff obtained judgment; that execution was issued thereon, and no goods or chattels were found whereon to levy.

The defendant files a general demurrer to this petition, on the ground that it does not state facts sufficient to constitute a cause of action; and the question of law sought to be presented by this demurrer is this: "Can the unassigned dower interest of a widow in the lands of her deceased husband be subjected by proceedings in equity to the payment of a judgment rendered against her?"

The exact nature of the right of dower when it is inchoate, as well as contingent, and its nature when it has become consummate by the death of the husband, and before any assignment thereof, has been frequently discussed, and decisions have been made which do not entirely harmonize with each other.

It has been characterized by a distinguished judge while inchoate, and before the death of the husband, as "shadowy and fictitious," and it has also been said "that it is not of itself property the value of which may be estimated, and yet, notwithstanding this, our own supreme court, in a very recent case, *Unger v. Leiter*, 32 O. S., 210, have recognized it as property, and allowed the wife's inchoate interest in it to be estimated and paid for out of the proceeds of land, even during the lifetime of the husband.

The question presented by this demurrer is, so far as I know, a new one in Ohio; it has certainly never been passed on by the supreme court of our own state, and, in fact, in but few of the courts of other states are decisions on this subject reported. It is insisted, on behalf of the defendant, that a widow's dower, before the same has been assigned or set off, is a mere personal right to have an estate created, as provided by statute, in the lands of her deceased husband; that until such assignment she is not invested with the freehold estate therein; that she has no seizin; no right of entry; cannot exercise ownership over it; is not entitled to rents and profits, and that the estate can only be made effectual by her application to have it set off to her according to the letter of the statute.

They insist also that the authorities abundantly maintain and settle the doctrine that a release by the doweress or the sale and conveyance by her of her contingent right of dower to a stranger to the fee is not operative to convey to him any legal right or estate therein. 1 *Barber*, Supreme Court Record, 500; *Park on Dower*, 334; 9 *Ind.*, 298; 23 *Ill.*, 81; 32 *Ala.*, 404; *Price v. Church*, 4 *O.*, 523; 9 *Mass.*, 143.

And it has undoubtedly been held in many states, and in numerous cases, that such dower interest of a widow before the same has been set off, is not such an interest as can be levied on, and sold on an execution at law, at the instance of a judgment creditor. There are exceptions to this doctrine in some states which hold that the fee vests immediately on the death of the husband. 5 *J. J. Marsh*, 156; 20 *John.*, 411; 11 *Mass.*, 298; 2 *N. H.*, 48; 23 *Ill.*, 81; 15 *B. Mon.*, 591; 19 *Ala.*, 367; 1 *Wash.*, R. P., 257; 2 *Scribner on Dower*, 26.

Now, although this may fairly be conceded to be the general holding, and although it has been decided and well settled as law in most of the states that a conveyance or transfer by a widow of her unassigned dower interest to a stranger to the title conveys to him no legal interest in the estate; and although it has been equally well settled in most of the states that such an unassigned interest is not such an estate as can be seized and sold on execution at law, yet I do not consider that these things necessarily imply that a fair sale or transfer of such an interest is wholly inoperative or void in equity; nor does it necessarily follow that such dower interest, before the same is set off to the widow, is one that cannot be reached by proper proceedings in a court of equity, for the purpose of subjecting the same. Both of these things were certainly true of any other equitable right or chose in action, before the adoption of the code, and yet the transfer of such rights could always have been protected, or such rights subjected by proceedings in equity. And an examination of the authorities clearly discloses that transfers of unassigned dower interest, when the same are not sufficient or inoperative to carry any legal interest in the same, have frequently been protected and enforced in equity. In 33 N. H., 524, it was held "that a party who takes a conveyance of a right of dower would have an equitable interest, and that if a widow sells her right of dower before assignment, the purchaser, having the power of attorney, may maintain a suit for dower in her name."

In 2 Ind., 37, it is said: "Such rights of action and such interests were assignable in equity at common law so as to enable the assignee to recover upon them in a suit in his own name in chancery."

Chief Justice Storey says, 2 Storey Rep., 630: "Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and in esse; on the contrary, they support assignments not only of choses in action, but of contingent interests and expectations."

In 7 Iredell's Eq., 152, it was held "that although a widow, before assignment of dower, is not seized of any portion of the estate and cannot convey any title at law, that she can make such a contract as equity can enforce."

In 27 Ia., 198, Chief Justice Dillon says: "But in equity the right of a widow to sell and convey her dower interest before assignment has been frequently recognized, and the assignee may prosecute a suit for dower in her name."

See also on this point the following authorities: 4th Rich. L., 506; Wright's Reports, 460; 1 Wash. R. P., 251; 2 Scribner on Dower, 40, 43; 1 McMullan Equity, S. C., 35.

Now, these authorities seem to settle the question that the right to have dower is not a purely personal right, but that it is a vested property interest transferable in equity to others before the same has been assigned and set off by metes and bounds.

This unassigned dower interest is variously termed in the authorities a "vested interest," "a right, or interest in land," "a legal interest in land," "a substantial right, possessing in contemplation of law the attributes of property, and to be estimated and valued at such," "as a thing or chose in action," as "a right paramount to all subsequent titles derived through the husband."

Jacobs' Law Dictionary. *McArthur v. Franklin*, 16 O. S., 193; Unger

v. Leiter, 32 O. S., 210; Singree v. Welch, 321; 27 Ia., 148, 197; 12 Ind., 37; 4 Paige, 448; 1 Smede's and M. Ch., 490.

It is difficult to perceive why a person entitled to this kind of property, which may be exceedingly valuable, shall be permitted to keep it away from her just creditors, or why an interest of this kind, like any other valuable right, cannot be subjected in equity.

Neither is it apparent why, if this kind of an interest is an "equitable interest," "a chose in action," or "a claim," the statute of our own state does not distinctly and specifically authorize such a proceeding.

Section 54, 64, statutes of 1880, provide that "when a judgment debtor has not real or personal property sufficient to satisfy a judgment, any equitable interest which he has in real estate, * * * or any interest he has * * * in any claim or chose in action shall be subject to the payment of the judgment by action."

And although the authorities directly bearing on this point are very few, indeed, and although an action of this kind is very rarely to be found in the reports, yet we are not entirely without definite authority in support of the right to maintain the action. In the second volume of "Scribner on Dower" it is said: "As a result of the doctrines of the equity court above described, it is held that the right of dower before assignment may be reached by creditor's bill." In 4th Paige, 448, Chancellor Walworth held the same doctrine, and said: "But in equity, if the widow is in possession, or is entitled to assignment of dower immediately, the want of a mere formal assignment of dower is not considered material. * * * She has no right, therefore, in conscience or in equity, to deprive her creditors of the benefit of her right of dower for the satisfaction of her debts or of continuing in possession and neglecting to ask for a personal assignment which, if made, and entry made under it, would entitle her creditors to reach it by execution.

And in this case the court appointed a receiver and authorized him to proceed in her name for the recovery and assignment of her dower interest. The same ruling was subsequently followed in 5 Barb., 438, but it is claimed by defendant that these decisions depend very largely upon the wording of the New York statutes, which conferred on courts of equity large powers. But I have examined this statute, and do not think it any broader or more comprehensive than the statute of our own state, or that it enlarged the general powers of courts of equity. The latest, and indeed the only case, I have been able to find is the case of Davidson et al. v. Whittlesey et al., in the supreme court of the District of Columbia, reported in 1 McArthur's Rep., 163; and it is directly in point, and is not made to depend on any statute whatever. The syllabus is: First:

"The dower right of a widow which has not been assigned may be subjected in equity to the payment of her own debts contracted since the death of her husband." Second: "When it is manifest that an assignment of dower by metes and bounds cannot be made, a receiver will be appointed to take charge of and rent out the property until the widow's share of the rents is sufficient to satisfy the judgments and costs." This doctrine is also distinctly recognized by Chief Justice Dillon in 27 Ia., 198. It is not necessary now to decide what is the proper practice in order to render this right effectual, but I will now simply hold that the present action can be maintained; that the petition does contain a good cause of action, and the defendant's demurrer to the petition is therefore overruled.

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Taylor v. Elder.

412

[Hamilton District Court, June, 1880.]

STATE OF OHIO ex rel. WILSON et al., Trustees, v. RITT et al.

For opinion, see 6 Dec. R., 940 (s. c. 8 Am. Law Rec., 750).

413

JURISDICTION.

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

RHODA ANN TAYLOR v. MARY T. B. ELDER.

Under section 6709, Rev. Stat., the district court could review judgments of the superior court of Cincinnati, in general term, on petition in error, filed before the passage of the act of April 13, 1880, and that act did not affect petitions in error already filed.

Error to superior court of Cincinnati. Motion to dismiss petition in error. Judgment rendered on reservation by the superior court, general term, April, 1878. Ground of motion that the district court had no jurisdiction in error over such judgment.

AVERY, J.

Undoubtedly at the time the judgment was rendered, only the supreme court had jurisdiction to review. But by the revised code, which took effect September 1, 1878, re-enacted by section 6709 Rev. Stat., a judgment or final order of any superior court may be reversed, vacated or modified by the district court for errors appearing on the record. In *Gibbons v. Catholic Institute*, 34 O. S., 289, this section was construed, in connection with the act of May 10, 1878, which repealed section 17 of the act organizing the superior court and all parts of such act conferring upon the court in general term jurisdiction to entertain petitions in error to the court in special term, and it was held, taking the two acts together and considering that the legislature had not repealed those parts of the superior court act which provided for petitions in error from the general term to the supreme court, that the jurisdiction of the district court did not extend to judgments of the general term already rendered. The Revised Statutes, however, which took effect January 1, 1880, repealed the act organizing the superior court, and in re-enacting it, omitted all provisions for petitions in error from the general term to the supreme court, nor indeed was the exercise of any jurisdiction by the court in general term provided for except upon reservation from special term.

The petition in error in the present case was filed March 5, 1880. As the law stood at that time a judgment of the superior court, as well as of the common pleas, might have been reviewed by petition in error filed by leave in the supreme court under section 6710, Rev. Stat. But there was nothing, as when *Gibbons v. The Catholic Institute*, supra, was decided, to limit the jurisdiction of the district court, under section 6709, so that it would not extend to judgments of the superior court in general term. The district court, therefore, had jurisdiction to entertain this petition in error when it was filed. The act passed and took effect April 13, 1880, providing that judgments and orders of the superior court upon reservation to general term shall be reviewable only by the supreme court, does not affect the case. That is the law now, but was not when the petition was filed.

Motion overruled.

I. S. Conner, for motion.

Jordan & Bettman, contra.

2 L. B.

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Taylor, Exr., v. McCullom et al.

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[Hamilton District Court, June, 1880.]

414

WM. C. SMITH v. JAMES O'CONNOR.

For opinion, see 6 Dec. R., 934 (s. c. 8 Am. Law Rec., 742). It was reversed by the supreme court. See opinion, 40 O. S., 214.

EXECUTOR—APPEAL BOND.

414

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

H. W. TAYLOR, Exr., v. McCULLOM et al.

Where an appeal bond on appeal by an executor against the estate for services, poundage and a claim assigned to the executor, was fixed by the probate court at blank: Held, that of the two provisions that an executor need give no appeal bond on appealing in the interest of the estate, and that a person interested personally may appeal, but must give an appeal bond, the latter applies, since the items were all of personal interest to the executor, and not in the interest of the estate, and the appeal must be dismissed for want of a bond.

COX, J.

Taylor and McCullom were executors of Mr. Pullen. Each filed separate accounts in the probate court. The court found McCullom's account correct with—dollars in his hands. In Taylor's account there were two or three items to which exception was taken and the exceptions sustained. \$7,392 was found in Taylor's hands. These items were a claim for \$1,800 against the estate, which had been assigned to Taylor. Another was an item of \$250 for himself for extra services, and another \$293, poundage for himself. There was another item of some \$1,200 for a monument, on which the probate court reserved a decision. From the ruling of the probate court Taylor appealed to the common pleas court. His bond for appeal the probate judge fixed at blank. In the common pleas court defendants made a motion to dismiss the appeal because no bond had been given, which motion the common pleas granted. The case now comes before the district court on error to the dismissal of the appeal. It was claimed by Taylor's attorney that, having given bond as executor, it was not necessary for him to give bond on an appeal in a matter of an account of the estate. The court, per Judge Cox, said that there was two provisions in the statute as to the bond for appeal from the probate court. One was that a party who is interested personally in the suit may appeal but he must give bond on such appeal. The other is that when an appeal is made by the executor or trustee in the interest of the trust then no bond is necessary. But in the case before them the court said that all items from the decision of the probate court, upon which Taylor had appealed, were matters in which Taylor had a personal interest, as his own claim against the estate, his pay for extra services, and his poundage, and his appeal was not in the interest of the trust. In the matter of the monument item, which is, perhaps, in the interest of the trust, the probate judge had not ruled it out of the account, but had only reserved his decision upon it. The executor ought, therefore, to have given a bond, and his appeal from the probate court to the common pleas was properly dismissed because there was no bond given for appeal from the latter court.

ARBITRATION.

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

WINDISCH, MUHLHAUSER & BRO. v. HENRY HILDEBRANDT.

Where the parties to a dispute agree that the possession of certain real estate shall be surrendered by one or the other, and other matters shall be submitted to arbitration, a clause in the award giving the possession of the property, being a mere reiteration of the agreement, does not vitiate the rest of the award.

COX, J.

This was a petition in error to reverse the superior court. The plaintiffs leased the Bellevue House to the defendant with the privilege of a renewal. They did not agree, and the plaintiffs wanted to get Hildebrandt out. Finally there was a written agreement made between the parties, by one clause of which Hildebrandt was to have \$2,500 for his interest in the pavilion; by another he was to give up the possession of the Bellevue House on demand of the lessor, and by a third the value of the interest of Hildebrandt in and around the Bellevue House, together with what he owed Windisch, Muhlhauser & Bro., was to be submitted to a board of arbitrators, and by a fourth clause the award was to be made an order of court. It was so submitted. They rendered an award giving the possession of the Bellevue House to Windisch, Muhlhauser & Bro., fixing the interest of Hildebrandt in the pavilion at \$2,500, his interest, exclusive of the above, in and around the Bellevue House at \$112.79, and found about \$4,400 due from Hildebrandt to Windisch, Muhlhauser & Bro. The plaintiffs excepted to the award. Their exceptions to the fixing of the interest of Hildebrandt in the pavilion at \$2,500, and to the giving the possession of the Bellevue House to Windisch, Muhlhauser & Bro. were sustained because the provisions had been agreed upon, and were not for the arbitrators to decide; but the rest of the report was made an order of the court.

To this award the plaintiffs in error object, because they claim that the arbitrators decided about the possession of land; because the clause providing for the determination of Hildebrandt's interest was too indefinite, and, third, because the award had been signed by only two arbitrators out of the three.

The court held that as to the first objection, the question as to the possession of the property had been settled by the parties themselves, and that a reiteration of it by the arbitrators, correctly ruled out by the court below, could not vitiate the entire award. As to the second question, the court held that the interest of Hildebrandt was sufficiently definite to be levied on by the sheriff, and therefore sufficiently definite to be determined by the arbitrators. As to the third objection, the court held that the award was a statutory award, and only needed the signatures of a majority of the arbitrators.

Hildebrandt & Hildebrandt and I. M. Jordan, for Windisch, Muhlhauser & Bro.

Forrest & Mayer, for Hildebrandt.

CONTESTS OF ELECTION.

422

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

STATE ex rel. WORTHINGTON v. ROBERT SIMPSON et al.

Contests of election of mayor, except in Cincinnati, by section 1731, Rev. Stat., are like those of justices, and under section 575 et al., if such contests are successful, the contestor is not inducted, but there is a vacancy.

AVERY, J.

The relator was a candidate for the office of mayor of College Hill at the election last April, and received 71 votes, his competitor, Henry M. Cist, receiving 49. The judges of the election, who are required by law to canvass the votes and declare the result, threw out 48 votes for the relator, and declared Henry M. Cist elected, and he accordingly took the oath of office. Upon proceedings in the probate court by the relator to contest the election, it was decided by the jury of three free-holders to whom, under the statute, the trial of the contest was submitted, that Henry M. Cist was not elected. The mandamus asked is to compel the defendants, as members of the village council, to pass upon the sufficiency of the official bond of relator as mayor, and to allow him to take the oath of office.

The supreme court has held that the approval of an official bond, where the sureties are sufficient, is a ministerial duty, which can be enforced by mandamus. *Bellows v. City Council*, 11 O. S., 544. There is no question as to the sufficiency of the bond here; the only question is as to the title to the office.

Title to elective office is held by election, but elections are regulated by law, and the law prescribes how the result shall be declared. In the present case it was left to the judges of the election to canvass the votes and declare the result, and the declaration was final until, in a direct proceeding for that purpose, set aside. The proceeding for that purpose was the contest in the probate court, and this being a special remedy provided by law, excluded any other, so far, at least, as the title of the person declared elected was concerned. *State v. Marlow*, 15 O. S., 114.

It is argued, however, that as to the relator, the remedy is incomplete, and that the judges having misconceived their duties in throwing out the votes he received, the election, as shown by the tally sheets and poll books, entitles him to the office.

But contests of the election of a mayor, except in the city of Cincinnati, are required to be in the manner provided by law for contests of the election of a justice of the peace, section 1731 Revised Statutes and the provisions for such contests are peculiar. It is provided, section 575 Rev. Stat., that "if, by the decision of the three free-holders summoned in the probate court to try the contest, there is a vacancy in the office of the justice of the peace, the judge shall transmit a copy of the decision to the trustees of the township, who shall give notice to the electors to fill the vacancy; but if, by the decision, the election remains good, he shall transmit the same to the clerk of the court of common pleas, who shall proceed as if no contest had taken place."

Apparently from this no other result of the contest is contemplated

by the law than that either the election of the person declared elected shall remain good, or that there shall be a vacancy in the office.

The language throughout leads to the same conclusion. For instance, section 576: "No election of a justice of the peace shall be set aside by the free-holders merely, because illegal votes have been given at the election, if the person whose election is contested has the greatest number of the legal notes." Again, section 578: "If the contestor fail in setting aside the election, he shall pay the costs, but if the election is set aside the township shall pay."

Moreover, by section 572 it is provided that upon notice of the contest being given to the probate judge he shall direct the clerk of the common pleas "to withhold the return of such contested election until the same is decided." Now, comparing this with the other provision that if by the decision of the freeholders the election remains good, the judge shall transmit a copy to the clerk who shall proceed as if no contest had taken place and observing that by the "return of such contested election" is meant the abstract required to be made and certified to the secretary of state, it follows that unless by the decision of the freeholders the election remains good, the return is permanently suspended, and necessarily a new election is needed.

With the expediency of distinguishing between contests for such offices as these and general state and county offices we have nothing to do; it is enough to know the legislature has distinguished. The result as declared by the judges of the election might have been made final if the legislature had so willed, and when final, unless set aside by contest, the legislature was left to provide in respect to the ultimate consequences of the contest. In our opinion, under the provisions made, there is a vacancy in this office.

The mandamus accordingly must be refused, and petition dismissed at relator's costs.

Perry & Jenney, and G. W. Worthington, for relator.

H. M. Cist, for respondent.

423

[Hamilton District Court, June, 1880.]

JULIA FREEMAN GOING v. JOHN C. SCHNELL et al.

For opinion, see 6 Dec. R., 932 (s. c. 8 Am. Law Rec., 739).

440

JURISDICTION OF JUSTICES.

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

CHAS. A. GREEN v. HARRIET M. SEWELL.

A justice of the peace may have jurisdiction of a suit to recover the consideration due on a conveyance of real estate. Such suit involves no question of title, and the contract to convey has been executed.

JOHNSTON, J.

This case came before this court on a petition in error to the judgment of the common pleas court.

Green instituted the action against Mrs. Sewell before a justice of the peace for \$259, and judgment was rendered for Green. The case was appealed by defendant to the common pleas court. In his petition to that court Green alleged that the defendant, Mrs. Sewell, was indebted to him in the sum of \$250, as part of the consideration for the transfer of certain lots of land in Kenton county, Kentucky. The contract was that

Green should convey the lots, which he had done, and that he should be paid \$50 in cash, which had been paid, and \$250 in goods, which had not been paid, and for the value of which he now sued. The defendants in the common pleas made a motion to dismiss the petition on the ground that the justice of peace had no jurisdiction, because the case concerned the title to real estate. The motion was unaccompanied by affidavits. The court below granted the motion and dismissed the petition. Green prosecutes his petition in error to reverse this judgment of the court of common pleas.

The district court, per Johnston, Judge, in disposing of the case, said that by the statute the cases covering real estate where the justice has no jurisdiction are two. The first is in actions on a contract for real estate; the second, in actions in which the title to real estate is sought to be recovered, or may be drawn in question. The court held that this action was neither to recover title to real estate nor one in which title was drawn in question, nor was it one on a contract for real estate within the meaning of the statute. It was a suit to recover the consideration for real estate after the agreement as to the real estate had been executed; after the land had been conveyed. The petition does not involve any question of title in its statement of facts, but clearly avers that the contract has been executed, the deed made and that the title had passed to the defendant.

It is also claimed that the motion should have been granted because the defendant was a married woman. The petition, however, does not set this out, and no affidavits appear to have been filed in the court below showing that she was a married woman.

ERROR—SUPERSEDEAS BOND.

440

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

MARIAN L. BASSETT v. JONATHAN BASSETT.

Where the court below decreed that the plaintiff was entitled to property subject to a charge for the support of a defendant and affirmed, and in remand of the case, judgment in favor of such defendant for his past support was rendered against plaintiff from the date of the decree, although the plaintiff has been kept out of possession by the defendants taking the case to the supreme court: Held, such judgment is correct. Plaintiff's remedy is on the supersedeas bond given by defendants on going up.

ERROR to the Superior Court.

On the 22d of March, 1875, a decree was entered in the special term of the superior court in favor of Marian L. Bassett, wherein it was found that she was the owner absolutely of two acres and three rods in Storrs township, which she took as heir of her husband. It was found that the property had been conveyed by her husband's father to him by a deed of purchase never recorded, the consideration for which was the support and maintenance of the father, Jonathan Bassett, for the rest of his life. The decree was that the case should be referred to a master, who should determine the exact boundaries of the land, and find the amount due Bassett per year for the maintenance of himself since the rendering of the decree (since it was found that he had waived the right to maintenance before the date of the decree), and that after payment of what was thus due the title in Marian L. Bassett should be quieted.

On a petition in error in the general term of the superior court the judgment was affirmed. The case was carried up on error to the supreme court, where leave was granted and an order to stay the mandate of the

general term issued. There the case rested until 1879, when the proceedings in the lower courts were affirmed by the supreme court. A mandate was issued from the supreme court to the superior court to proceed on the original judgment. The master did not proceed in his investigation until this last mandate reached the superior court. On October 13, 1879, however, he reported that he had found the exact boundaries of the lot, and that \$360 was necessary for a proper maintenance of Jonathan Bassett. The report was confirmed and \$650 was charged upon the property as a lien, and in default of payment thereof a sale of the property was ordered.

Marian L. Bassett excepts to this order and sale, claiming that the court below ought not to have charged the land with the maintenance all the time that she was out of possession, which was since the decree in 1875.

JOHNSTON, J.

This court must respect the decision of the supreme court affirming the judgment of the superior court, which found that the calculation for maintenance must begin with the date of the decree. If the case had not been carried to the supreme court, she would have had possession soon after the rendering of the decree. By the decree she was not to have possession until the report of the master. The master did not begin to investigate until after the supreme court had affirmed the judgment of the superior court, which was perfectly proper.

The indemnification of the plaintiff in error lies in the bond given by Jonathan Bassett and his grantee, Chas. Moulton, when, in order to carry the case to the supreme court, they stayed the mandate of the general term of the superior court to the special term to proceed with the judgment, February 26, 1876. In this bond they agreed to pay the value of the use of the property from that time until the judgment of the supreme court was had. Whatever then the plaintiff in error can show these premises to have been worth in this interval, she can recover. This is her remedy.

The master under the decree could not do otherwise than report the value of the maintenance since date of the original decree, and the confirmation by the court below of the report was proper.

Judgment affirmed.

J. F. Follett and Forrest & Mayer, for plaintiff.

Mallon & Coffey, for defendant.

441

ATTACHMENT—GARNISHEE.

[Hamilton District Court, June, 1880.]

Avery. Cox and Johnston, JJ.

STRAUB MILL COMPANY v. FANGER.

In an attachment case before a justice, where the garnishee against whom the debtor had obtained a judgment desires the possession of any funds or property of the debtor, the order of the justice sustaining the attachment does not fix the garnishee's liability. The plaintiff must sue the garnishee just as the debtor would have had to do, hence an assignee of the judgment against the garnishee has a right superior to the justice's judgment.

ERROR to Common Pleas.

JOHNSTON, J.

Fanger instituted this action in the common pleas court against the surviving executor of J. D. Wheeler, deceased, for the purpose of determining to whom certain funds in the hands of the executor belonged.

Amos Ludington recovered a judgment against the estate for \$800; \$500 was paid on this judgment. After the judgment had been thus paid the Straub Mill Company brought suit against Ludington in the Justice's Court on the 12th of August, 1876, and garnished the executor of the Wheeler estate, and Hildebrandt & Bruner, to whom the judgment had been assigned. To this garnishment the executor answers that a judgment had been recovered against the estate by Ludington, that part of it had been paid, and that it was doubtful to whom the rest belonged. Hildebrandt & Bruner, in their answer to the garnishment, denied holding any money of Ludington's in their hands, he having assigned this judgment to them for fees for legal services on July 25, 1876. The cause before the justice proceeded to trial, and a judgment was rendered against Ludington, and the attachment sustained. Thus matters rested, and no further action being taken, Fanger instituted this suit to compel the executor of Wheeler's estate to pay the amount of the judgment, which remains unpaid. The Straub Mill Company was made a party and filed an answer. It claimed that the amount unpaid on the judgment belonged to it, for the liability to that amount had been fixed on the estate by the judgment of the justice of the peace, which had been affirmed by the common pleas court. Fanger, on the other hand, claims the money on the ground that he had obtained an assignment of the judgment from Hildebrandt & Bruner, who had obtained it before the garnishment of the Straub Mill Company.

Judge Johnston, in delivering the opinion of the court, said that they were of opinion that the judgment and order of the justice sustaining the attachment did not fix the liability of the garnishee. Under the statute, when the garnishee answers and denies that he has any money in his hands belonging to the defendant, the plaintiff is remitted to his action against the garnishee just as the defendant would be if he had been compelled to sue his debtor. The sustaining of the attachment by the justice was a matter simply between the Mill Company and Ludington; that the attachment properly issued.

That did not settle the question whether the garnishee had money in his hands due to the defendant. It is only where the answer of the garnishee admits he has money in his hands due to the defendant, and the justice makes an order to pay it, that the liability before the justice of the garnishee becomes fixed.

No such answer was made by the garnishee in this case, and no such order was made. More than this, it appears from the record that the judgment had been assigned several days before the garnishment. The judgment in the common pleas, affirming the justice, was only in a case where Ludington and the Straub Mill Company were parties. Neither Fanger nor Hildebrandt & Bruner had their day in court. The money in the hands of the executor, therefore, belongs to Fanger.

The judgment of the court below is affirmed.

Savler, for plaintiff.

Hildebrandt, for defendant.

POWER OF TRUSTEE TO CREATE A LIEN.

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

JOHN B. PURCELL v. KUEHN.

A note given by a pastor of a church, expressing on its face that it was for a loan to the church, and that the church property was liable for the debt, being sued on, and a sale asked: averments that the legal title of all church property was in defendant as trustee, for the sole benefit of the respective congregations, and that the pastors are agents of defendant, authorized to make loans, is not sufficient to sustain a judgment on default, it not being stated that the agents could pledge the property, or that the trustee's power extended to create such lien by such certificate.

ERROR to the Common Pleas.

The defendant in error instituted his action in the common pleas court against John B. Purcell to recover a sum of \$250 upon the following note:

No. 964.

\$250.

The St. George's Roman Catholic Church, of Corryville, has received as a loan from John Kuehn, the sum of \$250, which are to be paid back at six per cent. interest one year from date, and for which the property of the church is liable.

Rev. B. Wilhelm, O. S. F.

Cincinnati, May 1, 1876.

The plaintiff alleged in his petition in substance that Purcell was Archbishop of Cincinnati; that by virtue of the laws of the Catholic Church the legal title to all the property of the churches was held by him in trust for the sole use and benefit of the congregation of each church; that as such trustee he holds the St. George's church property. The petition further alleges that under the laws of said church the property of each congregation is under the government of trustees, who are authorized to make loans, and are the agents of the defendant, Purcell, for such purpose. Petition further alleges that the money borrowed was used in the church, also that it is a lien on the property, and asks that the property be sold to pay it. The defendant was in default in the court below.

A decree was granted against him. The court found a lien for \$250 with interest, and decreed a sale unless that sum was paid within sixty days.

This petition in error was prosecuted to obtain a reversal of that decree.

JOHNSTON, J.

It will be observed that a personal judgment is not sought against John B. Purcell. It is only alleged that he held the legal title, and there were certain agents of his authorized by him to borrow money. The petition does not charge, however, that there was any authority in these agents to pledge the property. Moreover, Purcell, being merely a trustee, acting in a fiduciary capacity, cannot go beyond the power given him in the deed of trust. There is no allegation that he himself, from whom it is claimed that these others derived their authority, had any right to create a lien by this form of certificate. Nor does it appear from the petition that in any other way he was empowered to borrow money for the church and create a charge upon it. Such being the character of his

authority, it is the opinion of the court that no lien was created, according to the averments of the petition.

Judgment of the common pleas reversed.

Ph. Dolle, for plaintiff in error.

Forrest & Mayer, for defendant in error.

FIRE INSURANCE—ARSON.

464

[Guernsey Common Pleas Court, 1880.]

STATE OF OHIO v. CHARLES H. TUTTGERDING.

1. Under a clause in a policy that it shall become void by a change in the house, or if it becomes vacant and unoccupied, unless assented to by the insurer, it being stated in the policy that the premises are occupied by a tenant, it will not avoid the policy for the tenant to move out and the owner or another tenant to move in, within such time as would usually and reasonably be required for that purpose; but a failure to notify the company, within a reasonable time, avoids the policy, and it is for the jury to say what is a reasonable time.
2. On trial under an indictment under section 6832 for maliciously burning the accused's dwelling, with intent to defraud the insurer, a breach of a condition which avoids the policy is a defense, since there was then no subsisting insurance.

FRAZIER, J.

The indictment is found under section 6832, Rev Stat., and charges that the defendant, on the sixteenth day of April, 1880, did maliciously set fire to and burn a dwelling house, being his own property, and insured against loss and damage by fire, with intent to prejudice the insurer, the "Jefferson Fire Ins. Co. of Steubenville, Ohio."

By one of the conditions of the policy it is provided: "when a risk has been changed, either within itself or by its surroundings or adjacent premises, or change in business, or becomes vacant or unoccupied, * * it shall be incumbent on the party insured to give written notice thereof, and have the same described and assented to in writing on the policy, otherwise this policy is void." It is also stated in the policy: "the premises are occupied by tenant."

The evidence tends to show that the tenant had moved out about the fourteenth day of February, and the premises remained vacant until the burning, a period of sixty days, and that notice had been given to the insurance company that they were vacant. The prisoner refused to rent, stating that unless he sold he expected to move with his family into the premises some time in May.

The court charged the jury upon this point. The evidence must not only satisfy you beyond a reasonable doubt that the prisoner burned the building but the building must have been at the time it was burned insured against loss or damage by fire.

There must have been at the time of the burning a valid existing contract or policy of insurance.

It would not render the policy void for the tenant to move out, and the owner or another tenant to move in, within such time as would usually and reasonably be required for that purpose. But if you find from the evidence that the tenant moved out and the premises became vacant and unoccupied, it was the duty of the insured to give notice in writing to the insurance company, and have the same assented to in writing on the policy; and if he failed to give such notice in a reasonable time after he had knowledge that the building was vacant and ceased to be occupied

as a dwelling, the policy became void; and if you so find, your verdict should be not guilty.

Verdict: Not guilty.

J. O. Grimes, prosecuting attorney, for the State.

J. A. McEwen and G. J. Dorrell, for defendant.

ARSON—INDICTMENT.

[Noble Common Pleas Court, 1880.]

STATE OF OHIO v. HORTON S. CALLAND.

An indictment for burning a house with intent to defraud an insurance company, stating that the house was insured in a company named, is demurrable, unless it aver the insurance was against fire.

FRAZIER, J.

The indictment in this case was found at the May term, 1877, charging that Horton S. Calland, on the first day of September, 1877, in the county of Noble, and state of Ohio, "did wilfully, maliciously and feloniously set fire to, burn and cause to be burned, a certain dwelling house then and there situated, in said county, of the value of one thousand dollars, the property of said Horton S. Calland, with intent then and there in so doing to prejudice, damage and defraud the Millville Mutual Marine and Fire Ins. Co. (a duly incorporated insurance company doing business in the state of Ohio), the insurers of said property; which said dwelling house was then and there insured into the said Millville Mutual Marine and Fire Ins. Co. in the sum of one thousand dollars by the said Millville Mutual Marine and Fire Ins. Co. by a contract and policy of insurance duly executed by and between the said Millville Mutual Marine and Fire Ins. Co. and the said Horton S. Calland therefor, contrary to the form, etc.

May 14, 1879, a demurrer was filed to the indictment.

Section 240, Crimes Act, Swan and Critchfield, page 457a, provides: That every person who shall wilfully and maliciously burn or cause to be burned, any dwelling house * * * of the value of fifty dollars, * * * which shall be at the same time the property of said person, and insured against loss or damage by fire, with intent to prejudice such insurer, every person so offending shall be deemed guilty of arson, etc.

The court held that the indictment should aver that the building burned was insured against loss or damage by fire. Demurrer sustained, and defendant required to enter a recognizance in the sum of \$1,000 for his appearance at the next term, etc.

S. M. McGinnis, prosecuting attorney, for the State.

Spriggs & Foreman, for defendant.

501 RELEASE OF SECURITY FOR COSTS—EXCEPTIONS.

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

STANDARD PUBLISHING CO. v. SIMON S. BARTLETT et al.

1. There is no mode of release of security for costs given by the statute, and without defendant's consent; he can be saved from further liability only by dismissal of the action.
2. Moving for new security for costs by defendant does not waive the right to object to an erroneous discharge of the security, unless new security is given.
3. The want of an exception at the time to an order of court made on an ex-parte application, will not deprive one not present at the hearing, and without notice, from seeking a reversal.

ERROR to the Superior Court of Cincinnati.**EVERY, J.**

Simon S. Bartlett, a non-resident of this county, brought suit against the Standard Publishing Co. of this city, and Goodman and Storer became surety for costs. After the case had progressed about a year, the court, upon their application, made an order discharging them from liability as security for costs. The defendant then filed a motion that the plaintiff should be required immediately to give security for costs, and the court granted the motion, requiring the security to be given in fifteen days. Meanwhile the plaintiff moved into this county, and the court, upon his motion, set aside the order requiring him to give security, and also overruled the defendant's motion to dismiss the action for want of security, and their further motion to set aside the order discharging Goodman and Storer. To that the defendant excepted.

The case then proceeded to final determination, and was dismissed at the plaintiff's cost. Upon motion of the defendant, under provisions of the code, judgment was entered against Goodman and Storer for the costs up to the time of their discharge.

The court refusing to enter judgment against them for the costs that had subsequently accrued, the defendant excepted and filed his petition in error.

The liability of a surety for costs is fixed by law. The liability begins from the moment the surety indorses the writ, or signed the petition as surety, and is a liability for all costs that may be adjudged in the final judgment against the plaintiff, and for the costs of the plaintiff's witnesses, whether there be witnesses or not. The law makes no provision for the discharge of a surety when he has once undertaken the obligation.

Additional security may be required under the provisions of the statute, but this still leaves the original surety liable. A resident plaintiff who becomes non-resident, may be required to give security, but the law does not provide that a non-resident moving into the county after the suit is begun shall be relieved from the duty of giving security.

The jurisdiction of the court over the cause itself might, perhaps, in a proper case, upon the surety desiring to withdraw, justify the dismissal of the action. But without dismissing the action, we find no way under the statute by which an end can be put to the liability of the surety.

In this case the action was not dismissed. Upon the contrary, the court overruled the defendant's motion for a dismissal, and allowed the action to proceed, and in its course additional costs were accumulated, for which, if the order discharging the original security was valid, the defendant was without security. We think that under the circumstances it was error in the court to make the order.

But it is said that the petition in error does not allege that the court erred in discharging the surety; that the error alleged was simply in not entering up judgment against the sureties for the costs that had subsequently accrued. It is true the petition in error does not specifically point out this particular error, but it alleges that there are other errors apparent upon the record, and the general allegation includes this particular one. It is said again that the order discharging Goodman and Storer was not excepted to at the time. This is true also, but the order was made upon application ex parte, without notice or evidence at all, except to the clerk, who was informed that the sureties declined to consider themselves further bound.

The defendant, therefore, did not lose his right to except to the order by not taking it at the time.

The defendant had no opportunity to take it at the time.

It is said again that if there was error in discharging the sureties, it was waived by the fact that the defendant subsequently moved for new security; but, while the motion for new security might be deemed a waiver, it would be so only upon condition that the motion was granted.

Now, it is true that the court granted the motion, but almost immediately afterwards set aside the entry. The defendant then took his exception after his motion to dismiss the action as well as the motion to set aside the entry discharging the original sureties had been overruled. We think exception was taken in time; that, however, it might have been had new security been given as asked by the defendant. It was not given, and therefore its asking for new security was no waiver of his right to object to the discharge of those who were originally bound. The judgment, therefore, must be reversed, and, proceeding to render such judgment as the court below should have rendered, judgment will be entered for the costs of the defendant chargeable against the plaintiff up to the final determination of the suit.

Milton Sater, for plaintiff in error.

J. H. Perkins and Wulsin and Worthington, for defendants in error.

INCOMPATIBILITY OF OFFICES.

[Hamilton District Court, June, 1880.]

Avery, Cox and Johnston, JJ.

STATE OF OHIO *ex rel.* MOORE *v.* W. J. HEDDLESTON.

The provision of section 4047, Rev. Stat., that the treasurer of a school board cannot pay out any money except on an order signed by the president, prevents the same person holding both offices, and where, therefore, the treasurer accepts the office of president, he will be ousted from that of treasurer.

This was an application for a quo warranto against defendant, Heddleston, requiring him to show by what right he exercises the office of treasurer of the school board in the Madeira Special School District in this county. The defendant in his answer alleges that the board organized in April; there being but three members of the board, they organized by electing Hasbrook, clerk; Moore (relator), president, and defendant, treasurer; that Moore declined to serve as president, and having been clerk in the former board, would accept nothing else; but the defendant says that, Moore refusing to be president, the board then elected defendant president, and did so from necessity in order to proceed with the business of the board. As clerk of the old board, Moore refused to surrender the books and papers to his successor, Hasbrook.

JOHNSTON, J.

Upon examination of the school law, it appears from sections 3923, 3980, 4042, Rev. Stat., that the board of education of a special school district are chosen by the electors thereof; that the board organizes

annually on the third Monday in April, by electing one of their number president, and by choosing a clerk who may or may not be a member of the board. A treasurer shall be selected by the board, but he need not be a member of the board necessarily. Section 4042. By section 4047, a treasurer of the board cannot pay out any school money except on an order signed by the president and countersigned by the clerk. Obviously a separate duty is conferred and enjoined upon each officer to prevent abuses. There is no intimation in this case that the defendant would in any manner abuse his trust, but the spirit if not the letter of the law is that these various functions must be discharged by different persons, that the possibility of abuse might be averted. If one member may hold two of the offices, he may hold all three as well. And that one member may not be compelled to act in a dual capacity the legislature wisely provided that as to clerk and treasurer the board may go outside of their number and select those officers, and the contingency seems to have arisen in this board where they may exercise the right and select a treasurer from among the electors of the district, not a member of the board. Defendant cannot therefore discharge the duties both of treasurer and president, and a judgment of ouster as treasurer will be entered at the cost of defendant.

Louis H. Bond, for relator.

J. T. Demar, for respondent.

TRUST FUNDS—EXPENSES OF TRUSTEES.

503

[Superior Court of Cincinnati, Special Term, July, 1880.]

†ROBERT MITCHELL and WILLIAM H. LAPE v. CATHERINE F. SCHULTZ et al.

1. Trustees will be allowed to reimburse themselves, out of the trust funds, for all reasonable expenses incurred by them in the defense of suits brought without cause to annul and set aside transactions had by them, in their trust character, concerning their trust.
2. And this will be so, notwithstanding their own personal characters for competency and honesty, as trustees, may be involved in the controversy.
3. Nor will it alter the rule if the transactions in question have resulted in their private gain and advantage, provided the transactions were valid and proper for them to engage in, as trustees.
4. A surviving partner purchasing under, and according to the terms of the act of March 21, 1861 (58 O. L., 36), does not assume and become solely liable for liabilities of the firm which are unknown, and not taken into account at the time of the purchase.
5. Trusts are matters of honor and confidence, to be undertaken with humane or friendly or charitable, rather than mercenary views.
6. These characteristics of a trust should be borne in mind in determining the compensation to be allowed trustees for their services.

This case came up for hearing upon a supplemental petition, filed by the plaintiffs, Mitchell and Lape, who are executors and trustees of the estate of Frederick Rammelsberg, setting forth that the time had

†See also 6 Dec. R., 768 (s. c. 8 Am. Law Rec., 22).

arrived, according to the terms of the will creating their trust, for the final distribution of the funds held by them, and thereupon making such claims against the trust estate as to raise, among others, the questions disposed of by the court, as shown by that portion of the court's opinion here given.

The facts are sufficiently stated by the court.

FORAKER, J.

The next question arising upon the supplemental petition is as to the right of the trustees to be reimbursed, their counsel fees paid by them in the defense of the suit brought against them by Catherine Schultz and others, the children and heirs of Rammelsberg.

It is claimed on behalf of the trustees that this was a suit against them as trustees, and that their defense was in their trust capacity, and for the benefit of the trust estate, and hence that they are clearly entitled to the indemnity asked.

On the other hand, it is contended that the case was practically, and in effect, a suit against Mitchell in his individual capacity, to recover from him, for the benefit of the estate, the property and effects which he had irregularly and illegally possessed himself of, and hence that he was defending only in his own right, and consequently that his defense should be at his own expense.

The nature of that controversy must be determined from the pleading. The grounds for it from the result.

It is unnecessary to review the pleadings in a detailed way.

It is sufficient to say that both by the petition and the amended petition, the facts set forth and complained of are acts and transactions of the defendants in their trustee character. It may be generally stated that the complaint is that all the trustees had done up to the time of the filing of the petition was irregular and illegal, detrimental to the best interest of the estate, done for the private advantage and gain of Mitchell, done in disregard of their duty as trustees, and done fraudulently on the part of Mitchell, and through the weakness, inexperience and subserviency of Lape.

It was an effort, in short, to undo the dispositions of property that had been made, and return everything to the hands of the trustees, as such, to be by them again dealt with as trustees, under and according to the will.

This is the character of the suit that was brought and defended. It is true, however, that in the defense made was involved also, not only the defense of the characters of the trustees against the assaults thus made, but also a defense of the property interests that had been acquired by Mitchell in his individual character.

For the question was not alone whether or not there had been a faithful and competent administration of the trust, but it was also whether or not the large and profitable purchase of the business by Mitchell was a valid one.

The case was one, therefore, in which the trustees were sued in their trust character, and in which was assailed the administration by them of their trust, and in which all they had so done presumably for the benefit of the trust, according to their judgment, was to be undone.

Looking at the case to this extent alone, it would seem beyond argument the privilege and the duty of the trustees to defend as such, and at the expense of the trust if the charges brought should fail.

Does it make any difference that the character of the trustees for fidelity and competency was involved?

Clearly not, since if that were to alter the rule there could be no case where the charge of maladministration could be defended against by a trustee at the expense of the trust, since in the nature of things maladministration must be charged as the result of intentional wrong, or incompetency.

Does it alter the case then that not only the character, but the personal and private interests of the trustees were involved?

This is a question that in all probability seldom arises, since the rule is that trustees are not supposed to have any private business or financial interests growing out of the administration by them of a trust. The nature and character of the trust relation are such that trustees must be trustees only, in relation to their trust estates. And hence, when trustees have undertaken to deal as trustees with themselves as individuals, concerning their trusts, the courts have always, and with the least possible ceremony, pronounced such transactions maladministration, and have refused to confirm them. This is a rule so founded in reason and so sanctioned and upheld by precedent, that we must conclude that nothing but the most absolute good faith, nothing but the strictest fidelity to trust obligations, united with benefit to the trust, or such a condition of facts and surrounding circumstances as would make it inequitable and unjust to do otherwise, could induce a court of equity to exempt such a transaction from its operation.

The more especially would this seem to be the case when the trustee by such transactions has reaped profits or benefits for himself. I say, therefore, that in the nature of things, the question can have arisen but seldom if at all, where courts have determined whether or not a trustee should have his expenses paid by the trust fund for successfully defending a trust transaction with himself that has been to his individual advantage.

Such transactions are generally set aside as maladministration, and an allowance of expenses denied, because incurred in an effort to uphold maladministration.

But we have here a case that has been taken out of the general rule. Mitchell, while a trustee, did deal with the trust estate in the capacity, at least of a surviving partner, if not in his individual capacity. And not only that, but his dealings in a number of respects that are shown by the record were of such an apparently irregular character as to seemingly invite litigation. And yet, notwithstanding all this, his transactions have been upheld and confirmed by the courts. The litigation that put them to the test has been decided in his favor; and on the ground that he had acted in such good faith, and with such fidelity to his trust obligations as that equity required that they should be upheld. In other words, stating it more plainly, the result is that he had a right to do what he did do. However much this may be at variance with our individual notions and opinions of the law, or rather what the law should be, governing such a case, the fact remains that such is the conclusively settled law of this particular case.

And by this fact the question now before this court is made to appear to my mind in a very simple and plain form—for it amounts to only this: Shall a trustee be allowed for expenses incurred by him in good faith, in defending that which, in the due administration of his trust, he had a right to do, notwithstanding the fact that he derived a benefit from doing it.

But one answer can be given: if he had a right to do it, nobody had a right to call him to account for it. And this is true, no matter whether he has been benefited or not, since if he had a right to do it, he had a right to do it for the express purpose of benefiting himself. The question must therefore begin and end with the legality or validity of the transaction to be enquired into. If that be in the trustee's favor, he must be allowed to defend it in the name of, and at the expense of, the trust.

For these reasons the trustees will be allowed the expenses of their counsel fees in the suit above mentioned.

The third question arises out of what is called the Fort Dodge matter, and is as to the right of Mitchell to retain in his hands, on distribution, out of the trust funds, a sum sufficient to indemnify him against one-half of the liability that has been asserted against him as surviving partner of Mitchell & Rammelsberg, on account of a transaction had by the firm of Mitchell & Rammelsberg, during the lifetime of Rammelsberg, in relation to some real estate at Fort Dodge, Iowa.

This claim is resisted by the defendants, on the theory that it is founded upon a failure of title to Mitchell to real estate taken by him from his deceased partner under the surviving partners act. The defendants claiming in this respect that the title so taken was only a quitclaim, i. e., he took only Rammelsberg's interest in the property, whatever that may have been, and that he took the same at his own risk in every respect, and consequently he has no right to come upon the estate for any failure of the same.

If the facts sustained these propositions they would be sound. But I find from the evidence submitted that the facts, so far as it is necessary to state them here, are as follows: During the lifetime of Rammelsberg the firm of Mitchell & Rammelsberg took from one Jewett, an attorney, an assignment of a decree of foreclosure rendered in his favor by a court in Webster county, Iowa, on account of an indebtedness of Jewett to them. That afterwards, when the property against which the decree went, was sold, they bought it, and thus acquired title to the same, which they held without question or knowledge of any irregularity at the time of Rammelsberg's death; that when Mitchell took Rammelsberg's interest in the partnership property, he had no knowledge of any irregularity in the proceedings whereby they had acquired title to this property. That this property was appraised as part of the partnership assets, and as such taken by Mitchell along with the balance of the firm's property at the appraisalment. I find further, what seems to have been overlooked by the counsel for the defendants, that Mitchell's title so acquired has never been disturbed, and that what he is here seeking to have allowed him is indemnity, not against a failure of title or any kind of loss to him on account of his purchase of the property, under the surviving partners act, but what has happened and what he is asking protection against is quite independent of his purchase as the surviving partner, and wholly disconnected therefrom.

It is a liability that he would have been called upon to meet, as he has been, had he not made such a purchase. For the facts are that after Mitchell had acquired title as surviving partner, it came to light that Jewett, the attorney, had fraudulently taken the decree in his own name, which he had assigned them, instead of in the name of his client, who had put the note and mortgage, upon which it was founded, in his hands for collection only.

Thereupon the defrauded client brought suit and recovered judgment against Mitchell as surviving partner for the conversion by Mitchell & Rammelsberg of his decree by their acceptance of the assignment of it from Jewett in fraud of his rights. The true theory of this claim is, therefore, as it has been made, and as it has so far been upheld by the courts, that it was a liability of the firm of Mitchell & Rammelsberg, existing before and at the time of the death of Rammelsberg. And if Mitchell shall be required to pay it at the end of the litigation that is still pending with respect to it, it will be because it was an outstanding obligation of the firm when Rammelsberg died. When Mitchell purchased his deceased partner's interest under the surviving partners act, this existing liability of the firm was unknown, and consequently was not entered upon the schedule of liabilities that was, by the terms of that act, in such cases required to be made; the terms of that act being that in case of purchase by the surviving partner, the amount to be paid by him is to be determined by subtracting the aggregate of the liabilities which are to be entered upon a schedule from the aggregate of the assets, as they are inventoried and appraised. The question here presented is therefore whether or not, when a surviving partner so purchases, he can have relief as against his deceased partner's estate from a liability of the partnership that is omitted from the schedule, and in no manner taken into account because of ignorance of its existence.

Such a transaction must be regarded as in the nature of a contract; the surviving partner acting for himself on the one part, and the law through the agency of the appraisers and the probate court acting for the deceased on the other part. The law doubtless proceeds upon the idea that in such a case all the assets will be included in the inventory, and that all the liabilities will appear from the schedule, but there is nothing in the statute providing that such shall be conclusively deemed to be the case.

I see no reason, therefore, for applying a different rule to the construction of this contract from that which applies to other contracts.

The question is, therefore, what has been agreed to, for by that the rights and obligations of the parties must be measured. It is plain that Mitchell agreed to take the assets inventoried at their appraised value less the amount of the liabilities contained in the schedule. Where is there anything to show that he ever undertook to do more—certainly not in any provision of the statute, and certainly not in anything that he has done or agreed to, outside of the statute of which the court has been informed. I am quite clear, therefore, that he is not solely bound for the liabilities of the firm further than they were known and taken into account and assumed by him, by the terms of his purchase. That is to say, the discovery of an unknown and unaccounted for liability should not be his loss, any more than the discovery of an unaccounted for asset should be his gain.

Mitchell will be allowed, therefore, to retain in his hands such sum as may be necessary to indemnify him against this claim.

The next and last question to be disposed of is raised by the claim of the trustees for an allowance of additional compensation. They represent that they now have in their hands for distribution the sum of \$410,372.93, and ask that they be allowed a commission thereon of 2½ per cent., which would make the sum of \$10,259.32.

In England trustees are allowed all expenses incurred by them in the administration of their trusts, but nothing whatever in the way of compensation for their time, trouble and services as trustees, unless there be

an agreement to the contrary. Such was the rule of the civil law also, and such, too, was the rule in this country until in the early part of this century, when there began to grow up the rule which at present obtains in most states of the Union, of allowing a fair compensation, to be determined by the facts and circumstances of each particular case. This may fairly be said to have become the rule in Ohio, although since the adoption of our present constitution in the case of *Gilbert v. Sutliff*, 3 O. S., 149, our supreme court say that "As a general rule a trustee is not entitled to compensation in the absence of an agreement to pay."

In some of the states the amount of compensation to be allowed all kinds of trustees is fixed by statute. Here, however, we have no statutory provisions on the subject except those which relate to executors, administrators, assignees, etc. But in determining the amount of compensation to be allowed a trustee in any given case, the courts take these statutes upon these analogous subjects into consideration, and in so far as the case before the court may seem to come within the spirit of these laws, adopt them by a kind of equitable construction as a rule by which to be governed.

But in every instance it is not only the practice, but it is the duty of the courts to look at the facts of each particular case, and from a just consideration of all its features determine what may be a fair compensation, bearing in mind, too, that while by the allowance of compensation we have departed from the rule originally followed by us, and still followed in England, yet the dangers which that rule was intended to guard against still remain, and that they are of such a serious character as to admonish us in an unusual way to depart no further from the original rule than absolute justice to the trustee may require.

The following remarks made by Chancellor Kent in the case of *Manning et al. v. The Executors of Manning*, 1 John. Ch., 527, although made in support of the enforcement of the rule not allowing compensation to trustees, are not only not without application to this case, but they are worthy to be written in every trust deed.

He says: "A trust is regarded in chancery as a matter of honor and conscience, and as an undertaking with humane, or friendly, or charitable, and not with mercenary views."

And again, speaking of the case of *Robinson v. Pett*, 3 P. Wm., 248, he says: "Lord Talbot there laid down the rule in very general and emphatic terms, saying it had long prevailed, and was a reasonable rule, and one which tended to prevent the trust estate from being loaded and eaten up by a charge voluntarily assumed. It is a rule founded in the same equitable policy of closing the door to temptation, abuse and fraud with that other rule forbidding a trustee to become a purchaser for his own benefit of the trust estate. And if the rule applied with more force and propriety to one kind of trust than another, I should think it was of an executor who gives no security, and who is selected by reason of some special and sacred confidence, resulting from the ties of kindred or friendship, and charged by the testator in his dying moments with interests of the nearest human concern, and which he is on the eve of renouncing forever. The request of the testator in such a case is the supplication of a friend."

Such being the character of the trust relation, and of trust services, and such being the spirit in which courts of equity are to deal with trust

estates, let us examine the case that is here presented and determine what should be done with this application.

Mitchell and Lape were named by the testator in his will as executors and trustees, and by his request were not required to give any bond in either capacity. Mitchell was his business partner, Lape was his brother-in-law.

For the one he had all the confidence, friendship and esteem that a long and unusually prosperous and successful joint business enterprise could inspire. To the other he looked for all that the ties of the blood relation gave him a right to expect. The position into which Rammelsberg thus placed these men was, in the most emphatic sense, one of confidence, honor and trust, and if every man dying had a right to expect that those whom he had thus honored and confided in, would undertake their trusts with humane, friendly and charitable, rather than mercenary, views, Frederick Rammelsberg had a right to expect it of Robert Mitchell and Wm. H. Lape. In the language of Chancellor Kent, his charge was as the supplication of their friend, made in his dying moments, and concerning his nearest human interests, which he was then on the eve of renouncing forever.

But let us see what in other respects is the character of this trust.

| | |
|---|--------------|
| As executors, Mitchell and Lape paid to themselves, as trustees, as appears from their accounts | \$394,348 06 |
| From the sale of real estate they got about.... | 49,000 00 |

| | |
|----------------------------|--------------|
| More, or in all about..... | \$443,348 06 |
|----------------------------|--------------|

For the settlement of the estate, the conversion of it into money, and the transfer of it from themselves as executors, to themselves as trustees, they have been already fully paid as executors.

All services rendered by them in these matters are therefore to be disregarded here.

Hence their services consist in their taking possession, and becoming responsible for the investment, management, control and safe keeping of this large sum of money, and its increase, and the paying out from time to time, of the different sums of money which their accounts on file show them to have disbursed.

The trustees appear to have managed the estate wisely and well, and it has during this long period of time almost, if not quite, doubled itself; giving credit for the payments, with interest thereon, that have been made out of it. But the wisdom of the trustees is shown by their investment of the great body of these funds in United States government bonds, and the increase of the estate is but the legitimate result of the earning power of these securities. Trustees having such a large sum of money to invest are wise to invest it as this was invested, but the wisdom is not of a remarkable kind, and certainly not other or different from that which the trustees of such an estate would be expected to manifest.

I do not think, therefore, that in the nature of the investments made by the trustees there is anything to entitle them to exceptional credit. The wisdom of the action they took in this particular was not difficult to perceive. It was rather of that patent and self-recommending character, that to have overlooked it would have appeared like a lack of ordinary prudence for men of sound judgment and business experience.

Neither is there in the increase of the estate anything, except in-

creased responsibility to especially commend their claim for compensation since that increase is not due to any skill or management on their part other than what was manifested in the selection of the securities in which they invested. The increase is but the natural yield of the bonds.

While, therefore, the trustees have wisely and well administered their trust, and the estate has grown as stated, it seems to me nevertheless a case, considering that it is a trust of the character we have seen it to be, where there is absolutely nothing beyond the responsibility incurred by the trustees, and the time and trouble they have expended in the administration of their trust, that a court of equity can be asked to allow compensation for.

As to the responsibility incurred, while it is of course very great, yet it should be remembered that no bond was required, and that the form of securities invested is admitted by registration and other familiar means, of almost absolute protection against any kind of loss.

At any rate, the responsibility was of no unusual or exceptional kind, and probably amounted to nothing at all beyond that which prudence, diligence and honesty would entirely meet.

The services rendered and the time and trouble expended are portrayed by the annual reports filed herein by the trustees. There are sixteen of them—one for each year of the trust. Each report shows, therefore, a year's work. I have carefully examined all of these, and I find upon comparing them with each other that there is no substantial difference between them in respect to what they show to have been done during their respective years.

Any one of them will therefore substantially show the character of all, and what any one of them shows as to services rendered by the trustees during the year for which it is made, may be taken as a fair criterion of what was done during each of the other years of the trust.

Taking the 14th annual account of the trustees, I find it shows 78 receipts and 68 disbursements for the year. Analyzing and classifying the receipts, I find that they consist of the following kinds of items, viz:

| | |
|--|----|
| For interest on U. S. bonds, and premiums on the same | 23 |
| Interest on other securities. | 10 |
| Rent from three houses. | 42 |
| Protest fee refunded. | 1 |
| Balance in hand of trustees and interest on same. | 2 |

| | |
|-------------|----|
| Total | 78 |
|-------------|----|

To cut off the maturing coupons from the bonds, sell them at the premium they commanded, add the proceeds to the trust fund, and in the trust accounts make the proper entries, cannot be said to have either taken much time or occasioned much trouble. Any competent book-keeper could do it all in an hour's time. The ten items of interest and payments received on account of other securities may have taken more time and been the cause of more trouble, but there is nothing to show such to have been the fact, and therefore, while we know that private individuals do not pay interest as promptly, and with as little trouble to us as government bonds do, yet it is not reasonable to suppose, in the absence of proof, that there was anything attending the collection of these receipts out of the usual course of such transactions, and hence I conclude that these services were simple and of but little trouble.

The refunded protest fee is not worthy of mention, except to show

what all the items of receipts were, and the items which show the balance on hand, and the interest on same, with which the trustees charge themselves for its use, are not, of course, the subject of charge for services.

This leaves only the 42 items of house rents which make up the 78 receipts of the year.

These receipts of rents are from three different houses belonging to the estate, from which the trustees collected rents during all the years of the trust. Looking through the accounts it appears that these rents were paid in monthly and quarterly payments, and apparently with great promptness and regularity. So that the services of the trustees, as indicated by these 42 receipts, are only such services as are to be inferred as necessary to the renting of three houses and the collection of rents therefrom. This is an important service that I would not underestimate, but it does not need to be said that it is simple in character, and not likely to have consumed very much time.

Turning to the disbursements, I find them to have been:

| | |
|---|----|
| For compensation to the trustees | 1 |
| For compensation to the trustees' attorneys..... | 1 |
| For compensation to the trustees' book-keeper..... | 1 |
| For taxes | 5 |
| For quarterly allowances to different ones of the beneficiaries | 24 |
| To W. H. Lape, guardian | 23 |
| For insuring, repairing, advertising and leasing property | 13 |
| <hr/> | |
| Total | 68 |

For the allowances to themselves, their book-keeper and attorneys, nothing could be allowed. The five items of taxes means that a check was sent to the treasurer for the amounts indicated, and credits made in the trust account to correspond. It was a very simple matter for the book-keeper to attend to.

The allowances to the beneficiaries were fixed in amount and paid at stated times throughout the trust. Nothing more was involved in this matter than the giving of a check for each one of these twenty-four items, when the beneficiary entitled to it called for it.

As to the twenty-three items to Lape, as guardian, it appears that he as guardian, drew from himself and Mitchell as trustees, such amounts from time to time as he had occasion to use for his wards. He had no general funds in his hands as guardian, but determined his wants and satisfied them out of the general fund as they arose. So far as there was any trouble or service about these disbursements, it is fair to assume that it all practically fell to Lape, and that he has been fully paid therefor by the \$6,500 allowed him by the probate court as compensation for his services as guardian.

The other disbursements on account of the renting, repairing, etc., of the houses I have already considered in the remarks made about the receipts of rents from houses.

I have in this way classified and commented upon the items of these accounts, not for the purpose of underrating, or in any way disparaging what they show the trustees to have done, for the trustees have done all they could have done in the particulars referred to, and have managed their trust honestly and successfully, but for the sole purpose of showing,

what must be conceded, that the trust estate, commencing with it when it came from the executors, and continuing to the close, has been one unusually easy to manage. And it may be added that its character in this respect is due more to the condition in which the testator left it, than to anything else; while its increase, as we have already seen, is but its own interest-bearing power.

At any rate I am sure it has not been either an intricate, complicated or arduous labor that has been done.

But if there have been any complications or intricacies or doubtful questions connected with the trust, they have doubtless all been removed and made plain and simple by the professional services for which the estate has been taxed the sum of \$500 per year, making in all the sum of \$8,000.00 for the sixteen years of the trust, over and above counsel fees, that have been allowed and paid in liberal amounts for all the litigation that seems to have been encountered.

Judging from the accounts as an indication of what the labor was, I think it was chiefly performed by the accountant, who at the rate of \$300 a year, or the amount of nearly \$5,000, has been already paid out of the estate funds for his services.

If the trustees were before the court without having received any compensation whatever, with the entire estate of a million dollars in their hands for distribution, and all the other facts appeared that appear here, I should hesitate long, before I should, by equitable construction, extend the provisions of our statutes on analogous trust matters to their case, and allow them compensation on the entire amount at the rate of 2 per cent.

I should hesitate, because the rule thus established did not contemplate estates of this magnitude, and, therefore, this case would not be within the spirit of that legislation. I should hesitate again because the estate has been already "loaded" with the \$13,000 that have been paid to the attorneys and the book-keeper of the trustees.

I should hesitate especially because, after allowing for what the attorneys and book-keeper must have done, to earn the money paid them, there could not have remained, to be yet done by the trustees, as much as I think the statute expects of them for the compensation it allows.

But if I had not hesitated to allow 2 per cent. I am quite sure I should never for an instant have thought of going beyond that. And if it were now within my power to limit the compensation of these trustees to that rate I should feel it my duty to do so. But what has been done, and confirmed by the court, in this matter, as the annual accounts have been from year to year filed, cannot be now undone by me upon this hearing, although it has been done *ex parte*. It is my duty, however, to take into consideration, and to have such regard for it, as it may be entitled to receive, in determining the disposition of the application now before the court.

It appears from the accounts of the trustees that they have already paid themselves, by the allowances of the court, the sum of \$28,752.65. or about 3 per cent. of the entire amount of the estate, allowing in that amount interest upon the legacies and other payments made, as though not paid out, which the trustees claim to be the correct way of estimating the increase of the estate in their hands.

It may be said that these allowances so made by the court were by the judgment of the court allowing them fully earned by the services ren-

dered at the time when the allowances were made. Such may have been the intention of the court and the parties interested.

But if it be not a sufficient answer to this claim, if it is made that the proceedings whereby these allowances were secured, were of an *ex parte* nature, and probably not carefully scrutinized by the court, then I can only add, that there is a stronger reason than I suspected for admonishing the courts, as well as trustees, that trusts are to be undertaken with the humane, friendly and charitable, rather than mercenary, views, and that compensation is to be allowed accordingly.

Entertaining these views, I am of the opinion that no further compensation should be allowed the trustees.

King, Thompson & Maxwell and Stanley Matthews, attorneys for the plaintiffs.

Perry & Jenney, I. M. Jordan and C. K. Shunk, attorneys for the defendants.

CONSTITUTIONAL LAW—JUDICIAL SALES.

516

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†HUGH CAMPBELL v. WILLIAM M. CORRY.

1. The legislature has no power to grant relief by assuming judicial powers and reversing, vacating, or modifying a judgment in favor of an individual. The act for the relief of Wm. Corry (76 O. L., 256), must be construed to order a reimbursement to Corry out of the city treasury of the amount for which the judgment gave an unjust lien for street assessments against his property, but should not be construed as reducing the lien given to the contractor by such judgment.
2. An order of sale pursuant to a decree rendered by the district court in a case brought there by appeal must issue from the district court, and where it purports to command the sheriff to execute the order of the court of common pleas, and is signed by the clerk as clerk of the common pleas, confirmation will be refused and the sale set aside.
3. Ordinarily it is too late to object that an appraisal is too low after a second order of sale has been had and acted on under it without objection; but if a resale must be had for other reasons, a new appraisal may be ordered.

AVERY, J.

This case comes up on a motion to set aside the sale of certain lots on Jefferson street, Corryville, and also on a motion to confirm the same. The judgment under which the property was sold was rendered by this court seven or eight years ago, upon an assessment for paving Jefferson street under an ordinance of the Mt. Auburn, Walnut Hills and Clintonville road district, within the limits of which the street was at that time located.

The property was in blocks, not subdivided into lots, and the assessment was not limited to a valuation of one hundred feet in depth, but whether by fault of court or counsel, this error was not noticed, and the supreme court affirmed the judgment rendered by this court. In May, 1879, the legislature passed an act for the relief of William M. Corry, in substance, that the city auditor should ascertain the proportion between the value of the Jefferson street front one hundred feet in depth, and the entire value of the blocks, and that Corry should pay as his part according

†See also 6 Dec. R., 848 (s. c. 8 Am. Law Rec., 427).

to this proportion, which should be the extent of the contractor's lien, the other part to be paid by the city. The claim is that this act has in some way affected the plaintiff's judgment. But whatever else the legislature may do, it cannot assume judicial powers. Cooley Const. Lim., 94, 95. Being without power to reverse, vacate or modify the judgment, it had no power to impair the remedies under the judgment. The most it could do was, as by the act in question has been done, to provide for the relief of Mr. Corry by ordering that he should be reimbursed under a warrant drawn by the city auditor upon the city treasurer.

It is claimed again that the valuation was too low. It does appear that private sales have been made since the appraisement, under some arrangement between the parties, largely in excess of the appraised value. But the difficulty is that this is a second order of sale under the same appraisement, to which no objection had been taken on the ground that it was too low when first offered. Ordinarily such an objection as this would be too late at this time. The objection, however, that the order of sale was irregular in that it issued out of the court of common pleas, whereas the case has been brought into this court by appeal, is a fatal one. Upon inspection of the final clause of the order, it is found to be: "We therefore command that you faithfully execute the above and foregoing order of our said court of common pleas;" and it is signed by the clerk as clerk of the court of common pleas, and sealed with the seal of that court.

This ruling applies only to sales made under the last order. Sale set aside, and as a new order is necessary, there will also be a new appraisement.

Paxton and Warrington, for plaintiff.

O'Connor, Glidden & Burgoyne, for defendant.

MUTUAL BENEFIT SOCIETIES.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

SPRINGMEIER v. WIDOWS' AND ORPHANS' BENEVOLENT ASSN.

Where, by the constitution of the defendant, no person could be a member of it unless he was a member of the Improved Order of Red Men, and on failing to pay his dues to that society, he ceased to be a member of defendant's, but the two societies were independent bodies: Held, the receipt of assessments by defendant in ignorance that the person paying them had ceased to be a member of the Red Men by reason of non-payment of dues, is not an acquiescence or waiver of the fact that he was not a member in good standing, the defendant not having notice of such fact, and the widow of such person cannot claim death benefits from defendant. Nor is failure to tender back such payments to the widow a waiver, for the tender would be to the administrator.

This was an action in the court below to recover \$228 death benefits claimed by the plaintiff to be due to her from the defendant on the death of her husband, who was a member of the order. It appeared that the plaintiff's husband had become in arrears to the order eight months prior to his death, but that the secretary of the order, whose duty it was to collect the assessments upon the death of members, had collected from the plaintiff's husband three or four assessments after he had become in arrears and thereby ceased to be a member. The plaintiff claimed that the collection of these assessments was a waiver of that provision of the consti-

tution which provided that persons who failed to pay their dues failed to be members. Upon the close of the plaintiff's testimony, the defendant moved that the court direct the jury upon the evidence introduced to return a verdict for the defendant, which was done, and plaintiff excepted.

JOHNSTON, J.

It is clear from the testimony that the defense set up by the defendant was sustained by the plaintiff's testimony, to-wit: That by the constitution and by-laws of defendant, if a member of the Improved Order of Red Men, who alone could become a member of the defendant, should fail to pay his dues to his society or tribe, he from that time ceased to be a member of defendant, and his widow did not become entitled to the benefits of defendant, for the reason that at his decease he was not a member in good standing thereof; this the secretary of defendant testified when called by plaintiff. It further appeared that when these assessments were levied or assessed against Springmeier after he ceased to be a member, and paid by him, the officers of the defendant who collected the same from him were, at the time, wholly ignorant of the fact that he had ceased to be a member of his tribe by reason of non-payment of dues. The society known as the Improved Order of Red Men and the defendant are separate and distinct organizations. They have different officers. To constitute waiver, it should, at least, appear that the officers of defendant knew or had notice of the fact that Springmeier had ceased to be a member of his tribe when they received his subsequent assessments. A person cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence, unless he is fully appraised as to his rights, and all the material facts and circumstances of the particular case. A recognition, resulting from ignorance of a material fact, amounts to nothing. It was claimed in argument, that because the defendant had not refunded the assessments, Springmeier, after ceasing to be a member of his tribe, had paid, it should be held liable. The bill of exceptions does not disclose that the defendant either did or did not tender to pay the money back. It could only have been paid to the administrator, not to plaintiff. For ought the record shows it may have been paid or tendered to the administrator.

Hence, there being no further evidence but this, as matter of law, the plaintiff was not entitled to recover thereon. There was nothing for the jury to consider, and, in our opinion, the court did not err in directing a verdict for the defendant, and in thereafter rendering judgment thereon.

Sayler & Sayler, for plaintiff in error.

Wulsin & Worthington, for defendant in error.

APPEALS.

517

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†A. J. PRUDEN v. HARRIET M. SEWELL et al.

An appeal brings up the whole case as to the appellant, although his interests are separable. Section 5232, Rev. Stat., only applies where there are several defendants and only one appeals. Therefore, where a receiver to collect rents

†This case was dismissed by the supreme court commission, June 17, 1884, with the following entry: "There is no bill of exceptions in the record, and without one there seems no ground to disturb the judgment below."

of defendant's property was appointed in an action to set aside conveyances to defendant, and the petition was dismissed as to part of the property and sustained as to the rest, the defendant, having appealed from the judgment, cannot have a motion to set aside the receiver as to the property in which defendant's title was sustained by the judgment appealed from.

AVERY, J.

This was an action to subject real estate to the payment of a judgment obtained by the plaintiff against the late John W. Sewell. The ground of the action was that the real estate had been fraudulently conveyed by Sewell to his wife. The decree in the court below was in favor of the plaintiff as to some of the lots, and dismissing the petition as to the others. To that decree an appeal was taken by the defendant. The court below having appointed a receiver to collect the rents, it was claimed that the defendant was entitled to an order discharging the receiver as to those lots to which the petition was dismissed. The case came up on a motion for that purpose.

Judge Avery announced the opinion of this court, holding that this would be to divide the judgment. Where the interests of several parties are distinct and separate, one may appeal without bringing up the case as to the rest, section 5232, Rev. Stat. But where the interests of the same party are differently affected by the judgment, there is no warrant for separating that part in favor of the party, from that part against him, in order to allow an appeal from the unfavorable part without at the same time bringing up the other.

Motion overruled.

Cooper, for motion.

Lawrence Maxwell, contra.

523

[Superior Court of Cincinnati, July Term, 1880.]

SINGER MANUFACTURING CO. v. A. J. BRILL.

For opinion see 6 Dec. R., 958 (s. c. 9 Am. Law Rec., 48). It was reversed by the supreme court. See opinion, 41 O. S., 127.

531

COUNTY SURVEYOR—BOUNDARY—EVIDENCE.

[Hamilton District Court, 1880.]

†VILLAGE OF CARTHAGE v. JAMES N. CALDWELL.

Where a survey to fix a line is run by agreement, the surveyor is common agent of both parties, and the plat made by such surveyor of such survey on which he marks a corner agreed on as "agreed corner," is a written memorial not only of the survey but of the agreement, and is the best evidence in the absence of other written evidence of the location of such corner, and cannot be disputed by oral testimony any more than could any other writing of the parties.

ERROR to the Court of Common Pleas.

AVERY, J.

The village of Carthage, in improving the North Bend road within the limits of the village, cut down a hedge planted by the plaintiff below on the north side of the road, and appropriated a strip fifteen feet in width claimed by him. The judgment of the court of common pleas was for damages.

†This judgment was reversed by the supreme court commission. See opinion, 40 O. S., 453.

There was no question as to the width of the road. It was an old road and was resurveyed by the county commissioners in 1842. At that time the fixed width of county roads was sixty feet. But as showed by the plat of resurvey, it began at the east end of Fifth street, in Carthage, on the line between Millcreek and Springfield townships, and the question was as to that line.

At this point the line ran between section 12 of Millcreek and section 7 of Springfield. In 1810, Thomas Henderson, county surveyor, made a plat and survey of section 12. The plat marks the northeast corner, 82.25 chains, that is, 1 mile and 9 poles, north of the southeast corner, and calls it the "agreed section corner." By Henderson's statement indorsed upon the plat in 1838, it would appear that he did not find the northeast corner by the calls, but ran from the southeast corner of 12 to the northeast corner of 7, including some surplus land, and took a point equally intermediate between the two, and then it being found this would interfere with Ludlow's improvements, a break was made in the line by agreement of the parties.

The plat shows a break in the north line of the section running to what is marked as the "agreed section corner;" in other words, the line from there to the northeast corner of the section jogs down 1.34 chains at the northeast corner of the forfeiture. Ludlow owned section 12, so that any break in the line to protect his improvements must necessarily have been to the north. This could, of course, make the agreed corner north of the point equally intermediate between the northeast corner of 7 and the southeast corner of 12. It could be the corner made by the jog.

Nevertheless, it might be said the intermediate point may have been taken by the county commissioners as fixing the line. But, comparing it with the road as traveled, this would have made the established road too far south. The presumption is that the travel was somewhere within the limits of the established roadway, and since the evidence is that the entire distance between the southeast corner of 12 and the northeast corner of 7 was 2 miles and 9 poles, the intermediate point would fall $4\frac{1}{2}$ poles short of the agreed corner; so far south of the actual travel shown on the ground, that taking it as fixing the starting point in the re-survey, the travel would be entirely without the roadway. Besides, the parties concede that the starting point was the agreed corner, differing only by twenty-four links, or about sixteen feet, as to its location.

"The line by which the road was improved was run by Jonte, a surveyor employed by the village in 1874. The line claimed by the plaintiff was run for him in 1868, by Gilbert, the county surveyor. Jonte started from a point 1 mile and 9 poles north of the southeast corner of the section. Gilbert took his starting point 24 links farther south. Both ran through Dill's corner, but Gilbert took that point 15 links farther south than Jonte. Dill's corner is marked upon the plat of the re-survey of the road made by the county commissioners, as the end of the first course. It was the northeast corner of a tract conveyed by Ludlow to Dill, July 4, 1810, and was described by the deed as 1.34 chains south of what was called the northwest corner of the forfeiture. Jonte found a stone at the point he took, being the same he had found in a previous survey in that vicinity in 1863 or 1864. Gilbert also found a monument stone at the same point, which he says about fit all the other stones in the survey. Why he took a point fifteen links farther south, where there was no stone at all, except the one he planted, is not satisfactorily explained unless it was because he took his starting point farther south.

The question, then, is as to the starting point. Jonte measured 1 mile and 9 poles from the southeast corner of the section. Gilbert measured to a dry well 24 links short of 1 mile, and took his starting point 9 poles north of that. The dry well was not called for by Henderson's plat. The only reference to it was in an endorsement by William Wilson, upon a deed from Ludlow to James Caldwell, an uncle of plaintiff, and from whom he derived title, made in 1832. The deed was of the surplus land between sections 7 and 12; and after the indorsement was made, Ludlow acknowledged it again, referring to the indorsement, and expressing himself satisfied. James Caldwell owned the south part of section 7; William Wilson, by conveyance from Ludlow in 1810, owned the most of section 12. The indorsement was to the effect that he was present at a mutual agreement in 1810, between Ludlow and the Caldwells when the dry well at Carthage was found to be the corner of two sections, and some surplus land, and the agreement was that a line should be run from a point 9 poles north of the dry well, and that Ludlow should own all south of this line, and the Caldwells all north.

Evidently this was the same agreement to which Henderson refers. His survey was to find the corners for Ludlow and Wilson. Ludlow was about to convey to Wilson. Wilson and Samuel Caldwell were both present. Ludlow was to hold the whole of the surplus north of the forfeit, and the remainder lying west

from the forfeiture was to be purchased and paid for by Caldwell. In this respect there is an apparent difference, for Wilson says the Caldwells were to have all north. But Henderson's survey was the only one. Wilson took his conveyance according to it, June 15, 1810. Ludlow also conveyed to Samuel Caldwell, June 18, 1810; and the deed from Symmes to Ludlow of the surplus is dated June 25, 1810. This latter deed refers to the surplus as having been found by accurate survey of Thomas Henderson, county surveyor; and in Samuel Caldwell's deed to Andrew Smalley, Aug. 16, 1833, of the tract conveyed to him by Ludlow, one of the corners is described as the northwest corner, according to survey and plat made by Thomas Henderson, surveyor of Hamilton county, on the 16th of June, 1810.

The evidence, therefore, leaves no doubt upon the point, and the agreement being the same, the only question was where it placed the disputed corner. Of course, the agreement of parties could not change section lines, but no other line was shown, and the subject of inquiry was the line adopted in the resurvey of the road, and not the actual section line.

Now, Henderson's plat was a written memorial, not merely of the survey itself, but of the agreement. The northwest corner, as shown by the plat, is called the "agreed corner," and the interpretation must be the same as if it had been written out in words that the parties had agreed that the corner should be placed there. The rule is elementary that written evidence of an agreement cannot be disputed by oral testimony. This requires that the writing should be by the party himself, or by his authority. But authority to make the plat followed from authority to make the survey, and when the lines were run by agreement, the surveyor became a common agent. Henderson's plat, therefore, was the best evidence of the corner agreed upon. The distance as noticed from the southeast corner of the section was 1 mile and 9 poles, and there were no monuments to control the distance. There may have been a dry well on the ground, but it was not on the plat, and to interpolate it was no more admissible than oral interpolation in any other instrument of writing.

The judgment in favor of the plaintiff then was not warranted. As to the weight of the evidence, it left no question that the agreement evidenced by the plat and that spoken of by Wilson were the same. This being so, the plat controlled.

Judgment reversed, and cause remanded for new trial.

Headly, Johnson & Colston, for plaintiff in error.

Lincoln, Stephens & Slattery, for defendant in error.

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INJUNCTION—GOOD WILL.

[Cuyahoga Common Pleas, May Term, 1880.]

BACKUS OIL CO. et al. v. BACKUS OIL AND CAR GREASE CO. et al.

Where a person has, by the expenditure of money or labor, built up a business under a trade name, another person will be enjoined from giving the same name, though it be his own name, to a corporation so in combination with other words not incident to it, as to lead persons to believe that the business is identical with that of the person who has built up a business on the name and words combined, and the fact of having been incorporated by such name by the state is not a defense.

BARBER, J.

There is but little controversy as to the fact in this case. The plaintiff, the Backus Oil Co., is a corporation. Its stock is all owned by the plaintiffs, Peter S. Jennings, Ambrose M. McGregor and George H. Vilas. They purchased said stock from the then owners some time in November, 1878, among whom were the defendants, W. B. Parish and H. M. Backus; they also purchased the good will of the business then carried on by the corporation. Since that time they have continued the business, which is that of manufacturing and selling lubricating and illuminating oils in the name of the corporation. Their trade has become valuable and extended, and their oils have acquired a valuable reputation as being manufactured by them. No other person is interested, so far as the proof shows, in their business.

The court finds from the evidence that the defendants, Parish and Backus immediately after selling out their interest in the Backus Oil Co., went to Cincinnati and commenced and carried on the same identical business under the name of "The Backus Oil and Car Grease Co.," as a co-partnership until about February 2d, 1880, and since that time and until the commencement of the suit the said H. M. Backus under the name of and as trustee for the Backus Oil and Car Grease Co.

That about that time the defendants, H. M. Backus, George W. McKinney, T. H. Lawson, Charles Porter and A. C. Caskey, as incorporators, procured a charter under the name of "The Backus Oil and Car Grease Co.;" a sufficient amount of their stock was subscribed, and they were about to complete their organization by electing officers, with intent to continue said business under the charter they obtained, when they were estopped by the injunction of this court.

There is no evidence that defendant, Parish, has any connection with, or is at all interested in, the new corporation. The petition must therefore be dismissed as to him.

The court finds from the evidence that confusion has arisen in the correspondence of the two companies, and is likely to arise from the similarity of the names, and that persons are liable to deal with one supposing that they are dealing with the other, although by persons who are careful, and read the names and places of business carefully, the distinction can easily be made, and careful persons need not be misled into buying the goods of one firm supposing them to be the goods of another.

The name "Backus" in the "Backus Oil Co.," was given to it by F. M. Backus, one of its incorporators, and the name Backus or the Backus Oil and Car Grease Co., was given to it by the defendant, H. M. Backus, he claiming the right to do so as if in his own name.

The question for the court is whether under these circumstances, the rights of the plaintiff with respect to their trade name have been and are threatened to be interfered with in such manner and to such an extent as to require a court of equity to interfere by injunction.

The doctrine on this subject is not new, and although we found few allusions to it in the courts of Ohio, yet in England and in many of the states, the cases have been frequent, and the doctrine may be regarded as well settled.

The following cases have been cited and examined: 37 Conn., 278; 1 Dady, 609; 7 Beavan, 84; 61 N. Y., 226; 39 Conn., 450; 3 H. of L., ap. Cases, 376; 51 N. Y., 189; 122 Mass., 139, 152-53; N. S., 929; 4 K. & J., 747; 3. 338; 62 N. Y., 69; 66 N. Y., 69; Rice et al. v. Buckland et al. Sandusky county district court.

There is no property in a trade mark or a trade name, but a person may acquire such a right to it in respect to it. The principle upon which relief may be granted is that the defendant shall not be permitted, by the adoption of a name or trade mark, to sell his own goods as those of the plaintiff, thus committing a fraud on the public, and injuring the plaintiff by intercepting and drawing away from his custom.

Wherever it appears that the plaintiff has adopted a trade name and has founded his business on that name, and by the expenditure of labor and money extended his business, and acquired a reputation such that the public will be led to understand that goods sold under that name are goods of his manufacture, the law will not permit another to adopt that trade name, or one so nearly like it and containing a material part of it, that it

would be calculated to mislead unwary dealers to suppose they were dealing with the other party.

It is entirely immaterial whether this be done purposely and fraudulently or ignorantly and innocently, if continued after being notified of the fact and the injury a court of equity will interfere.

A person may always use his own name in his own business even though it interferes with the business of another who has the same name, but he cannot so combine it with other words not incident to it as to lead other persons to believe that his business is identical with that of another who has built up a business upon the name and words combined.

The principal business of the Backus Oil Co. is that of manufacturing lubricating oils, or in plainer language car and axle grease. The business of the defendant corporation is the same thing, only they call it car grease; now they take the name of the plaintiff corporation and add to it the words "Car Grease" which is simply an indication of the business carried on by the plaintiff.

The fact is proved by the evidence that persons have been deceived by the similarity of the names, and the court can see no reason why even careful persons might not be misled in the same way. In the case of the *Singer Sewing Machine Co. v. Wilson* H. or L. App. Cases, 376 the Vice Chancellor in his opinion says: "It must be borne in mind we have to consider not merely the case of experts in the history and peculiarities of sewing machines, but the case of common workmen, and workmen have few and limited ideas and a very imperfect knowledge upon the subject of such machines."

"In the present case," he continues, "the question must be: are the advertisements of the defendant, having regard to the evidence in the case, calculated to mislead an unwary purchaser of machines?"

I think it clear in this case that the similarity of the names is calculated in the ordinary course of business to lead those persons who have been customers of the plaintiff's corporation to deal with the defendant corporation supposing they were dealing with the plaintiff.

I do not think that the fact that it is his own name that he has given to the corporation helps the matter any. He may use his own name in his own business, but he has no right to give it to a corporation or to any body else to use to the injury of another.

And the fact that they have procured a charter from the state is no defense.

It is argued by the defendant that having procured a charter they can only be interfered with by a quo warranto in the name of the state. The case of *Holmes, Booth & Hayden v. The Holmes, Booth & Atwood Manufacturing Co.*, 37 Conn., 278, and *Newby v. the O. C. R. R. Co.*, 1 Dedy, 609, are analogous cases, and in the latter case this question was directly passed upon by the court, and the doctrine sustained that a court of equity may enjoin a corporation fully organized.

The petition of the plaintiff must be granted and perpetual injunction allowed as prayed for as to all the defendants except Parish, and as to him the petition is dismissed.

Decree—At this term, to-wit, on the 26th day of July, 1880, this cause came on to be heard upon the petition of the plaintiff, the answer of the Backus Oil and Car Grease Co., Henry M. Backus, George W. Kinney, T. H. Lamson, Charles Porter, Alexander C. Caskey, and W. B. Parish; the exhibits and testimony offered in evidence in the case.

On consideration of which the court finds that the statements and allegations in said petition contained as to said W. B. Parish are not true, and the petition as to him is dismissed at the costs of the plaintiff.

The court further finds that the allegations and statements in said petition contained are true as to said Backus Oil Co. and Car Grease Co., Henry M. Backus, George W. Kinney, T. H. Lamson, Charles Porter and Alexander C. Caskey.

It is therefore ordered that the said Henry M. Backus be and he is hereby perpetually enjoined from using as a name under which to transact business the name of "Backus Oil Co." and the name "Backus," in the name, title and style of said form of "The Backus Oil and Car Grease Manufacturing Co.," or any words or title so expressed as to be an imitation of the corporate name of the plaintiff.

It is further ordered and adjudged that the said H. M. Backus, George W. Kinney, T. H. Lamson, Charles Porter, Alexander C. Caskey and the said "Backus Oil and Car Grease Co.," he, and each of them are hereby perpetually enjoined from issuing as a name, title or style for a corporation for manufacturing or selling oil, the name "Backus Oil and Car Grease Co.," or the words "Backus," or any other words or title in a corporate name for the purpose aforesaid, so expressed as to be in imitation of the corporate name of the plaintiff.

It is further ordered that said defendants, H. M. Backus, George W. Kinney, T. H. Lamson, Charles Porter, Alexander C. Caskey, and the Backus Oil and Car Grease Co., within thirty days from the final adjournment of this court at this term, pay the costs of this proceeding, excepting those adjudged against the plaintiff, and in default that execution issue therefor.

OFFICE—STATUTES.

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[Hamilton District Court, 1880.]

STATE OF OHIO ex rel. DREW v. CHAS. F. HORNBERGER et al.

Where an act (77 O. L., 89, amending section 21, Rev. Stat.), provided that there should be no board of health in cities of the first grade of the first class and first grade of the second class, and devolved their duties on the police commissioners, but the legislature had previously extinguished the police commissioners in cities of the first grade of the first class: Held, the designation of the latter grade of cities in said first named act must be construed to be a clerical error, the evident intention being to abolish the board of health only where its duties could be performed by the police commissioners.

EVERY, J.

Among the general powers conferred upon cities and villages and for which council may provide by ordinance, is the power to establish a board of health. Section 1692, Rev. Stat.

The organization of the board and its general duties are prescribed from sections 2113 to 2148 inclusive; but in section 2141, as originally enacted, it was provided that, "in cities of the first and second grades of the first class, and of the first grade of the second class, there shall be no board of health, but the board of police commissioners shall perform the duties required of the board of health."

By an act of the last session of the legislature, passed February 27, 1880, the board of police commissioners in cities of the first grade of the first class, that is to say in Cincinnati, was abolished, and by the same act

section 2141 was amended by omitting the prohibition against boards of health in cities of that grade but continuing it, as originally enacted against boards of health in cities of the second grade of the first class, and of the first grade of the second class. 77 O. L., 53. Afterward, at the same session of the legislature, March 29, 1880, (77 O. L., 89), another act was passed, beginning thus:

"Be it enacted by the general assembly of the state of Ohio, that section 2141 of the Revised Statutes of Ohio be so amended as to read as follows: Section 2141. In cities of the first grade of the first class, and cities of the first grade of the second class there shall be no board of health."

If this had been all the meaning, it must at least have been free from dispute; but it went on: "In cities of the first grade of the first class and cities of the first grade of the second class there shall be no board of health, but the board of police commissioners shall exercise all the powers and perform all the duties required of the board of health and mayor in this chapter." Now, in cities of the first grade of the first class, the act already mentioned had abolished the board of police commissioners.

That it could have been intended in cities of that grade to leave the duties required of the board of health unperformed is not to be maintained. To say nothing of the obvious want of reason for distinguishing in that particular against the most important city of the state, the act expressly provides the duties shall be performed. Did it, therefore, in providing for performance by the board of police commissioners, repeal by implication the act abolishing that board? Repeal by implication is a question of intention, and it would be against reason to suppose that, in providing for the performance of duties required of boards of health, the same legislature intended to repeal the act vesting the police powers and duties in the mayor.

It is left then, to consider whether the words, with which the act begins, must be read as written, "In cities of the first grade of the first class * * * there shall be no board of health."

The only guide to what the legislature intend by a law is the language used; courts are not permitted to write laws. But language is the connection of words to express thought, and when it appears what was intended to be expressed, any words contrary to such apparent intention may be disregarded. Thus it is a maxim that a thing within the intention of the makers of a statute is as much within the statute as if it was within the letter; and a thing within the letter is not within the statute unless it be within the intention of the makers. Bacon's Abridgment, title Statutes, I. 5.

The intention is apparent that in cities contemplated by the act the duties required by the board of health shall be transferred to the board of police commissioners. How the act shall be construed to give every line effect is of less importance than that it shall not be so construed as to be contrary to what from the act itself appears to have been the intent. One provision must be construed by another, according as one or the other is the chief object to be obtained; and that there shall be no board of health is only in consequence of the other provision that the board of police commissioners shall perform the duties required of the board of health. There being no board of police commissioners in one of the

grades of cities named, there is a necessary inference of clerical mistake in the designation of that grade.

Courts have not infrequently been governed in the interpretation of statutes by the necessary inference derived from one part, of clerical mistake in another part. Thus where the right of appeal was given in equity cases, pending in a certain court on the first day of July, and there could be no cases pending there on that day, but could on the first Monday in July, the first day of July was held to be a clerical mistake, and that the act read as if written the first Monday in July. *Burch v. Newberry*, 10 N. Y., 374, 391.

A statute will be construed according to its obvious intention, although the collocation of the different branches of the provision is so arranged by mistake as to lead to a different conclusion. *Matthews v. Commonwealth*, 18 Gratt, 989. Words absolute of themselves and language the most broad and comprehensive may be qualified and restricted by reference to other parts of the same statute and to circumstances and facts existing at the time and to which they relate or are applied. *Smith v. People*, 49 N. Y., 337. The maxim, "*Falsa demonstratio non nocet cum de corpore constat*," is applied to statutes as well as to wills and deeds. *Lindsley v. Williams*, 20 N. J., Eq., 93.

Nor, construing the designation of cities of the first grade of the first class, in the beginning of the act, to have been inadvertently placed there, is the law left as it was by the first amendment of section 2141, and so the later amendment deprived of all object and effect. The first amendment provided that, in cities of the first grade of the first class, the funds in the city treasury, or due or to become due to the city for sanitary purposes, should be subject to the control of the council or of the board of health as council should prescribe; this latter amendment, that in any city of the second grade of the first class, in which the board of police commissioners, heretofore, had acted as a board of health, they should transfer the balance of any fund in their hands upon written demand therefor by the president of said last named board.

The argument is persuasive that the words, "any city of the second grade of the first class," in this branch of the act, belong of right to the beginning clause, and that the words, "cities of the first grade of the first class," in the beginning clause are there by mistake of collocation, and must change places, which would leave the object apparent, namely, that it was to place any balance in the hands of the police commissioners, subject to the demand of the president of the board of health.

But not launching out too far, the case requires us only to dispose of the question whether in cities of the first grade of the first class the intention was that there should be no board of health. From considerations, not outside the language, as in *Woodbury v. Berry*, 18 O. S., 456, but from the very provision itself, although in some appearance quite contrary to the letter, we are satisfied that such was not the intention, and we so hold. In other words, adopting the language of Judge Scott in *Medical College v. Ziegler*, 17 O. S., 52, 64, "To make the literal sense of the terms harmonize with each other and with what seems to be the purview and main purpose of the enactment is simply impossible. We may well be contented if in such a case we can arrive at a satisfactory conclusion as to

what was not intended, without assuming to determine with confidence what was the actual intention."

Accordingly the demurrer is sustained, and petition dismissed at costs of relator.

Kumler, Crossley and Ampt, for relator.

Tilden, Buchwalter & Campbell; Paxton & Warrington, Jordan, Jordan & Williams, for respondent.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

COLUMBIA AND NEW RICHMOND TURNPIKE CO. v. CINCINNATI
AND PORTSMOUTH R. R. CO.

Where a corporation having a right to condemn property has unlawfully and without condemnation taken possession of part of private property and damaged the value of the rest, the owner of such property may maintain ejectment or may have an action to compel condemnation, but can not have an action for damages as for condemnation and for consequent injury to the remainder, because payment of the damages awarded in such action would not vest the title in the corporation; therefore, the action being for trespass, a judgment for damages, and that on payment thereof title shall vest in the corporation, is erroneous.

ERROR to Common Pleas.

JOHNSTON, J.

This suit was instituted in the court of common pleas by the plaintiff, who owns the turnpike road running from Cincinnati to New Richmond, and a branch road leading into the main road at the point where the main road crosses the Little Miami, in Anderson township. The plaintiff averred that in 1876 the defendant commenced to construct a railroad; that between the intersection of the Salem branch and a point on the main road, known as the three-mile post, it began to encroach upon plaintiff's roadbed. The plaintiff's road at this point is constructed at the base of a very steep hill, composed for the most part of sand and gravel, and it averred that the defendant was attempting to construct its railroad further up the hill, causing the plaintiff's road and culverts under the same to become blockaded and filled up. The plaintiff also averred that the defendant threatened to cross the Salem branch at three different points not at grade. The plaintiff claimed it would be irreparably injured, and asked damages for the injury done the main road in the sum of \$5,000, and for an injunction against the crossing of the Salem branch. A temporary restraining order was granted in 1876. Amended and supplemental petitions were filed. In January, 1879, the case was tried to a jury, who rendered a verdict on the issues joined in the first cause of action for plaintiff, and assessed the damages at \$500, and, on the second cause of action, involving the damages to the Salem branch, a verdict for \$85 was rendered. A motion was made by the railroad company at the same term for a new trial, but not disposed of till the following September, a subsequent term, when it was overruled. No exceptions were taken by the plaintiff, and the defendant failed to take a bill of exceptions. The judgment on the verdict decreed that the plaintiff should recover of the defendant \$585 with interest, and unless the defendant, within sixty days from the entry of the judgment, paid to the plaintiff that sum and costs,

an injunction was to issue perpetually enjoining the defendant, as prayed for in the plaintiff's pleadings; and the court further ordered that upon full payment of said sum within the time specified, the Railroad Company should have full right to operate its railroad as then located along the turnpike and across the Salem branch as fully as it might have done had the defendant regularly proceeded in condemnation to condemn the property for its use. To this order the plaintiff excepted, and the court overruled the motion for a perpetual injunction against the defendant, and the plaintiff to that excepted. The petition in error was filed by the plaintiff to reverse these orders.

The court remarked that it had been unable to ascertain what the evidence was on the trial of the case because it had not been brought before them on a bill of exceptions, such bill not having been perfected at the trial term or thirty days thereafter. The court was left therefore simply to examine the case as it appeared upon the pleadings for the purpose of determining whether the court below was authorized to refuse an injunction upon the verdict of the jury restraining the defendant from operating its road over any portion of the plaintiff's roadbed.

The original, amended and supplemental petitions taken together were simply a petition asking for damages for trespass committed by the defendant against the plaintiff in encroaching upon its roadbed, and for an injunction. It was not an action instituted for the purpose of determining the value of the property of the plaintiff claimed to have been appropriated by the railroad company, and for the damages ensuing to the rest of it. A corporation having a right to condemn property can not unlawfully and without authority take possession of the property of another without first having gone into court and condemned that right by proceedings therein, and a property owner has not the right to proceed in an action to recover damages as for a condemnation, and damages consequent upon the unlawful taking of the property. Such an action can not be maintained, for the reason that when the damages should come to be paid the title of the owner would not therefore become vested in the corporation taking the property. 35 O. S. The owner might either, if not estopped, proceed by ejectment, and recover the possession of the property, or, by condemnation to compel the railroad company to condemn the property. The petition in this case was simply to recover damages for trespass. Such being the character of the pleadings, the court had a right to presume in the absence of any evidence that the evidence was not any broader than the pleadings, and yet, upon the verdict having been rendered in favor of the plaintiff, the court below proceeded to order that, on the payment of damages, the railroad company should become vested with the title to that portion of the turnpike embraced within the limits of its track, and the plaintiff enjoined from disturbing it any further on account thereof.

In that respect the court erred. This court would not disturb the first part of the verdict—that for \$500—the damages accruing to the plaintiff by reason of the trespass, but the case must go back to the court below for the purpose of hearing an application for an injunction. Upon that hearing it may be determined possibly what was the character of the damages submitted to the jury—whether simply past, or past and prospective. As to the second branch of the verdict, it must stand also, but without any provision for a rehearing, for the reason that when the motion was decided no exception was taken to the ruling, and the court must presume

that the amount awarded to the plaintiff covered all damages, present and prospective, to it. The pleadings and former order of the court are broad enough to embrace such damages.

A. A. Ferris, for plaintiff.

Mallon & Coffey, for defendant.

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TENANTS IN COMMON—LIMITATIONS.

[Hamilton District Court, 1880.]

JOHN G. ELSENHEIMER v. JOBST F. A. SIECK et al.

Possession of one tenant in common is not deemed adverse to his co-tenant unless clearly adverse, and the co-tenant becomes advised of it actually or constructively. Where the co-tenant lives in a foreign country, merely completing a house left unfinished by the common ancestor, is not proof of adverse holding.

ERROR.

JOHNSTON, J.

Suit was instituted by the defendants in 1871, to recover possession of an undivided one-half of a lot in George Jones' subdivision in this city, situated on Pleasant street. They alleged that they were the owners of said undivided one-half, and that Elsenheimer kept them out of the possession. The court below found that they were such owners, having become seized of the same by virtue of their heirship to Herman Heitman, brother of their grandfather. This petition was prosecuted to reverse that judgment and finding. The defense, though ostensibly made by Elsenheimer, was made by J. W. Banning, his warrantor.

It appeared that Herman Sieck through whom plaintiff also claimed title, purchased this property on coming here from Germany in 1843; that his brother Henry came with him; that shortly after the purchase of the lot they settled in Indiana never thereafter residing in this state. The title was in the name of Herman. When a building had been partially erected thereon he died. Henry took possession of the property, and completed the building and collected the rents. In 1863 Henry becoming indebted to Shaw, Barber & Co. of this city the property was attached as his and sold subsequently at judicial sale. In 1869 Banning bought the property from Charles G. Shaw, the purchaser at the judicial sale. Banning sold to plaintiff. The defendant in error instituted this suit in 1871, claiming that their mother was the sole heir of Frederick Heitman, brother of Henry and Herman, and that Herman died without issue. The plaintiff in error denied that the defendants were the lawful heirs of Frederick, he having died without issue before they left Germany, and claimed that the statute of limitations ran against their claim for the reason that Henry Heitman had been in peaceful and undisturbed possession ever since the death of Herman, in 1845. On the other hand, it was claimed that on the death of Herman, Henry and the defendant's mother became tenants in common of this property; that the possession and charge taken of it by Henry, who was in this country, was not adverse to the defendant's mother, who lived in Germany; that they were minors at the time of their mother's death in 1864, and that up to her death she was a married woman, and for these reasons the statute of limitations did not operate as a bar.

Johnston, J. announced the opinion of this court. He found that the defendants had conclusively established their heirship to Frederick Heitman. As to the defense of the plaintiff of the statute of limitations, it

was well settled that the possession of one tenant in common was the possession of the other. It was possible for one tenant in common to acquire by adverse possession the title of the other, but it must clearly appear that the holding was adverse, open, notorious and continuous, and such that the cotenant against whom it is claimed became advised of it either actually or constructively.

When the cotenancy was cast upon the defendant's mother she was a married woman, residing in Germany. Henry being in this country, he would naturally be expected to take charge of the property, and, therefore, the fact that he completed the house was not inconsistent with his cotenancy. During the time of his holding possession he never by any overt act laid claim to the entire lot. It was not until 1863, when the property was attached, that it was claimed as the property entirely of Henry. It was then that the statute began to run against his cotenant—for the whole lot was seized and sought to be sold by his creditors, and the purchaser took possession under the judicial sale of the whole lot. This suit was instituted really only eight years after the statute had begun to run, and hence defendants in error commenced their action within the time.

In the absence of any evidence that Henry was holding possession of this lot adversely to his cotenants, the judgment of the court below in favor of the defendant in error must be affirmed.

Hoadly, Johnson & Colston, for plaintiff.

Forest & Mayer, for defendant.

BILLS AND NOTES.

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[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

HENRY D. COCHRAN, Trustee, v. PETER DUFFY et al.

The maker of a note may antedate it, and in such case the note is due so many days from date, and may be sued on then, without waiting the same length of time from its execution.

APPEAL from Common Pleas.

In this case the plaintiff brought an action in the common pleas court to enjoin the collection of a judgment rendered in Morgan county in favor of Duffy and against Henry N. Free, under which a levy had been made on Free's stock of goods. Plaintiff claimed that the judgment note given by Free to Duffy, being ante-dated, was not in fact due at the time of the rendition of the judgment in Morgan county, and that the judgment was therefore void. The goods were sold by plaintiff pending the litigation, and by agreement of the parties the money was held by him to abide the event of this suit. The court held the maker of a promissory note has a right to ante-date it, and having done so, and being payable one day after date, the note becomes due one day after the date it bears without regard to the date of its execution, and rendered judgment in favor of the defendant for the amount claimed, and ordered the plaintiff to pay the same out of the funds in his hands, arising from a sale of the property on which he had a levy.

There were three other cases of the same kind in which John H.

Marlow, Samuel Hadden and Turner E. Morehead were defendants, and the same judgment was rendered in each case.

Cochran & Retallic and Scott & Donaldson, for plaintiffs.

Ferguson & Noon and Butler & Huffman and L. A. Tussing, for defendants.

CHATTEL MORTGAGE.

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

HENRY D. COCHRAN, Trustee, v. THOMAS BREEN et al.

In an action on a chattel mortgage, an answer that neither the mortgagor or mortgagee had in view, or any idea of the number or kind of goods intended to be conveyed, states a defense.

This was a petition in error to reverse the judgment of the court of common pleas. In this case Henry N. Free executed a chattel mortgage on certain store goods to the defendants to secure them as his sureties on a certain promissory note. The answer in the common pleas court stated that at the time the mortgage was executed neither Free nor Breen had in view or any idea of the number or kind of goods intended to be conveyed. A demurrer was interposed to this answer, which was sustained in the common pleas court, and to reverse this judgment this petition in error was filed.

Judgment reversed and cause remanded to court of common pleas for further proceedings.

Cochran & Retallic, for plaintiff.

Ferguson & Noon, for defendants.

CONTRACT TO ISSUE A POLICY.

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

†CORNELIA Z. KRUMM v. JEFFERSON FIRE INS. CO.

Receiving an application by a local agent, who forwarded it to another agent, who did not act upon it, as he was absent from home, does not constitute a contract to issue a policy.

APPEAL from the Court of Common Pleas.

This was an action to enforce the specific performance of a contract of insurance and to recover the value of the property. In this case the testimony showed that the plaintiff was the owner of certain household goods; that on the 1st of December, 1876, she filled out an application for a policy of insurance on them and delivered it to Timothy Thompson, who forwarded it to Towson, an agent of the company at Lancaster, Ohio. Towson was not at home and the application was not received or acted upon by him. Towson testified that he would not issue a policy on the application, as it would have been in violation of the rules of the company to do so, they having at that time a policy of \$1,000 on goods in the same building. The goods were destroyed by an accidental fire on December 5, 1876. The court held that there was no assent on the part of the company, and that an application not acted upon by the company could not constitute a contract.

Judgment for defendant.

Butler & Huffman, for plaintiff.

Ferguson & Noon, for defendant.

†This judgment was reversed by the supreme court. See opinion, 40 O. S., 225.

PETITION IN ERROR.

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[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

†VASHTI THACKER v. SARAH C. SHEERAN.

Petition in error to reverse a judgment of the common pleas cannot be considered where there is no journal entry showing the allowance of a bill of exceptions.

This was a petition in error to reverse the judgment of the common pleas court, confirming the verdict of a jury, finding that plaintiff in error kept defendant in error out of possession of certain real estate. The court held that as there was no journal entry showing the allowance of a bill of exceptions it could not be looked into, and the description of the premises in the verdict was sufficient, and affirmed the judgment in favor of the defendant.

Jackson & Conly, for plaintiff; W. E. Fink and Ferguson & Noon, for defendant.

JUDGMENT—HUSBAND AND WIFE.

647

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

TIMOTHY W. O'BRIEN v. JOHN McDONALD.

A joint judgment against husband and wife, and an order to sell the separate properties of both as one, void as to her for coverture, may stand as to him, because the error is not prejudicial.

This was a petition in error to reverse the judgment of the common pleas court. In that court a joint judgment was rendered against O'Brien and his wife, on a mechanic's lien, and an order issued to sell the separate properties of O'Brien and his wife as one property. Plaintiff claimed that the judgment against her was void, she being a married woman, and it being a joint judgment was also void as to him. The court, in passing upon the question, said that although satisfied there was error in the record, a majority of the court being unable to see wherein O'Brien was prejudiced by it, affirmed the judgment.

Ferguson & Noon, Cochran & Retallic and Chas. Hoy, for plaintiff.

Moses M. Granger and Butler & Huffman, for defendant.

AGENT—LIMITATIONS.

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[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

DAVID D. BRUSH, Adm'r, v. BRIDGET HERLIHY.

The statute of limitations does not begin to run against an agent who receives money to invest, at the time the money is given him, for so long as he obeyed the principal's instructions there was no action against him.

This was a petition in error to reverse the judgment of the common pleas court. In this case the defendant brought an action to recover a

†This decision was affirmed by the supreme court commission, without report, November 6, 1883.

judgment against Bush as administrator of John Herlihy, deceased, for the sum of \$100 and interest from March, 1872, claiming that it was given to Herlihy in his lifetime to loan for her. The defendant claimed that it was barred by statute, more than six years having elapsed from the time it was given before it was presented to the administrator. The common pleas court rendered judgment in her favor, and to reverse this judgment this petition was filed. The court held that Herlihy being a mere agent, no cause of action rose against him so long as he followed his principal's instructions, and therefore the statute of limitations did not apply.

Judgment of common pleas court affirmed with penalty.

Cochran & Retallic, for plaintiff.

Ferguson & Noon, for defendant.

COURTS—ADMINISTRATORS.

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

LYMAN J. JACKSON, Adm'r of JOHN J. JACKSON, v. JOSEPH P. JACKSON et al.

Courts have no jurisdiction to instruct an administrant as whether he shall reject or allow a claim, or as to whether a lease is valid.

The plaintiff filed his petition in this case setting out that the deceased in his lifetime executed his note for \$1,000 to his daughter, Caroline Jackson and Ann Grate, payable at his death, and also executed a lease on his farm to said parties for the term of five years, commencing at his death. Plaintiff asked the court to instruct him as to whether he should allow or reject said note, and as to whether said lease was valid. The court held it had no jurisdiction to instruct the plaintiff as to what he should do, and dismissed the action.

Lyman J. Jackson, for plaintiff.

Allen Miller and Butler & Huffman, for defendant.

JUDGMENT.

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

P. C. & St. L. R. R. CO. v. JOSEPH W. WRIGHT.

Where there is any evidence to sustain the plaintiff's claim, a justice's judgment will not be reversed as against the evidence.

This was a petition in error to reverse the judgment of the common pleas court, affirming a judgment of a justice of the peace. The original

action was brought before William G. Buckner, justice of the peace, of Pike township, to recover the value of a horse alleged to have been killed through the negligence of the company's agents. The company moved the court to dismiss the action for want of evidence, the motion was overruled and exceptions taken. The common pleas court affirmed the judgment of the justice, and to reverse this judgment of affirmance the present action was instituted. The district court held that there was evidence tending to prove the plaintiff's claim, and therefore affirmed the judgment.

John S. Brazee, for plaintiff.

Cochran and Retallic, and L. A. Tussing, for defendant.

MONEY PAID BY MISTAKE.

647

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

THOMAS SELBY v. JOHN N. BUMCRATS.

Action to recover money overpaid on a judgment, by mistake, and for the surrender of a promissory note executed under a mistake of facts.

This was a petition in error to reverse the judgment of the common pleas. The original action was brought in the common pleas to recover money overpaid by mistake, upon a certain judgment, and for the surrendering up of a promissory note executed under a mistake of facts. The defendant, Selby, in the court below, was ordered to surrender up said note, or that the decree operate as such surrender, and the cancellation thereof, and, also, judgment was rendered for the amount of money claimed in the petition; to reverse said judgment and decree, this petition in error was filed, upon the ground that the common pleas erred in sustaining a motion to strike out a certain portion of the answer, and in sustaining a demurrer to the amended answer. "Judgment of the court below was affirmed with penalty.

Cochran and Retallic, for plaintiff in error.

L. A. Tussing and James E. Johnson, for defendant in error.

GUARDIAN AND WARD.

647

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

†HESTER A. POTTENGER v. MARTHA E. BAILEY.

Where a guardian sold his ward's real estate, and invested the money in lands in his own name, and they were afterwards allotted to his wife as alimony; after divorce from such guardian, the ward cannot charge the property with a lien for the money expended to purchase it.

Appeal from common pleas court. The testimony in this case showed that the plaintiff, when under age, inherited certain real estate in Randolph

†This judgment was affirmed by the supreme court commission, without report, March 4, 1884.

county, Indiana, from her mother's estate. This was sold by her father, Wm. A. Bailey, who was her guardian, and a part of the proceeds of the sale went into the purchase of a house in New Lexington. The deed was taken by Wm. A. Bailey in his own name. Afterwards Martha E. Bailey, the defendant in this action, who was Wm. A. Bailey's wife, procured a divorce from him, and the house in question was decreed to her as alimony. The object of the present action was to charge this property with a lien for the amount of plaintiff's money expended in its purchase. The court held that it could not be done, and rendered judgment for defendant.

Butler & Huffman and W. E. Fink, for plaintiff.

Jackson & Conly, for defendant.

ACTION FOR MONEY.

[Perry District Court, 1880.]

Freisner, Knowles and Bradbury, JJ.

†NOAH KARR v. PERRY D. VEACH.

In an action for money, and also to subject funds of the defendant in the hands of another, a judgment finding for the amount and ordering the third person to pay it over, will be reversed.

This was a petition in error to reverse the judgment of the common pleas. The original action was brought by Veach to recover a judgment against John P. Reid, and to subject certain funds in Karr's hands to its payment. The court of common pleas rendered judgment in his favor against Reid, and ordered Karr to pay the money to Veach. To reverse this order, this petition in error was filed. Judgment of the common pleas reversed.

Scott and Donaldson, for plaintiff.

Perry D. Veach, for defendant.

EXECUTION.

[Hamilton District Court.]

CITY OF CINCINNATI v. FROST, STEARNS & CO.

A building erected by the city of Cincinnati, and used for a long time as a fire engine house, but from which the engine company had been removed to another locality by the board of fire commissioners, was rented by them for the purposes of revenue to the fire department, but without any act of the city council authorizing it: *Held*, that the property did not, thereby, become subject to levy under a judgment against the city.

ERROR to the Common Pleas.

AVERY, J.

The error alleged is that the court of common pleas confirmed the sale upon execution of a certain lot and building belonging to the city of Cincinnati.

†This judgment was reversed by the supreme court. See opinion, 41 O. S., 179.

The lot and building had been occupied for many years, until 1876, as a fire engine house. In 1876, by authority of the board of fire commissioners of the city, the engine company was removed, and the building continued to be used merely as a place of storage for fire plugs and other like material, until September, 1879. It was then rented by the board of fire commissioners to a monthly tenant, who was occupying it as a beer saloon at the time of the levy.

In a former case determined by this court, the opinion was expressed that property of a municipal corporation, held for private purposes, might be subject to levy. *Cincinnati v. Cameron*, 6 Dec. R., 727; (s. c. 7 Am. Law Rec., 592.) The distinction contemplated was between the public or governmental character of a municipality, and its mere character, as a corporation, having capacity to acquire and hold property. *Darlington v. The Mayor*, 31 N. Y., 164, 193; *New Orleans v. Insurance Co.*, 23 L. A. Ann., 61; *Holliday v. Frisbie*, 15 Cal., 630. But see *Darling v. Mayor of Baltimore*, 7 Reporter, 500.

In the case mentioned, a lot was considered exempt that had been purchased for the erection of public buildings, under an act of legislature for the purpose. But as was said, whether property be devoted to public use by act of the constituted authorities of the city, or by act of law, the reason is the same. The functions to the discharge of which it is to be applied, protect it against seizure upon the same grounds of policy that protect all agencies of government.

In that view of the case, actual use would not be needed to exempt property from seizure. To seize it, because not in use, might hinder the discharge of the functions which, upon occasion arising, would require its use. That it is held to be used for a particular public purpose must, therefore, be sufficient reason for its protection.

The use to which public property is held may generally be determined by the use to which it is put, but not always. It may lie idle, awaiting in the exercise of governmental discretion the occasion for use; or may be used by the officers to whom it is entrusted in a way not authorized by the municipal body itself.

The present case illustrates this. The property was in actual use as a beer saloon, and had been let by the board of fire-commissioners for that purpose. But it was only as belonging to the fire-department of the city that the property was under control of the board of fire-commissioners. Letting the property for the purposes of revenue to the fire department, was a proper use, or was a misuse. If a proper use, it was an actual employment of the property in the discharge of governmental functions. *Wheeler v. Cincinnati*, 19 O. S., 19. If a misuse, the property still continued to be held, so far as the city itself was concerned, for the purposes for which it had been committed to the board of fire commissioners.

That the building had been erected as an engine house, and was left under control of the officers of the fire department, was sufficient evidence that it had been devoted to the use of that department by the constituted authorities of the city. There was no evidence of any corporate act withdrawing it from that use. The resolutions of council, looking toward the sale of the property, treated it as appropriated to the use of the fire department. The sale proposed, was with a view to purchasing a more convenient location for the engine house elsewhere. All that was resolved, was that the officers of the fire department should be consulted upon the matter. The act of the board of fire commissioners, in letting

the property, if not within the uses that the fire department was organized to subserve was without authority. The title was not in them, but only the management and control of the fire department.

Upon the evidence, therefore, the property was not held by the city for private purposes. The question was not one of the weight of evidence, but was matter of law arising upon facts that were admitted or not denied. The order of the court of common pleas confirming the sale is accordingly reversed, and said sale and the levy under which it was made are set aside.

Kumler, Crossly and Ampt, for plaintiff in error.

Wulsin and Worthington, for defendant in error.

GUARANTY.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†JOHN W. RUTHERFOORD & CO. v. HENRY BRACHMANN et al.

A guaranty to the contractor who is building a railroad of the payment of the monthly estimates, in accordance with the contract, does not bind the guarantors to pay the final estimate, where the contract clearly distinguishes the final estimate from the monthly estimates.

ERROR to the Superior Court of Cincinnati.

Rutherford & Co. were plaintiffs below. The error alleged is that the court directed a verdict for defendants. Action was on a guarantee. Rutherford & Co. had contracted to build twenty-eight miles of the Cincinnati and Portsmouth narrow gauge railroad from Columbia, in this county, to Bethel, in Clermont. Afterwards the contract was modified by a new one dated June 29, 1877, under which R. & Co. were to build only the first eleven miles, from Columbia to Mt. Carmel, including a track connection, and were to complete the work September 1. At the same time, by a separate paper to defendants, who were directors of the railroad, they guaranteed fulfillment of their contract, and defendants executed to them the guaranty sued on as follows:

"For and in consideration of one dollar, to us paid, and of the above guaranty, we, the undersigned, guarantors of the Cincinnati & Portsmouth R. R. Co., do hereby agree and pledge ourselves for the payment of monthly estimates in accordance with the contract entered into by and between John W. Rutherford & Co. and the Cincinnati & Portsmouth R. R. Co., this the 29th day of June, 1877, with the exception of the retained fifteen per cent. Witness our hands and seals, at Cincinnati, this 29th day of June, 1877."

Afterward agreement was made between R. & Co. and the company to extend time of completion to September 20, on condition guarantors would consent, and a paper was presented to the guarantors for their signatures and signed by all but one, who, however, agreed to it and promised to sign. The work was not completed until September 20. Action was for amount of final estimate, less payments already made and fifteen per cent. on the whole, being thus in effect a claim for the work of the last twenty days.

AVERY, J.

In support of the ruling two propositions were submitted. One that the action was for work not done in time unless under the agreement for extension, and that the agreement for extension made a new contract between the principal parties requiring, to bind the guarantors, that all should have consented in writing. The other, that the final estimate was not a monthly estimate within the meaning of the guaranty.

†This opinion was reversed by the supreme court commission. See opinion, 40 O. S., 604.

This latter proposition is rested upon a distinction drawn from the language of the original contract between the estimates required during the progress of the work, and the estimates upon its completion.

The guaranty was for payment of the monthly estimates in accordance with the contract of June, 1877. The contract was for the payment, monthly, as per estimates of the engineer. Payment monthly implied that the estimates were to be monthly, and since the original contract, which provided for monthly estimates, remained in force, except as modified, it is to be resorted to. By that contract, the engineer was to make an estimate on or about the first day of each month, during the progress of the work, of all that had been done the preceding month, eighty-five per centum of which was to be paid the contractor on or before the fifteenth of the month; and when all the work embraced in the contract was completed, a final estimate was to be made, and the balance appearing to be due paid to the contractors upon their giving a release under seal.

Thus, monthly estimates, as the term was used in the contract, were estimates made during the progress of the work; only eighty-five per centum of the amount was payable, and payment might be deferred until the fifteenth. Upon the other hand, the estimate when the work was completed was called the final estimate; it was payable in full, and no time was allowed.

There was a distinction, therefore, in the terms as they were used, but not merely that. The last work under the contract could not have been embraced in a monthly estimate, since all the work would then have been completed, and monthly estimates were only to be made during the progress of the work. It necessarily would be embraced in a final estimate which could not be, at the same time, to the extent the work last done, a monthly estimate, for the reason that, if a final estimate at all, the whole of it was immediately payable, whereas monthly estimates were allowed to the fifteenth day of the month.

The contract of June, however, was for the payment monthly, as per estimates of the engineer, the amount of such estimates on all the road, bridges etc., from Columbia to Mt. Carmel, until the same was ready for the rolling stock, less the fifteen per cent. retained; and from this it is argued that under the contract, at least, monthly estimates were to be made on all the work. The argument would be unanswerable, perhaps, had not the contract gone on to provide that, if the work stopped at Mt. Carmel, which was the contingency that actually happened, a final estimate should be made.

Again, it is argued that the guaranty was for payment of monthly estimates, in accordance with the contract, excepting the retained fifteen per cent., and that this exception would have been surplusage unless all the work was meant. But the monthly estimates of themselves included the fifteen per cent., and it was merely excluded in providing for payment; so that while "payment in accordance with the contract" might have been sufficiently expressive, the exception added was for greater certainty.

The distinction contemplated in the original contract appears accordingly to payment of monthly estimates. It did not cover the estimate for which suit was have been kept up. The guaranty itself was explicit in undertaking only for the brought. The estimate was in terms a final estimate, and not within the letter of the guaranty. Guarantors, like sureties, are permitted to stand upon the letter. *State v. Medary*, 17 O., 554, 565; *Lang v. Pike*, 27 O. S., 498; *Brandt on Suretyship*, section 579. But taking it upon the evidence that no other estimate would be furnished by the engineer of the company, as in effect an estimate for the work during the last month, it was still not a monthly estimate within the meaning of those words in the guaranty.

The conclusion to which we have come upon this point renders unnecessary any discussion of the other proposition advanced in support of the ruling of the superior court. The judgment is affirmed.

Saylor & Saylor, Hoadly, Johnston & Colston, for plaintiffs in error.

Wulsin & Worthington, Stallo & Kittredge, for defendant in error.

[Hamilton District Court, 1880.]

710

CINCINNATI ICE CO. v. JACOB PFAU et al., Assignees.

For opinion see 6 Dec. R., 969, (s. c. 9 Am. Law Rec., 306.)

This case was dismissed by the supreme court commission, for want of preparation, April 29, 1884.

712

Corcoran v. Building Association.

711

[Hamilton District Court, 1880.]

ELMA ORR v. ALFRED ORR et al.

For opinion, see 6 Dec. R., 968, (s. c. 9 Am. Law Rec., 304).

712

[Hamilton District Court, 1880.]

T. E. BLACKBURN v. HARRIET M. SEWELL.

For opinion see 6 Dec. R., 967, (s. c. 9 Am. Law Rec., 303.)

712

ERROR—JUDICIAL SALES.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

R. J. CORCORAN v. PACIFIC BUILDING ASSOCIATION No. 2.

1. An order of court, where a second mortgagee bought in the property at foreclosure sale, and paid in part of the purchase money, but failed to pay the rest; ordering a resale at his risk, is void. There is no power to make such order.
2. But if such purchaser made no motion, nor took exception to the partial payment made by him, to make up the deficiency, on resale to another person and its distribution to prior lienholders, he has no standing in court to bring a proceeding in error, for he is, as purchaser, not a party to the record.
3. In his character as second mortgagee he was a party to the record, but in that character he was not affected by such order.

ERROR to Court of Common Pleas.

Action below was for foreclosure of Building Association mortgage, and plaintiff in error, holding second mortgage, was made party. Upon the sale of the property it was struck off to him for \$2,250, and he paid in \$275; but, failing to pay the rest, the court ordered a re-sale at his risk, and a new order of sale issued. Under this order sale was made to another purchaser for \$1,850, and was confirmed. Error complained of is that the \$275 paid in by plaintiff in error, and which had been retained by the sheriff, was ordered to be distributed with the proceeds of sale and applied upon the Building Association's claim.

AVERY, J.

We have a statute providing that upon a purchaser failing to comply with the terms of a sale under execution or order, he may be proceeded against as for contempt. Rev. Stat., 5397. Apart from the statute he may be made liable, possibly, in an action by the sheriff for any loss upon re-sale, at least if notified that the re-sale was to be at his risk. Galpin v. Lamb, 29 O. S. 529. But we know of no authority to sanction the withholding the money of a purchaser upon a sale that is not confirmed, and its application upon re-sale to another purchaser, for the purpose of making up the difference between the two sales.

The plaintiff in error, however, has no standing in court upon this question. The order complained of did not affect him as a party to the suit, but as purchaser, and as purchaser he is not party to the record. He made no motion, nor took any exception; he did not put himself in

position to litigate the matter there, and cannot bring his petition in error here. It is only judgments, and final orders affecting a substantial right in an action that are subject to review upon error. Section 6707, Rev. Stat. Obviously, a petition in error will not be entertained from a party against whom no judgment is rendered, and whose substantial rights as a party are not affected. In general a petition in error must be prosecuted by a party to the record and to the judgment sought to be reversed. *Hanover v. Sperry*, 35 O. S. 244, 245: The plaintiff in error was party to the record as holding a second mortgage upon the property, but in that character was not affected by the order. He was affected as purchaser, but in that character is not party to the record. Consequently his petition in error must be dismissed at his costs.

Hildebrandt & Hildbrandt, for plaintiff in error.

P. S. Goodwin, for defendant in error.

ELECTIONS.

737

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

STATE ex rel. BLOCK v. EDWIN HENDERSON.

1. Those poll-books which by section 2961, Rev. Stat., are to be deposited with the city clerk, "there to remain for the use of any person who may choose to inspect the same, after the expiration of the time within which any legal notice of contest could be given," cannot, as of right, be inspected before that time by any person not interested in a different manner from the mass of the community.
2. A candidate for the office of justice of the peace, after the ten days for giving notice of contest have expired without his giving notice, has no more interest than any other citizen, and as a citizen cannot have access to such books, as of right, until the time for notice of contest of any of the officers on the same poll-book have expired, which as to some of the officer is thirty days.

AVERY, J.

The relator alleges that he is an elector of Cincinnati township, and was a candidate for justice of the peace at the election on the 12th of October, and on the face of the returns was defeated; but that he is desirous of contesting the election, and on the 23d of October demanded of defendant, who is city clerk, the privilege of inspecting the poll-books of said election in his office, which was refused. Mandamus is prayed against defendant to compel him to permit such inspection.

The office of the city clerk is a public office, and the poll-books are subject to inspection the same as all books and records of a public office, unless the statute has restricted the right. The statute prescribes that they shall forthwith be "deposited with the clerk, there to remain for the use of any person who may choose to inspect the same, after the expiration of the time within which any legal notice of contest could be given." Sec. 2961, Rev Stat. "There to remain for the use," etc., "after the expiration of the time * * * " is not equivalent to saying, "there to remain after the expiration of the time * * * for the use," etc., since by the latter no provision would be made as to where they should remain meanwhile. "There to remain" relates to the time when deposited, otherwise it would have been of little advantage to provide the books should forthwith be deposited. The words "after the expiration of the time within which any notice of contest could be given" can only be read as fixing the

period for use by any person who may choose to inspect the books, and not as fixing the period from which they are to remain with the clerk. As the statute formerly stood it read, "there to remain for the use of the persons who may choose to inspect the same." (S. and C. 536). The additional words now incorporated into the statute must be presumed to have been put there with a purpose, and the only construction possible is that it was to restrict the former right. But this was a right given by statute, a right to any person who might choose to inspect the books. It was not the right of an interested party; that is a common law right and needed no enabling act. 1 Greenleaf Evidence, sections 471 and 475. High Extraordinary Remedies, section 306. *Rex v. Guardians of the Poor*, 9 B. & C. 541; *Harrison v. Williams*, 4 D. & R. 820; *Bréwer v. Watson*, 61 Ala., 310. Nor is there anything in the body of the statute to extend the restrictive force of the words. The poll-books are not required to be put under cover by the judges of election and sealed, as is the case when directed to the clerk of the court of common pleas; but the provision is simply that they shall be "deposited with the clerk." They are not required to be locked up like the ballots until after the expiration of the time within which any legal notice of contest can be given, and if notice is given, until the trial. In short, nothing is required, but, as implied by the words themselves, that the books are not to be open to any person who may choose to inspect them, until after the expiration of the time within which any legal notice of contest could be given.

The precise extent of interest needed to sustain the right of inspecting public books and records can not be accurately defined. In its nature the interest must be distinguishable from that of the mass of the community and involve some question of gain or loss, in a matter of lawful right, to be affected by the inspection. *Heffner v. Supervisors*, 47 Ill., 256; *Linden v. Alameda Co.*, 45 Cal., 7; *People v. Green*, 29 Mich., 121; *Webber v. Townley*, 10 Rep., 83; *High on Extraordinary Remedies*, section 330; *Wood on Mandamus*, 96, 107. Within this description of interest is that of a candidate at an election for public office, where the inspection sought is of the poll-books of the election. But this can be only so long as the right of contest is open, for when it is closed, and the certificate of the result given by the canvassers has become final he has no more interest in the poll-books than any other citizen.

This disposes of the present case, since although the relator was a candidate of the office of justice of the peace, he had given no notice of contest, and when he demanded an inspection of the books the time for giving notice had expired. Neither has he a right maintainable upon the terms of the statute itself, independent of common law grounds. The poll-books are not required to be deposited with the city clerk, there to remain for the use of any person who may choose to inspect the same after the expiration of the time for giving any legal notice of contest, but the words are "after the expiration of the time within which any legal notice of contest could be given." It is not the expiration of the time for any contest but the expiration of the time within which any notice could be given, thus extending the time to include the period within which any legal notice of contest is possible touching the same poll-books. Although the time for giving notice of contest for the office of justice of the peace is ten days and has expired, section 572, Rev. Stat., there are state and county offices on the same poll-book for which the time of giving notice of contest is thirty days, and has not yet expired, sections 2997, 3003 and

3005, Rev Stat. This construction is not rendered awkward, as was suggested in argument by comparison with the statute fixing the time of trial in case of a contest of the election of justice of the peace. The time fixed for the trial is fifteen days from the day of election, and it is argued that if our construction prevails, there can be no right of inspection for the purpose of preparing for trial. But the right of a candidate to an inspection of the poll-books so long as time is open for notice of the contest, or if notice be given, so long as the trial remains open, is, as has already been observed, a common law right not depending upon the statute.

The writ is dismissed at relator's costs.

APPEALS—BUILDING ASSOCIATION MORTGAGE.

752

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

THE MONITOR BUILDING ASS'N v. G. B. EGGEN et al.

1. An order of distribution after foreclosure being made, and a motion to modify being then filed, which was continued until next term and then granted, the new order in effect setting aside the old order, appeal lies from the latter order; the decision does not relate back to the filing of the motion, but the jurisdiction over the motion continues.
2. A provision in the defeasance clause of a building association mortgage, that in the event of a foreclosure the amount due shall be ascertained by taking the whole amount of the loan and deducting credits paid in, is void as depriving the mortgagor of the benefits he is entitled to as a member.

AVERY, J.

This case came to the district court by appeal from an order of distribution in the court of common pleas

When the order was made a motion was filed to modify it, which was continued until the next term, when it was granted, and such an entry of modification made as to make in fact a new order and set aside the old one. The appeal was taken from the new or modified order. A question arises as to the appeal. A motion made at one term and continued until another term, when it is decided, is, in contemplation of law as if decided at the term when made. *Bank v. Doty*, 9 O. S., 508. Not that the decision relates back, but that jurisdiction over the motion continues, and, when exercised by setting aside the original order, the court may take up the case and proceed to make a new order. The appeal was therefore properly taken, and the questions arising upon distribution are open.

The order of distribution was of the proceeds of sale under a building association mortgage. In the decree for sale judgment was entered for interest and dues up to the time of the decree. The amount up to that time is fixed, therefore, and can not be disturbed. The only question is from that time. The ordinary rule of computation would be to take the dues and interest up to the time of distribution, and compute the present value of the future dues and interest from that time on until the end of the probable duration of the association. One question now made is as to the rate of interest, and another as to the rule of computation.

The interest must be calculated under section 2, article 13 of the by-laws of the association, and not under section 9. Section 2 has refer-

ence to the advance of shares, section 9 to the loaning of money to members.

The defeasance clause after the usual form securing dues, interest and fines, according to the constitution and by-laws, contains a proviso that in the event of foreclosure the amount shall be ascertained by taking the face of the mortgage and arrearages thereon, and deducting the credits paid in. This proviso is void as taking from the mortgagee advantages he has the right to enjoy as member. It treats the transaction, in the event of foreclosure, as a loan payable by installments, and crediting the dues paid it charges the balance of the amount named in the mortgage and interest; whereas the true nature of the transaction as the same is set out in the defeasance is the advance of the value of the shares upon the security of the mortgage that meanwhile until winding up of the association weekly dues and interest shall be paid. *Hageman v. Build. Assn.* 25, O. S., 186, 205, 206. To give the proviso effect therefore would be to enforce the forfeiture of rights of membership as a penalty for non-payment. It follows that the ordinary rule of computation must be observed in this case as more particularly defined in *Windisch Muhlhauser & Bro. v. Korman*, *ante*, 60.

Judgment accordingly.

Tilden, Buchwalter & Campbell, for the association.

A. J. Jessup, for Eggen.

753 AMENDMENT—GUARDIAN AND WARD—LIMITATIONS.

[Hamilton District Court. 1880.]

Avery, Cox and Johnston, JJ.

JOHN B. SHIERBERG et al. v. JOSEPH SHIERBERG.

1. Granting leave to amend answer before trial by filling a blank before the word "years" is within the discretion of the court.
2. The general statute of limitation that an action for fraud must be brought within four years after discovery of the facts, does not apply where there are special limitations, and therefore does not apply to an action by a ward to review a guardian's account for fraud, which, by section 629, Rev. Stat., must be within two years after the ward arrives at full age.

ERROR to the Superior Court.

JOHNSTON, J.

The plaintiffs below instituted an action, alleging in their petition that in 1853 the defendant, their uncle, was appointed their guardian; that they were at that time seized of real estate on the corner of Front and Ludlow, in this city; that in 1858, having acted as guardian and had control of their property for six years, he filed a final account, which showed a small amount due them from him. They allege that this account was so kept as to prevent their discovery of fraud in it until 1877, when this petition was filed. The prayer in the petition asked for relief against the defendant, and that he be required to render a correct final account.

The defendant answers, denying fraud and goes on further to say that before the death of his brother he agreed to purchase half of this real estate on Ludlow and Front, at the price of \$9,000; that he was to receive one-half of the rents—that is \$75 per month; and that after his brother's death he continued to pay to himself these monthly installments of \$75, and that

these payments appear openly upon his final account. Further, he alleges that the right to attack the account has expired by statutory limitation.

The case went to trial, and, after the plaintiffs had introduced their testimony, a motion for judgment was made by the defendant, which the court granted.

Before the trial a motion by defendant for leave to amend the answer, to fill in the blank space left before the word "years" in the answer with the figure two, was granted.

An exception was taken to the court's allowing this amendment.

It was claimed that this was not an action to review a final account, such as the statute contemplated, but was an action outside of the final account, attacking the fraud of the guardian, the limitation for which action is found in the general statute of limitations under the code.

The court said that, as to the first ground, the granting of the motion to amend was within the discretion of the trial court, and they could not say that that discretion has been improperly exercised. As to the second ground, he said that, from looking at the prayer of the petition, it could not be claimed that this question was outside of the final account, but was plainly to review it. Section 6289 of the Revised Statutes provides that a settlement, made in the probate court, of the accounts of a guardian, shall be final between him and his ward, unless an appeal be taken to the common pleas, or unless, for fraud or manifest mistake, he opens and reviews by civil action in the court of common pleas such settlement at any time within two years after the ward shall arrive at full age.

In this case it appears that the youngest of the wards whose estate was involved in this settlement became of age ten years ago, and this action was not commenced until 1877. More than the two years allowed by this statute had therefore expired. It is claimed, however, that the general Statute of Limitations should apply here, which provides that an action for fraud shall not be brought except within four years after the occurrence of the facts which constitute the fraud or their discovery. This general statute, however, does not apply where there are special limitations in any act, which is the present case. Section 4976. The court below acted rightly in dismissing the petition of the plaintiffs in error. Judgment affirmed.

Halstead & Humphreys and Judge Wright, for the plaintiffs.
Von Seggern, Phares & Dewald, for defendants.

FORCIBLE ENTRY AND DETAINER.

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[Huron Common Pleas, November, 1880.]

†HILL v. HOLLISTER.

Section 6607, Rev. Stat., which provides, "If the suit be not continued, place of trial changed, or neither party demanded a jury upon the return day of the summons, the justice shall try the cause," must be construed in connection with section 6547, providing that "in all civil action," after defendant's appearance and before proceeding to inquire into the merits, either party may demand a jury. Forcible entry and detainer is a civil action, and the first section above cited must be read as if the comma after the word summons was placed after the word jury, and it is error in the justice to refuse a demand for a jury on the trial day, but some days after the return day.

†This holding is approved by the supreme court in *Bonham v. Mills*, 39 O. S., 534.

DOYLE, J.

A petition in error was filed in this court to reverse the judgment of a justice of the peace. The action was forcible detainer. Complaint was filed September 8, 1879. The case was twice continued by the justice, on application of defendant, for cause; after such continuances and on the trial day, the defendant demanded a jury which the justice refused to allow, but proceeded, over the objection of defendant, to hear the testimony and determine the case. Judgment having been entered for the plaintiff below, plaintiff here alleges as error, the refusal of the justice to call a jury upon his demand.

The action of the justice and the judgment are sought to be sustained upon the construction of the statute, given by Swan in his Treatise of the Powers and Duties of Justices of the Peace, 10th ed., page 552, where he says: "It would seem from the provisions of the statute, that the demand for a jury must be made upon the return day of the summons." This language appears in all the editions of this work, and has been very generally followed by justices in this part of the state.

During the pendency of these proceedings, the act of 1878, was in force. The statute is as follows: Section 9, chap. 9, 75 O. L., 1000. "If the suit be not continued, place of trial changed, or neither party demand a jury upon the return day of the summons, the justice shall try the cause," etc. Section 6607, Rev. Stat.

If this was the only provision in the statute on the subject, the construction claimed might be correct, but we must read this in connection with the other provisions of the same law. The next section (10) provides:

"If a jury be demanded by either party, the proceedings, until the empanelling thereof, shall be in all respects as in other cases." Section 6608, Rev. Stat.

The proceedings in other cases are regulated by sec. 4, chap. 6, page 990, which is as follows:

"When a jury is demanded, the trial of a cause must be adjourned until a time fixed for the return of the jury; if neither party desire an adjournment, the time must be determined by the justice, and must be on the same day, or within the next two days; the jury must be immediately selected as herein provided." Section 6548, Rev. Stat.

Sec. 3, chap. 6, page 990, of the same act provides: "In all civil actions after the appearance of the defendant, and before the court shall proceed to enquire into the merits of the cause, either party may demand a jury to try the action." Section 6547, Rev. Stat.

Unless it can be said, that the action of forcible entry and detainer, is not a civil action within the meaning of the last provision, these four sections must be read and construed together.

It will be observed that there is no provision in chapter 9, (which relates to forcible entry and detainer exclusively) directly giving the right to demand a jury to either party, but the provision is that, "if a jury be demanded, the proceedings, until the empanelling thereof, shall be in all respects as in other cases," after the empanelling of the jury, the section prescribes their powers and duties; for the right to a jury we must look to chapter 6.

Proceedings in forcible entry and detainer were not, originally, a remedy of the common law, but were given by statute. It was, however, a well-defined action, to the extent that it was directed against those who

made unlawful and forcible entry at the time of the settlement of this state. *Yager v. Wilber*, 8 O., 400.

Our first statute was adopted by the governor and judges from Massachusetts, in 1795, and provided that "Two justices of the peace shall have authority to enquire, by jury, etc.," 1 Chase's Stat., page 188. This was repealed and a new act passed February 2, 1805, 1 Chase Statutes, 482. The first section of which provides in like words that "Two justices of the peace shall have authority to enquire, by jury, etc." The act of January 15, 1820, repealing this act, re-enacted the words of the first section quoted above, 2 Chase Statutes 1082. In the revision of 1824, these words were again enacted, Chase Statutes page 1359. And also in the act of February 25, 1831, Chase's Statutes, page 1765. Under these statutes, the justices had no power to make inquiry into the truth of the complaint without a jury; they could render judgment of restitution only after a verdict of guilty, by a jury. This law, with various amendments enlarging the class of cases to which it applied, was in force until the passage of the Justice's Code of March 14, 1853, S. & C. p. 769, in which act there is contained the same provisions as are enacted by the statute of 1878, on this subject.

It has been the settled law of the state for nearly sixty years, that this action should be tried to a jury. Was it the intention of the legislature, in passing the act of 1853, to limit the right to a jury in these cases, beyond the general limitation for all other civil causes, as provided by that act? Sec. 73, of the act of 1853, is identical with Sec. 1, chap 6, of the act of 1878. 75 O. L., 989; section 6545, Revised Statutes, and is as follows: "At the time appointed for trial if no jury shall have been demanded by either party, the justice shall proceed to try the action, shall hear the proofs, and determine the cause according to law and right."

This is not limited to the time the cause may be first set for trial, if for any of the reasons provided by law, it be rightfully continued, and I cannot believe that the legislature intended that the right to a jury, in this action, in which the law for over half a century absolutely required a jury, should be limited to the return day of a summons, and if not then demanded, should be deemed waived, even though the action at that time be continued for good cause. This section 6607, no doubt confers upon the justice the right, which previous to its adoption in the act of 1853, he did not have, of trying the case without a jury, if a jury be not demanded. It placed the action of forcible entry and detainer in the general class of civil actions, for which the act of 1853, provided a general code of procedure.

I am aware that the punctuation of this statute, seems to justify the construction claimed for it, but courts, in the construction of statutes, will, for the purpose of arriving at the intention of the law makers, disregard the punctuation, or repunctuate if need be, to render the true meaning of the statute, *Jones v. Carr & Co.*, 16 O. S., 428; *Shriedley v. State*, 23 O. S., 130. Take away the comma after the word summons, and place it after the word jury, and the section will have the same import as section 73 of the act of 1853, section 6545, Rev. Stat., and will give the section the effect which I think the legislature intended it to have.

I am compelled to disagree with Judge Swan's construction of this statute, and to reverse the judgment.

Judgment reversed.

DEAD BODY—RIGHTS OF BURIAL.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

ANN FARLEY and JAMES FARLEY v. WILLIAM CARSON.

1. A husband or wife, relict, is entitled to the possession of the body of the deceased wife or husband, for sepulture, and in the fitness for burial in which death leaves it.
2. It does not show an infringement on this right to possess the body with decency of death, where the attendant physician, immediately on the death of decedent in a hospital, and without delaying the delivery of the body to the widow, made an incision in the body in order to ascertain the extent of an abscess, of which the patient had died, one part or organ being dismembered or removed, and the incision not being visible when the clothes are on.

ERROR to Superior Court of Cincinnati.

AVERY, J.

The action was brought by Ann Farley for damages. Afterward, by an entry upon the journal, her son James, aged fourteen, was made party with her.

Her petition alleges that her husband, James Farley, died in the Cincinnati Hospital, January 11, 1879, and that his body was wrongfully withheld from her and desecrated and mutilated by defendant. The answer was a general denial.

Upon the trial, the record shows that the court took the case from the jury at the close of the evidence for plaintiff, and dismissed the petition on the ground that it did not state a cause of action. The bill of exceptions sets out the evidence.

The established rule of the common law was that a corpse is the property of no one. The heir, says Blackstone, though he has a property in the monuments and escutcheons of his ancestors, has none in their bodies or ashes. 2 Comm., 429. To steal from a corpse, as for instance the shroud, was larceny, and the deceased being no longer able to possess anything himself, the property was laid in his executors or those who buried him. But it was not larceny to steal the corpse itself. 3 Chitty, Criminal Law 948. At the same time it was indictable as a misdemeanor to the great indecency of Christian burial. 2 Chitty, Criminal Law 35; and while the holding was uniform that there could be no property in a dead body, certain rights to its possession for the purposes of burial, were recognized.

Thus, in *Regina v. Fox*, 2 Q. B., 246, where a debtor died in jail and the jailor undertook to detain the body from the executors, a peremptory mandamus was awarded.

To the same effect, as the recognition of a right in the relatives of the deceased, a right correlative to the duty of burial, is our own statute. Section 3763, Revised Statutes.

The burial of a deceased wife has been held to be the duty of the husband, and the burial of a deceased husband the duty of the wife. *Jenkins v. Tucker*, 1 H. Black, 90; *Ambrose v. Kerrison*, 10 C. B., 775; *Chapple v. Cooper*, 13 M. & W., 252; *Sears v. Gidday*, 9 Rep., 179. It is left to them, since it must be left to some one, because of the mutually dependent character of their relationship, and by the common custom of our race it is no less a right than a duty.

In *Durell v. Hayward*, 9 Gray, 248, it is termed the indisputable and paramount right and duty of a husband to dispose of the body of his deceased wife by decent sepulture. This must, of necessity, include the

right to possession of the body in the fitness for burial in which death leaves it; and the organization of courts of justice would be defective if in a proper case redress by damages might not be afforded for wilful violation of such right.

We are not prepared to say, therefore, that the petition did not state a cause of action. It is alleged that the body was wrongfully withheld, which implies refusal of delivery, upon demand, or under circumstances rendering demand unnecessary. It alleged wilful desecration and mutilation, which words were comprehensive enough to include that disturbance of the decent fitness of the body for burial, which would constitute the violation of a right. This was a right in plaintiff as a widow, and entitled her to an application of the rule, that wilful infringement by one person of a right existing in another, imports damage. *Mayne on Damages*, 4; *Ashby v. White*, *Ld. Raym.*, 938, 955; 1 *Smith Lead Cas.*, 6, *Am. ed.*, 438, 439, 447.

The allegations, however, are not sustained by the evidence.

The deceased had been an inmate of the hospital about two weeks, and was attended by the defendant who was of the medical staff, or faculty, of that institution. He had an abscess of the liver, and had been tapped for the purpose of withdrawing the accumulation of pus, one or more times before coming to the hospital. The afternoon before his death he had been operated upon, to what extent the bill of exceptions does not show, except that he sat up afterwards and conversed with his wife, or at least with a friend. His death was during the night, and at 7 o'clock the next morning the plaintiff was notified. The body was at once delivered to her upon application, and by friends taken to her house. It was in fit and decent condition, and only in putting on the garments for burial was there discovered an incised wound, to the right of and above the navel, extending upward toward the ribs. The length of this was from four to eight inches, the witnesses differing to that extent in their estimates; it was sewed up and covered by a strip of adhesive plaster. How it was made and when did not appear; the only evidence was that the defendant said, upon coming into the hospital in the morning, and being informed the patient had died, that he would examine the extent of the abscess. The witness who testified to this understood him to mean, simply that he would probe it.

For all that the evidence showed, unless indeed the extent of the wound excluded the supposition, the incision might have been made at the time of the operation. But taking it as made at the time alleged, and by the defendant, the decency of death was not disturbed. The privacy of the examination and the confidence involved in the relation of defendant as attending physician, freed the act from all indignity. It was not a mutilation of the body, or dismemberment or removal of any part or organ, and for all the purposes of fit and proper burial the body was left without disfigurement.

The right of the widow to possession for those purposes was not therefore infringed upon, and although the court should have directed a verdict for defendant upon the evidence, rather than have dismissed the petition, the result would have been the same to plaintiff. The mode adopted was no error to her prejudice.

The judgment is affirmed.

W. A. Cotter, for plaintiffs in error.

L. W. Irwin and John W. Herron, for defendant in error

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Levy v. Trennel.

788

[Hamilton District Court, 1880.]

HENRY BECKROEGE v. F. W. SCHMIDT.

For opinion see 6 Dec. R., 994, (s. c. 9 Am. Law Rec., 410.)

788

[Hamilton District Court, 1880.]

DENNIS SULLIVAN v. JOHN MANNIX.

For opinion see 6 Dec. R., 992, (s. c. 9 Am. Law Rec., 409.)

789

[Hamilton District Court, 1880.]

CITY OF CINCINNATI v. C. L. ENGLISH.

For opinion see 6 Dec. R., 972, (s. c. 9 Am. Law Rec., 310.)

792

[Hamilton District Court, 1880.]

JUSTINA GARDNER, Adm'x, v. FRED G. HENGEGHOLD.

For opinion see 6 Dec. R., 997, (s. c. 9 Am. Law Rec., 414.)

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BILLS AND NOTES—PLEADING.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

†HERMAN LEVY v. GEORGE TRENNEL.

Under the revision on the statutes of 1878, section 5086, it is no longer required in a pleading on negotiable paper, against other than makers or acceptors, to state the kind of liability upon which they are sought to be held, but the facts alone making the liability are sufficient.

ERROR to the Superior Court of Cincinnati.

JOHNSTON, J.

In the court below Trennel brought suit to recover on a note made by A. Siegmund, payable to Herman Levy & Co., and indorsed by them to Trennel. To this petition Levy filed a demurrer. This demurrer was overruled, and Levy filed an answer setting up a settlement between Siegmund and his creditors, by which he, Levy, had indorsed the note in the petition to secure Trennel, one of the creditors, against loss, in order to induce him to come into the settlement. On the issue made the case went to the jury, and a verdict was rendered for plaintiff against Herman Levy & Co. and Siegmund. No bill of exceptions was taken, but the petition in error was prosecuted to reverse the ruling of the court below on the demurrer to the plaintiff's petition. The grounds of error claimed were, that the petition was insufficient, in not stating the kind of liability upon which they sought to hold Herman Levy & Co. This was urged by reference to the old code of procedure, in which it was provided that when others than makers or acceptors of negotiable instruments were intended

†This case was affirmed by the supreme court commission, without report, May 6, 1884.

to be held liable, it should be necessary to state the kind of liability upon which they were sought to be held and the facts going to make up that liability.

The court in deciding the case, said that even under the old code, to which reference was made, it had been held that it was not necessary to follow strictly the language laid down in the code, *ipissimis verbis*. In 1878, however, the code was revised, and section 122, which embodied the above provision of the old code, was changed to section 5086 of the new code, and in the change the requirement to state in the petition the kind of liability was left out and the new section only provided that it was necessary to state the facts upon which the liability was founded. The petition sets forth the note which shows Herman Levy & Co. to have been indorsers, and which is a fact sufficient to meet the requirement of the statute. The petition further set forth that the demand was made at the place of payment, namely Herman Levy's bank, and notice of non-payment given. As the demurrer to the petition was rightly overruled, the judgment of the court below is affirmed.

Yaple, Moos & Pattison, for plaintiff.

Jordan & Bettman, for defendant.

HUSBAND AND WIFE.

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[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

JOHN KNAGGE v. CATHARINE PFEIFFER.

While a divorce suit is pending by a husband against the wife in which alimony pendente lite is allowed and promptly paid by the husband, persons furnishing the wife with board during the pendency of the suit and before divorce is decreed, cannot look to the husband for payment; his responsibility ends on payment of the alimony.

ERROR to Common Pleas.

JOHNSTON, J.

Catharine Pfeiffer, the plaintiff below, commenced an action before a justice of the peace, to recover from Knagge money for the board of Catharine Knagge, his wife, for several weeks. There was judgment for plaintiff, and Knagge appealed. The answer of Knagge in the common pleas was that at the time Knagge had already begun an action for divorce against his wife, and that during the pendency of the suit alimony had been allowed by the court to his wife, and had been paid by him. For all expenses during that time, those with whom his wife contracted debts must look to the alimony and not to him for payment.

Upon the trial of the case in the common pleas, judgment was rendered for the plaintiff for the amount claimed. A bill of exceptions was taken, and this petition in error was prosecuted to reverse that judgment.

Judge Johnston delivered the opinion of the court. He said that it appeared from the record that the action for divorce having been commenced by Knagge against his wife, on motion the court allowed the defendant \$50 for alimony, which Knagge paid promptly, and that afterwards the court made a further order for \$25 to enable the wife to carry on the suit, which was also paid. Knagge obtained a divorce because of the misconduct of his wife. It is now claimed by the defendant in error that the husband is still liable, even though he did pay alimony,

because full alimony was not given, and that the plaintiff below, the defendant in error, was justified in furnishing board and relying on the husband for payment.

From the authorities the court found that if a wife be living separate and apart from her husband, the presumption is that he is not responsible for her debts, and those who deal with her are put up on inquiry. When an action for divorce is pending, and alimony has been decreed and paid promptly, those dealing with the wife do so at their peril, and the circumstances fixing his liability must be shown by those dealing with her. The testimony shows that Mrs. Pfeiffer knew that there was an action for divorce, and, although she denies knowing that there was an alimony granted, it was her business after learning of the action for divorce to have inquired into the matter to see if alimony had been allowed and paid. She should have gone to the court or to the attorney of Knagge or to Knagge himself, to learn if the alimony had been paid, and then looked to that for payment or have declined further to board the wife. The husband is not responsible under such circumstances, when he has paid the alimony.

Judgment of the court below in favor of Mrs. Pfeiffer reversed, and the cause remanded for further proceedings.

Von Seggern, Phares & Dewald for Knagge.

A. J. Pruden for Pfeiffer.

For opinion see 6 Dec. R., 985, (s. c. 9 Am. Law Rec., 380.) It was reversed by the supreme court. See opinion, 40 O. S., 322.

SPECIAL ASSESSMENT—INJUNCTION.

[Cuyahoga Common Pleas, November, 1880.]

†RAYMOND et al. v. CITY OF CLEVELAND.

Collection of a special assessment levied on certain real estate owned by plaintiff to pay the damages awarded and expenses incurred in extending a certain street.

PETITION FOR INJUNCTION.

BARBER, J.

This is an action to restrain the city of Cleveland from collecting a special assessment levied on certain real estate owned by plaintiffs, to pay the damages awarded and expense incurred in extending Bond street from Superior street to Euclid avenue. The facts, as stated in the petition, and admitted to be true, are as follows:

The plaintiffs are the owners of 43 feet front on Superior street at the southwest corner of Bond and Superior, and extending south on Bond street 312½ feet. They became the owners in March, 1878, paying full value therefor without deduction for liability to assessment for the Bond street opening. Before the proceedings by the city council to extend Bond street, it was a part of a larger tract of sixty-six feet front on Superior street, twenty-three feet of which was appropriated and taken by the city for the street, leaving forty-three feet, as above stated. The initiatory steps to extend Bond street were taken by the city September 23, 1873, when an ordinance was passed to lay out and extend Bond street from Superior street to Euclid avenue. In the ordinance it was provided that to raise money to pay the damages awarded for land appropriated and the cost and expense of opening the street, an assessment should be levied on all the lands benefited by said improvement, but no lands were designated as the lands that would be specially benefited, and assessed therefor.

The land necessary for the extension of the street was appropriated by proper proceedings, and in 1874 the street was opened as extended.

†The decision of the district court, on the authority of council to reassess, was affirmed by the supreme court. See opinion, 42 O. S., 522.

After this was done, in 1875 and 1876, the city council, by the action of an estimating committee and an equalizing board, attempted to determine what lands were benefited and the extent of such benefits to each parcel thereof, and to make an assessment therefor. And a final report having been made by the equalizing board, and approved by the council, an ordinance was passed making the levy.

Afterwards, in the case of *Kelly v. City of Cleveland*, 34 O. S., 468, all action of the council after the street was opened, to-wit, the reports of the estimating committee and equalizing board, and the order levying the assessment, was declared illegal and void for irregularities in the proceedings, but without prejudice to the right of the city to make a new assessment.

Pending the proceedings in the supreme court to declare the assessment void, the act of April 12, 1873, which was the law in force at the time all the proceedings then in controversy took place, was repealed by act of May 14, 1878. The new act provided that in making improvements like the one in question, as well as others, the council must designate what lands will be benefited by the improvement before it is made. A new section in the new Code saved all rights which were vested in any municipal corporation at the time of the repeal.

On the 9th of June, 1879, the council proceeded to make a new assessment under and in accordance with the law as it stood before the repeal.

The board of improvement were directed by ordinance to and did make an estimated assessment upon the property benefited, and reported the same to the council. Objection being made, a board of equalization was appointed, which did the duty and reported an equalized assessment, which was approved by the council in the same manner precisely as might have been done if the old law had not been repealed.

By the proceedings the land of the plaintiffs was divided into two parcels, which were severally assessed as follows:

1. The Superior street front, 43 feet, to the depth of 150 feet, \$1,712.25.
2. Bond street front, 64½ by 43 feet deep, \$2,084.68.

The only complaints as to the regularity of these proceedings is that the board of improvements and the board of equalization refused to hear testimony which was offered by plaintiffs to show that their land was not benefited, and if benefited in some degree, it was not benefited to the extent found by these boards. We are to presume, then, that those proceedings in other respects were strictly in accordance with the provisions of the old Code, and fully authorized by its provisions.

It is further stated that plaintiffs' lands are not benefited, at least to the extent of the assessments made upon them.

To this petition a demurrer is filed, and therefore for this hearing all facts properly pleaded are admitted to be true.

The first question is, had the plaintiffs the right to offer testimony before those boards? That those boards might have sought information from plaintiffs or from anybody else cannot be questioned, but they have no power to summon witnesses or administer oaths. A specific duty is assigned them, that is, as to the board of improvements, while acting as an estimating committee, to determine what lands are benefited by the improvement, and the extent of such benefit to each lot or parcel, and then to make an estimated assessment thereon, not to exceed the amount of the benefits to each; and as to the equalizing board, to equalize the assessment so made, so that each parcel of land may bear its proportion according to the benefit it has received, when, in their opinion, the estimating board has erred in judgment. There is no provision of law for any testimony before those boards. They are therefore to be governed by their own judgements on inspection of the premises, and such information as they deem useful and can obtain. But whether they will hear the statements of parties or witnesses they may offer is wholly within their discretion. And it is no ground for setting aside their action that they refuse to do so.

It is also claimed that as plaintiffs purchased their land long after this improvement was made, and while there was no lien upon it, and paid full value for it, and did not assume to pay the assessment, that the city had not the right now to put this burden on their land to their prejudice.

When they bought their land in 1878, the right of the city to make a legal assessment existed and was matter of record; they are charged with knowledge of the proceedings already legally taken, and they took the land subject to the existing rights of the city. If they did not take the liability of the land to pay its share of the damages awarded, and cost and expenses of opening and extending the street, into consideration as part of the purchase price, it was their own neglect, for which they have no remedy.

The only remaining question is whether or not the saving provisions have preserved and continued the former powers of the city, so that it can continue to exer-

cise them as to this improvement until it has reimbursed itself for the money expended in making it, although the law itself is repealed.

A repeal of the law without any saving of rights accrued under it would deprive the council of all power to enforce such rights unless it were given in the new law. Under the new Code the property to be assessed for any street improvement, including the damages awarded for lands appropriated, and the cost and expense of opening or extending a street, must be determined by ordinance before the improvement is made. We must therefore look to the repealing act to ascertain if accrued rights have been saved.

To be more explicit, the authority for this assessment under the old Code is found in section 539 of that Code, and if the provisions of that section as to this improvement are still in force, ample authority is there given for this assessment. That section was repealed by paragraph 53 of section 1, chap. 1, Division 10, 75 O. L. 413. In the same act, chap. 1, Division 1, section 4, 75 O. L., 165, is found the only saving provision of the new Code. That section reads as follows:

"Section 4. All rights and property which were vested in any municipal corporation under its former organization, shall be deemed vested in the same municipal corporation under the organization made by this title, and no rights or liabilities, either in favor of or against such corporation existing at the time of the taking effect of this title, and no suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had taken place; provided that where a different remedy is given in this title which can be made applicable to any rights existing at the time of its passage, it shall be deemed cumulative to the remedies before provided, and may be used accordingly."

The same repeal and the same saving clause are carried into the Revised Statutes, which were in force at the time of this levy. Section 1539, Rev. Stat.

The discussion is thus narrowed down to the effect of the savings in section 4, above given.

In construing the rights of the parties, it is important to keep in mind the situation at the time the first error was committed by the council in their efforts to make this levy. No complaint was made, but that the proceedings to appropriate the property and open and extend the street were regular in all respects.

The city then has paid for the land appropriated, to the owners, as it must do before land taken for such purposes can be entered upon. The law as it then existed authorized the city to reimburse itself, or if the money was borrowed by the issue of bonds, to raise money to pay them by an assessment properly levied upon the property benefited. There was then no requirement that the property sought to be assessed should be designated before the expense was incurred. On the other hand, the law contemplated that the council should direct its board of improvements, or appoint a special board to ascertain what property was benefited, and to make an estimated assessment, and that this might be done after the improvement was made. After this improvement was made and the expense therefor incurred, the council neglected to cause the land benefited to be ascertained, but proceeded arbitrarily to assess the whole expense upon certain land without regard to whether or not the assessment exceeded the benefits. This the supreme court say was illegal.

Pending the proceedings in the supreme court to set aside the assessment, the law as it then stood was repealed with the saving above given.

Was it the intention of the general assembly to, and have they taken away the right of the city, now to proceed and do exactly what it might have done if the repeal had not taken place?

No argument can be drawn from the lapse of time, as the failure to make a proper assessment arose from the city authorities not understanding what the law required. They were all the time trying to make a proper assessment, and collect the money. The case stands in the same situation it would if the appropriation proceedings had ended only the day before the repeal and before there was time to make a legal assessment.

The rule of construction to be applied to saving provisions of this character is that they must be liberally construed to carry out the intention of the legislative will, as ascertained from a consideration of the whole act, and to do equity by all parties.

The language of the savings provision is: "All rights and property which were vested," etc.

The city, at the time of the repeal, had expended a large amount of money for the purpose of extending this street. The expenditure was made in a legal and proper manner. It was not a lien upon any property until further steps were taken to make it attach to the property subject to the assessment. The city had the right and the power to take those steps, and it had by its original ordinance given notice to everybody that it would take those steps, perfect its lien and collect the money according to law.

Is the right to take those steps one of the rights contemplated in the savings section, above given? If it is, that ends the controversy in favor of the city.

It is claimed by plaintiffs that the repeal of the power to make an assessment in the old mode, was a destruction of the power of the council, and of any board appointed by the council, to determine what property was benefited, and as that power had not been exercised during the existence of the old law, it was forever gone; that the word "rights," as used in the first clause, means intangible property, and in the second clause, only those rights which may be enforced. And as there is no power saved to enforce it, the right which was left to the city to reimburse itself for the money so expended, cannot be said to be a vested right, such as was intended to be saved.

The error in this argument is the assumption that the power of the city to determine what property is benefited, as to this improvement, is destroyed by the repeal.

The repeal and the savings section are part of the same act, and operate at the same moment. The savings section prevents the operation of the repeal as to all the rights of the city in the condition they then were. If no repeal had taken place, the city had the right and the power to make the assessment in the manner required by the statute then in force; hence the city now has the same right and the same power, and it is such a vested right as is saved to the city.

It was the intention of the general assembly to leave the matter of assessment for expenditures already made, exactly where it was at the taking effect of the repeal, and this I think is clearly accomplished by the language used.

It is said a strict construction must be given to this savings section, for the reason that the old law was liable to great abuse, and was therefore a great evil. The general assembly repealed the law and did not put anything in the place of this objectionable part of it; therefore it intended to correct the evil. If the general assembly intended to prevent the city from reimbursing itself for money already expended under existing laws in the manner it was then authorized to do, it would have said so in unmistakable terms. The former act was in force a long time, and was sustained by the supreme court. I do not think any such technical construction should be given to the saving section. That section, construed with the entire act, shows an intention to allow the city to finish such business as had proceeded so far under the old law that it could not be completed under the new, the same as if the repeal had not taken place.

The demurrer to the petition must therefore be sustained, and as the plaintiffs do not wish to answer, final judgment for the defendant will be entered.

Grannis & Griswold, for plaintiffs.

Heisley, Weh & Wallace, for defendant.

[Hamilton District Court, 1880.]

815

MALACHI KELLY v. MARY McCUNE HINES.

For opinion see 6 Dec. R., 988, (s. c. 9 Am. Law Rec., 404.)

[Hamilton District Court, 1880.]

816

JOHN B. CROWLEY v. A. E. CHAMBERLIN et al.

For opinion see 6 Dec. R., 982, (s. c. 9 Am. Law Rec., 376.)

[Hamilton District Court, 1880.]

817

GEO. W. PLUMB v. JAMES DEE.

For opinion see 6 Dec. R., 996, (s. c. 9 Am. Law Rec., 413.)

[Hamilton District Court, 1880.]

832

MADDUX, HOBART & CO, v. CHAS. W. WEST and MARY E. BURSON.

For opinion see 6 Dec. R., 1010, (s. c. 9 Am. Law Rec., 484.)

851

Jones v. Howells.

833

[Hamilton District Court, 1880.]

STATE OF OHIO ex rel. MARKS et al. v. CAPPELLAR, Auditor.

For opinion see 6 Dec. R., 1015, (s. c. 9 Am. Law Rec., 543.)

851

LIEN OF A BANK UPON COLLECTIONS.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, J.

HAKMAN, HENGHELD & CO. v. OSWALD SCHAAF, Assignee.

An assignment that the proceeds of certain drafts deposited with a bank for collection shall be applied by it against a balance due the bank by the depositor, merely carries out the general rule of law, that a bank has a lien on proceeds for balances due, and the bank is entitled to retain all proceeds collected against an assignee for creditors of the depositor, but cannot hold the drafts not collected or collected since the assignment.

ERROR to Superior Court of Cincinnati.

COX, J.

In the superior court Schaaf brought suit as assignee of the Western Furniture Co., to recover the proceeds of a large number of drafts which the latter company had deposited with the plaintiffs in error, who are a banking firm, for collection, and to which the assignee claimed to be entitled on demand. The court below found the facts to be that a large number of notes and drafts had been deposited with the bank under an agreement that the proceeds as collected should be placed to the credit of the Western Furniture Co. against a balance due the bank from the company. The court below held the bank had no right to hold such notes and drafts as had not been collected at the time of the assignment, and the proceeds of them collected since the assignment should be given to the assignee.

It is a general rule of law that a bank has a lien upon the proceeds of all deposits of notes, drafts, papers, etc., for any balance due the bank from the depositor. This general rule the defendant in error does not dispute, but claims that the agreement in this case modified the effect of the general rule so as to make a collection of the notes, drafts, etc., a condition precedent to the acquiring of any lien by the bank, so that any assignment or disposal of these drafts by the depositor before collection took from the bank their right to hold the draft. We cannot sustain this claim, but, on the contrary, are of opinion that the special agreement in the case at bar merely carried out and emphasized the general rule, and that the defendants by collecting cannot deprive the bank of the proceeds of the note, but must account to it for the amount.

Judgment reversed.

Long, Kramer & Kramer, for plaintiffs in error.

J. F. Baldwin, for defendant in error.

851

ABATEMENT—DEFAMATION.

[Hamilton District Court, 1880.]

Avery, Cox and Johnston, JJ.

ROBERT JONES and CATHERINE JONES v. ANN HOWELLS.

The change in the Code abating suits for defamation, on the death of either party, does not apply to pending suits.

ERROR to the Common Pleas.

COX, J.

Ann Howells brought suit in the court below against the plaintiffs in error for the uttering of slander in regard to her by Catherine Jones in the Welsh language. One trial of the case was had, a new trial was granted, and before the second trial the plaintiff died and the case was continued by her administrator, and a verdict rendered for plaintiff. The grounds of error urged are, first, that the court below did not hold the case to have abated by the death of the plaintiff; and, second; because, as claimed, there was a variance between the petition and the proof, in that the slander was alleged to be in the Welsh language, and the testimony gives it only in the English language.

Previous to the 1st of September, 1878, an action for slander abated only on the death of the defendant; upon that date an amendment took effect which abated the action for slander on the death of either party. The second trial of the case took place after the 1st of September, 1878, and the amendment would apply to it were it not for the saving clause in the amendment which provided pending suits should be prosecuted to judgment in all respects as if the amendment had not been passed. The death of the plaintiff did not, therefore abate the case. As to the second ground, the court said that though the proof did not show the words to have been in Welsh, the witness said she understood the Welsh language, and the words given by the witness were the same as those given in the English translation in the petition, and therefore the inference was that the words were in Welsh, as alleged in the petition. The court below, therefore, erred in neither of the two points argued.

Judgment affirmed.

C. H. Blackburn, for plaintiff in error.

Forest & Mayer, for defendant in error.

[Hamilton District Court, 1880.]

852

JACOB BROCK v. AUGUST BECKER.

For opinion see 6 Dec. R., 1009, (s. c. 9 Am. Law Rec., 482.)

[Hamilton District Court, 1880.]

853

CENTRAL BUILDING ASSOCIATION v. MICHAEL O'CONNOR.

For opinion see 6 Dec. R., 1012, (s. c. 9 Am. Law Rec., 486.)

DISCHARGE OF JURY.

875

[Hamilton Common Pleas, December, 1880.]

STATE OF OHIO v. SILAS W. HOFFMAN.

A court may discharge a jury without prejudice to another trial of an accused, who has been guilty of fraudulent practices in regard to the jury, and may arrest a trial without prejudice to a future trial for collusion between the prosecuting attorney and the accused, though such cases of interference are not enumerated in section 7313, Rev. Stat. The accused in such case has not been once in jeopardy if he had secured jurors pledged to acquit, and cannot escape punishment by adding such offense to his original crime. But clear and convincing proof will be required before the court will take such action.

SMITH, J.

Silas W. Hoffman was arrested at this term of court, arraigned on Monday, November 29, and pleaded "Not Guilty." He appeared in court accompanied by his attorney, Mr. Campbell, and Mr. Drew, the prosecuting attorney for the county, being present, both attorneys claimed to be ready for trial, and fixed the following Thursday for trial. On Thursday, the 2d inst., the same attorneys being present, and professing to be ready, a jury was impanelled, and the following day (Friday) was devoted to the introduction of testimony in behalf of the state. In conducting the trial the state was represented by Mr. Drew, the prosecuting attorney, Mr. Outcalt, the assistant prosecuting attorney, and Mr. Crossley, the assistant city solicitor. Mr. Outcalt conducted the examination of witnesses. The court adjourned from Friday evening until the following Monday, when, soon after the opening of the court, Mr. Drew appeared, accompanied by Mr. Outcalt and Mr. Crossley, and presented a motion as follows, viz.:

"Now comes Samuel H. Drew, the prosecuting attorney of Hamilton county, and moves the court to discharge the jury now impanelled and sworn herein, and issue a venire for a new jury to try said cause, for the following reasons, to-wit:

"Because the present jury impanelled and sworn to try said cause is not a legal jury."

As soon as this motion was presented and the jury had been withdrawn, it was stated by Mr. Outcalt, in open court, that such facts and things had come to his knowledge that he believed to a moral certainty there was a fraud and a conspiracy on the part of certain persons connected with the defense, especially in relation to impanelling said jury, tending and designed to defeat the ends of justice and procure a corrupt verdict; and, by reason of such knowledge they desired this jury to be discharged, and a new venire issued.

The court at once directed Mr. Outcalt to prefer charges and specifications, upon which said motion was founded, and present them on the following morning, to which time the cause was continued. On Thursday Mr. Drew appeared in said court with the charges and specifications prepared saying he had doubt about the propriety of presenting them, but would like further time to consult with other attorneys, and he was allowed time for that purpose. Afterwards, having consulted, he came into court, apparently undecided what to do, still disinclined to present them; but Mr. Outcalt insisting, the charges and specifications were handed by one or the other of these gentlemen to the opposite counsel, and afterwards submitted to the court. Mr. Outcalt desired to be heard as to their pertinency. The court required affidavits and proof in support of the charges. Affidavits and proofs were furnished on both sides, and after discussion submitted for decision.

My situation has been embarrassing for several reasons:

1. By the conflicting attitudes of the counsel representing the state. Mr. Drew presented the original motion. He refused to acquiesce, though he did not approve the filing these charges and specifications. He declined to file any affidavits; he even withheld what seemed to me important information, viz., who gave him the names on the list he handed to Mr. Moses for talesmen on the jury. He might thereby have repelled any suspicion of collusion with the other side, if unjust and unfounded.

He was present during the reading of the affidavits and arguments of counsel, and practically drifted into the position of a defendant to his own motion. He had been charged with being in complicity with the defense. Certain facts and circumstances stated in the affidavits were relied upon to prove it. It was a serious charge.

When Mr. Outcalt closed, Mr. Drew, the prosecuting officer for the county, desired to be heard upon those matters personal to himself. I thought that, under the circumstances, considering how he had been attacked on both sides, it was no more than right and fair that such permission be given. He made his statement, but in doing so he neglected to answer the matter stated in the affidavits, and, regardless of his duty as public prosecutor, he disclosed confidential communications made by a prosecuting witness for the state to him as the public prosecutor of the state, and ended by saying he did not care what was done with the original (his own) motion.

On the other hand, the assistant prosecuting attorney, Mr. Outcalt, thoroughly in earnest, and believing the said charges to be true, embarrassed by the action of Mr. Drew, has, nevertheless, prosecuted them boldly and vigorously, and asks that they be considered. As he has so far been conducting the principal management of the trial for the state, his request should be granted.

2. A second disagreeable feature in this hearing has been that the same persons have appeared in two characters of parties, witnesses and counsel, in matters of grave importance affecting their personal professional reputation. It was not, therefore, to be considered that in the argument under the impulse of strong feeling, much should be said not entirely consistent with decorum.

3. The conflicting character of the affidavits. It is almost impossible to come to any satisfactory conclusion as to the truth of a large portion of the matters contained therein.

4. That all this discussion has taken place whilst the defendant has been on trial charged with a grave offense, and asking a deliverance by the verdict of a jury.

There are four specifications in support of the motion:

First.—That two of the friends of the defendant, acting in his behalf, procured one John Downing, a member of the regular panel, then absent in the Cincinnati Hospital, to come to the court house on the day the jury was to be impanelled for the purpose of sitting on the jury and upon the understanding and agreement that his verdict should be "Not Guilty."

Second.—That on the morning of the day the case was to be called for trial, Mr. Campbell, the attorney for the defendant, requested one Harry Kline to be about the court room when this jury was to be selected. That Mr. Moses, the criminal bailiff, would call the jurors, that Kline would see Moses that he might be called, and after the trial was over that he should go to Mr. Campbell's office, and Mr. Campbell would make it all right with him.

Third and fourth.—That John L. Hite and Albert Humphreys, two of the jurors, improperly caused themselves to be called and accepted as jurors.

The action is founded on section 7313 of the Revised Statutes, which provides that:

"The court may discharge a jury without prejudice to the prosecution, for the sickness of a juror, or other accident or calamity, or because there

is no probability of the jurors agreeing, and the reason of the discharge shall be entered on the journal."

It is claimed by the prosecution that the facts and circumstances in this case bring it within the scope and meaning of "other accident or calamity" named in said section. As our crimes are defined by statute and our criminal proceedings regulated by statute, the court has no power to grant this motion unless the statute confers it. Nor has our supreme court, so far as I know, defined what is an accident or calamity, such as would authorize the court to interfere and prevent the case going to a verdict.

The constitutional provision that no one shall be twice in jeopardy for the same offense is jealously guarded in this state; and this jeopardy commences when the prisoner is placed on trial and the jury impanelled and sworn. But, at common law, if the court had no jurisdiction, or the indictment was so far defective that no valid judgment can be rendered upon it; or, if by any overruling necessity, such as the sickness or death of a judge holding the court, or of a juror, or the inability of the jury to agree upon a verdict after a reasonable time, or the term of the court comes to an end before the trial is finished, in such case the accused may be again put on trial for the same offense. Cooley's Constitutional Limitations, 327.

It is claimed by the counsel for the state that if there has been fraud practiced by defendant or by his procurement, such as tampering with the jury, keeping back witnesses or procuring persons to be introduced into the panel pledged to give a verdict one way or the other, without regard to the law or the evidence—such facts create a legal necessity (called in some of the books the necessity of doing justice), and requires the court to interfere, discharge the jury, and this should not prejudice a subsequent trial. In truth, why should it? How can a man be in jeopardy when he, by his own procurement, secure jurors in the panel pledged, at all events, to acquit? Suppose it now appeared certain to the court, the counsel and all parties connected with this case, that one or more jurors in the present panel had already agreed to acquit without regard to the evidence; that they swore falsely touching their qualifications when they were examined, and before they were sworn; that by reason of said pledged and perjured jurors no honest verdict could be obtained, should we continue such trial longer? Suppose such pledged and perjured jurors were secured into the panel by the defendant's procurement, should he escape punishment by adding this last offense to the original crime? Many authorities cited by Messrs. Outcalt and Crossley say emphatically that in such a case the jury ought to be discharged and a new venire awarded.

In the case of *The State v. Ball*, 81 N. C., 591, decided as recently as 1879, it is said by the court:

"There is what is termed the necessity of doing justice which arises from the duty of the court to prevent the obstruction of justice by guarding its administration against all fraudulent practices, such as tampering with the jury, keeping back the witnesses, and to which may be added as especially belonging to this class, the fraudulent introduction into the panel of a perjured juror, who, at the instance of the prisoner, has procured himself to be selected on the jury for the purpose of acquitting the prisoner—citing 68 N. C., 203; 65 N. C., 426; 6 S. & R., 56.

"If the judge were to sit on the bench and allow such a fraud as is

disclosed in the facts found in this case thus cited, the trial by jury would be a farce and the administration of justice a mere mockery. It is the judge's duty to see that there is a fair and impartial trial, and to interpose his authority to prevent all unfair dealing and corrupt or fraudulent practices on the part of either the prosecution or defense. Fraud vitiates every transaction into which it enters. Citing Bishop Criminal Law. In *State v. Wiseman*, 68 N. C., 203, the jury was discharged and a new venire issued, because the officer in charge had been conversing with the jury in such a way as to influence them unfavorably toward the prosecution."

The late Judge Curtis, one of the most eminent lawyers and judges that ever lived in the United States, says in the case of *The United States v. Morris*, 1 Curtis, 35:

"Suppose the judge during the trial, obtaining by accident personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or evidence, is he bound to hold his peace? In my judgment, such a doctrine would be as wide of the common law, as it would be of common sense and common honesty."

And again, on page 37, the same judge says: "The truth is that it is an entire mistake to suppose that in a court of justice either party can have a vested right to a corrupt or prejudicial juror, who is not fit to sit in judgment on the case."

There must be some legal necessity to thus authorize a jury to be discharged. What is this legal necessity is the question. As the doctrine and the decisions at common law were well known and understood when said section 7313 of our code was first enacted, it might be a question whether the legislature intended simply to reaffirm it, and authorize the court to apply its principles in each particular case as it arises, in determining whether this legal necessity has arisen, or to determine by statute what is this legal necessity, and restrain the court from the latitude allowed at common law.

Is it a physical necessity which prevents the jury from coming to any verdict at all, like the sickness of a juror, or an inability to agree, or may it be some other kind of necessity which prevents an honest and an impartial verdict by reason of the fraudulent practices of the defendant? On the one hand it may be urged it is the duty to protect the courts under the circumstances from fraudulent practices, and no one, under any circumstances, should be allowed to take advantage of his own fraud.

On the other hand it may be said the defendant's rights are all guarded by his motion for a new trial, motion in arrest, writ of error, etc., and it is well to protect him from being harrassed while on trial for his liberty or life, and having the trial suspended by reason of some other charge touching the regularity or honesty of the jury thus trying him. The state may waive some of its rights in favor of the rights and liberty of the citizen. In *Hines v. State*, 24 O. S., 134. Judge McIlvaine, in speaking of the doctrine what is meant by being twice in jeopardy, says that no inflexible rule can be laid down, but must be determined in each case, at the discretion of the court, governed by known rules and fixed principles.

But even if fraudulent practices by the defendant is a ground for discharging a jury, before a verdict, without prejudice, those fraudulent practices must be satisfactorily proved.

Let us examine the evidence with reference to the specifications. Many affidavits have been filed, which, it seems to me, can not possibly have any relevancy to the motion.

The first specification has reference to the juror, John Dowling. He was sworn from the jury box, near the beginning of the term as a regular juror, and regularly entitled to be in the panel. He was sick—had left without leave of court, gone to the Cincinnati Hospital, where he was an inmate when this case was set for trial. Defendant's friends, Seiter and Brady, went to the hospital to secure his attendance at this trial. If this is all they did, there is no ground for complaint. They had the right to do it. Dowling was a legal juror—such a juror as the law provides. It is claimed by the state that not only they secured Dowling's attendance in court, but also exacted a promise that he would, as a juror, give his verdict of acquittal. He came into the box, was examined on oath as to his qualifications, and gave satisfactory answers that he had never talked about the case to anyone, nor had any opinion or bias whatever about it. He could not therefore be challenged for cause. He was afterward, however, challenged peremptorily. It is doubtful if this alleged agreement with Seiter and Brady, to give said verdict of acquittal, is proven by legal and competent testimony. He stated to Mr. Outcalt that he had such an understanding with Seiter and Brady, and when Outcalt went with Taft to get his affidavit he refused to give it, but said to Mr. Outcalt, in the presence of Mr. Taft, that he had had such an understanding with Seiter and Brady, and had previously so stated to Outcalt. Dowling has, however, given his own affidavit for defendant, and sworn that he never made such a statement to Taft and Outcalt, and that neither Seiter nor Brady ever spoke to him (Dowling), or in his presence, about the Hoffman trial, nor in any manner relative thereto. Both Seiter and Brady deny that they ever talked with Dowling about the trial, though admitting they went to the hospital to secure his attendance as a juror. I am satisfied that Dowling made this statement to Mr. Outcalt, as Outcalt says in his affidavit, and that he repeated it in the presence of Taft and Outcalt, as Taft swears; but as this alleged agreement or understanding with Seiter and Brady rests entirely upon Dowling's testimony, might say it is not proved. It seems to rest upon hearsay testimony, but whether hearsay testimony or not, Dowling has made such different statements about it, that as a witness he is unreliable, and as Seiter and Brady both deny it, they are entitled to the benefit of their denial.

But the counsel for the state claims that Dowling swore falsely to get himself accepted as a juror; that if he had sworn truly he would have been challenged for cause. The state has thus been deprived of one peremptory challenge. He is not, however, on the jury as finally impanelled. The defendant's right ought not to be imperiled by his conduct unless the defendant procured it, and as I have just said, Dowling's testimony is not entitled to any credit.

Second: The second ground of the motion is that on the morning of the day the case was set for trial, Mr. Campbell, the defendant's attorney, requested one Henry Kline to be in the neighborhood of the court room, and to see Mr. Moses, the criminal bailiff, for the purpose of being placed on this jury, and after the said trial was over, to come to Mr. Campbell's office and he would make it right with him.

When these charges were first submitted to me, I said I thought it was irrelevant, and since the argument I have not changed my opinion.

Kline was never called to this jury; never had any connection with it; and so far as appears in this case, no more than any other spectator in the court room. How, then, can any conversation with, or proposition

to him, affect this panel? I therefore dismiss this, and the affidavit pertaining to it, without further comment. The charge is sustained by the affidavit of Mr. Kline alone. Mr. Campbell denies it in toto, and presents affidavits of others corroborating him, and the weight of testimony in the case is in his favor; but as the change affects the character and reputation of a prominent member of this bar, it is due to him, to the court, and the administration of justice in this room, that its truth or falsity be established by some proper proceeding.

Third: The fourth and fifth charges and specifications (the third being withdrawn) refer to the manner in which two jurors, John L. Hite and Albert Humphreys, were procured to be placed on the jury. It is claimed by the state, first, that these two jurors were placed in the panel by reason of a corrupt bargain between Mr. Drew and Mr. Campbell; or, if that is not so, second, that these two jurors are irregularly there; that as now impanelled the jury cannot render a valid verdict, and therefore it is idle to proceed further in the case.

During the impanelling of the jury it became necessary to summon talesmen. The question arose, how were they to be summoned? Mr. Outcalt called for a special venire. Mr. Drew checked him, and after a few moments of consultation it was stated in open court, either by Mr. Drew or Mr. Campbell, or both, that they had agreed that Mr. Moses, the criminal bailiff, should summon the talesmen. It is admitted that either then or some time previously during the day, Mr. Drew handed to Mr. Moses a slip containing six names, suggesting them as proper to be placed on this jury. Mr. Moses, with this slip, went into the street in search. He brought in at different times four men, two of whom were named in this list. One of the other two was challenged for cause and the other three accepted—including Messrs. Hite and Humphreys, on this list. Mr. Moses also testifies that when Mr. Drew handed him this list, he said they were all good business men; that he was afraid the other side might set up the jury on him, and if any of those men were selected they would do justice, etc.

Mr. Drew has not seen fit to deny the truth of this affidavit, nor that he made this statement to Mr. Moses. What does he mean by the "other side making up the jury on him?" Had he any reason to expect it then? Did he have any evidence of it? He is the prosecuting attorney of the county, then engaged in impanelling a jury for a trial of much importance. If he suspected or feared, or had reason to suspect the other side were doing this, should he not have called it to the attention of the court, and have made effort to stop it? Had he then heard of the efforts of Seiter and Brady, or the application of Kline? Was he going to counteract their efforts by issuing a special venire of his own? What he meant by that statement he ought to have explained. It is claimed by the state that this list was given to Mr. Moses in pursuance of an arrangement between Messrs. Drew and Campbell, and certain suspicious circumstances are commented upon.

1. That Mr. Campbell should so readily agree that the talesmen should be selected by Mr. Moses, his enemy. But Mr. Campbell explains it by saying, that being the general attorney of the sheriff's office, in order to avoid scandal, he did not wish the deputy sheriff to summon men to any jury before whom he was to try a case.

2. It is said that when it was first stated in court last Monday that Mr. Drew furnished this list to Mr. Moses, from which two of the jurors

had been selected to try this case, of so much importance to his client, and who would be virtually unfriendly to him, Mr. Campbell did not object, but persisted in going on with the trial. But the defendant does not waive any of his rights in a trial for a high crime. Mr. Campbell may say this irregularity in securing the jury is none of my seeking, and will give me another chance; I still have my chance with the jury, and if the verdict goes against me, a chance to upset the verdict before the court.

There are other circumstances of more or less importance suggested by counsel tending to show collusion. But in a matter of this importance and charging serious crimes against the prosecutor of the county on one side and a prominent lawyer on the other, the most convincing proof should be required. Mere suspicious presumptions, a few isolated circumstances, are not sufficient. If it had been clearly proven that such a combination or conspiracy existed, as is now claimed, it would be my duty to stop the trial where it is. But at present the proof fails to establish it.

But it is further said by the state that this irregularity in putting on two jurors will prevent a valid verdict; that the defendant can always except to it, and it is therefore idle to proceed further. But by whose fault or act is this trial prejudiced? The legal proposition is this: The defendant is on trial charged with a most serious crime. The prosecuting attorney of the county has intentionally, not by accident or misfortune, committed an irregularity which may possibly arrest the verdict. Can the state take advantage of this wrong, and thus discharge the jury against the consent of the defendant? Suppose that during the trial of a criminal case by an oversight, or mere carelessness, the state had failed to put in an important link in the chain of testimony which could not be supplied during that term of court, would that authorize the court to discharge the jury before a verdict, to help the state out of its difficulty? Certainly not. How then can Mr. Drew's irregularity in furnishing Mr. Moses this list be termed a legal necessity? Whether or not the defendant by consenting to go on after being informed how these two men were selected, does not waive their irregularity, need not now be considered. That question can be determined when it arises.

There is no evidence whatever before me tending to impeach the character and integrity of those two men, Messrs. Hite and Humphreys, about whom so much has been said. The positive testimony about Hite, so far as there is any, is that he is a good man, and all that has been said about Mr. Humphreys is that he was seen frequently about the court house on the day he was impanelled as a juror. Mr. Moses in selecting the talesmen was not confined to the list given him by Mr. Drew. He brought in two other men, whom he knew to be good men, and I feel satisfied he believed Messrs. Hite and Humphreys were good men, otherwise he would not have summoned them.

There were sundry affidavits offered by the defendant, more especially affecting Mr. Outcalt, that cannot possibly pertain to his motion. Mr. Outcalt's motion to have them stricken out of the record should have been granted.

Having thus carefully examined this motion as presented, and the grounds urged in its support, I have come to this conclusion: 1. That it is questionable how far under the statutes of Ohio the court would be justified in arresting a trial for felony without prejudice to a future trial, except for the causes actually named in said section. 2. That if fraud

on the part of the defendant touching the impanelling of the jury, or tampering with the jury after it is impanelled, be a sufficient cause thus to discharge a jury before a verdict, such fraud must be proved by clear and convincing testimony. I think the state has failed in that degree of proof, and the motion must be overruled.

TRIAL—PROSECUTING ATTORNEY.

881

[Hamilton District Court, December, 1880.]

STATE OF OHIO ex rel. DREW v. FAYETTE SMITH, Judge.

A court presiding over a criminal trial has power in a proper case, where the prosecuting attorney is guilty of misconduct, and there are charges of collusion between him and the accused to relieve him of further part in the trial of the case, and to allow the assistant prosecuting attorney to conduct the trial.

EVERY, J.

The question touches a criminal trial now in progress in the court of common pleas, and which, up to the time of the controversy, had been conducted by the assistant prosecuting attorney. The question is whether this court shall, by mandamus, compel the trial court to permit the prosecuting attorney of the county to take part in the case. The facts in substance, as alleged by the answer, which the demurrer admits to be true, are:

That until the third day of the trial it had been conducted by the assistant prosecuting attorney; that while the cause was in progress on that day, the prosecuting attorney of the county came into court and filed a motion in writing to discharge the jury, impanelled on the trial, and issue a new venire, "because said jury is not a legal jury;" that he then admitted he had furnished to the criminal bailiff, who, it had been agreed between him and counsel for the defendant on trial, should summon talesmen to fill up the jury, a list of names from which to select, and that the bailiff had selected two names, and the persons were then on the jury; that the assistant prosecuting attorney charged that from facts within his knowledge he had reason to believe in the existence of a conspiracy between the defendant and his agents to get persons on the jury in the interest of the defendant, and who would prevent a verdict against the defendant; that the court thought the charges were grave and ought to be investigated, and adjourned the court until the next day to enable the assistant prosecuting attorney to draw specifications; that on the next day the prosecuting attorney of the county came into court, and was not inclined to file the specifications, because he did not think them pertinent, but the assistant prosecuting attorney desiring to argue the pertinency, affidavits were filed and the argument heard, in the course of which much bitterness of feeling was apparent between the prosecuting attorney of the county and the assistant prosecuting attorney and the assistant city solicitor, who by consent, as representing the city, interested in the matter, had been permitted to take part, on behalf of state; that great bitterness of feeling was expressed by the prosecuting attorney of the county against one who was said to be an important witness for the state; that the statement of the prosecuting attorney of the county in that connection seemed to be in opposition to the motion he had made, and, at the close of his statement, he declared he did not care what became of the motion, that after overruling the motion the court adjourned until 2 o'clock of the same day

to enable counsel for the prosecution to consult; that at 2 o'clock the court met, and the assistant prosecuting attorney and the assistant city solicitor were present and remained during the entire afternoon, but the prosecuting attorney did not appear, and although the court made every effort, could not be found, and did not come until about half-past 4 o'clock in the afternoon, having kept the court waiting until that time and said, among other things, as his reason for not being there, that he had private business of more importance to him than the trial of the cause; that the assistant prosecuting attorney, who, it was apparent to the court, had prepared the case and was expected by the prosecuting attorney of the county to try it, declared that he would not go on if the prosecuting attorney remained in the case; that the prosecuting attorney of the county apparently took little part and but little interest in the case, and that the court being satisfied that it was impracticable to proceed in the trial with the prosecuting attorney of the county as one of the counsel for the state, made an order relieving him from taking further part in the trial until a committee of members of the bar, who, by the same order, were appointed to investigate his conduct, should report.

Mandamus will only lie to enforce a duty specially enjoined by law as resulting from an office, trust or station. Rev. Stat., 6741. The duty must in its nature be mandatory or imperative. The writ cannot be used to control discretion.

Conceding the duty of a court to permit parties to be heard in person or by counsel, there is another duty, and that is to preserve those decent and seemly forms which, when stripped from the proceedings of a court, leave nothing to distinguish it.

The conduct of counsel in the trial of a cause, even though it falls short of actual contempt, is not so much beyond the control of the court as that he must be permitted to proceed with the trial whether or no, and when the trial is one which in its nature, being a criminal case, must in the absence of consent by the defendant, proceed whether or no, the prudent exercise of discretion by the court in that dilemma is not to be controlled by mandamus upon any other ground than that the interests of the party represented by the counsel will suffer. 28 Ind., 205, 212; 43 Conn., 268.

That the prosecuting attorney of the county, Drew, made a motion to discharge the jury, and then made an argument or statement in opposition to, and declared at the conclusion he did not care what became of the motion; that he kept the court waiting at the hour to which an adjournment had been taken for the further progress of the case, two hours and a half, and then gave among other reasons as his excuse that he had private business of more importance to him than the trial of the cause—these allegations made by the answer are admitted by the demurrer to be true.

The prosecuting attorney of the county was not a party to that trial; it was the state of Ohio. The duties of the office of prosecuting attorney of the county were devolved upon the relator by his election, and the control of that office was his. But the statute provided for the appointment by the judges of the court of common pleas of an assistant prosecuting attorney. 75 O. L., 47; and under that provision, when the relator took charge of his office, the present assistant prosecuting attorney was appointed.

For the purposes of a trial in which the assistant prosecuting attorney is permitted to conduct the cause, he, the assistant, does not represent

the prosecuting attorney of the county, but the party—that is, the state of Ohio—and when he has been permitted to begin a trial and conduct it for the course of three days, it would seem to be but the application of an ordinary principle when the exigency arose requiring the court to determine between him and the prosecuting attorney, that he should be permitted to proceed.

The answer alleges that the assistant prosecuting attorney had prepared the case upon the law and the facts, and was expected by the prosecuting attorney of the county to try it: that he had, in fact, conducted the trial from the beginning until the third day, when these controversies arose. For the purposes therefore of that case, the state of Ohio was represented before the court by the assistant prosecuting attorney. In the progress of the case, the conflict, evidenced by the great bitterness of feeling expressed between these two gentlemen, arose. It became necessary then, in the performance of the chief duty of that court, which was to proceed with the case, to determine this conflict, to choose between the two.

With the matters influencing the discretion of that court in its choice we have nothing to do. It is enough for the purpose of this proceeding to determine that it was a matter of discretion. Extreme cases may be put wherein it might be the undoubted duty of this court to interfere, but extreme cases sometimes only denote the extremity of the argument. The particular construction of a statute or of a contract may be determined by the possible consequences, but upon application for interference by mandamus, it is certainly no argument in a particular case that possible cases may arise.

Necessarily this application involves only that part of the order which could be complained of under this application. That is not the order appointing the committee nor the recitals in the order, but simply that part which relieves the relator from taking further part in the trial of the cause.

For these reasons, therefore, the demurrer is overruled.

BASTARDY.

889

[Hamilton District Court, December, 1880.]

Avery, Cox and Johnston, JJ.

WILLIAM KNOX v. KATIE WEBER.

The plaintiff in a bastardy suit need not be a resident of the county, a former requirement to that effect being omitted in the statute.

ERROR to Common Pleas.

COX, J.

This was a proceeding in bastardy instituted by the defendant in error. Upon the first trial of the case the jury found the defendant "not guilty." A motion for a new trial was overruled. Subsequently, however, the court of its own motion set the verdict aside. A new trial was had, and Knox, the defendant below, the plaintiff in error, was found guilty. A great many errors were assigned. The first was the ruling of the court upon the plea of Knox that he had once been tried and could not again be put in jeopardy. This was argued on the ground that the nature of the proceeding was criminal.

The court below sustained the demurrer to this plea, as we think, correctly. The supreme court has decided that a bastardy proceeding is in its nature civil, and the confinement in prison in default of the payment of the amount in which the court orders the defendant to stand charged for the support of the bastard child, is not in the nature of a punishment for a criminal offense. There was also a plea to the jurisdiction of the court, and the court was asked to charge that if they found that Katie Weber, the plaintiff, was not a resident of Ohio, or of this county, she could not maintain this suit. The testimony shows that she lived in Newport, Kentucky; that she went to Hamilton, Ohio, to work as a servant, and while there she had intercourse with Knox, the result of which was a bastard child, and finding him here in this county she brought suit. The law previous to the commencement of this suit required that the plaintiff be a resident of the county in which suit was brought. But the amendment to that law, and which applies to this suit, makes no such requirement. The refusal of the court so to charge, we think correct. We also are of the opinion, from an examination of the testimony, that the verdict was fully warranted by the evidence.

Judgment affirmed.

C. H. Blackburn and J. J. Muir, for plaintiff.

W. Highly, for defendant.

BILLS AND NOTES—PLEDGE.

889

[Hamilton District Court, December, 1880.]

Avery, Cox and Johnston, JJ.

†REUBEN R. SPRINGER et al. v. JOHN B. PURCELL et al.

Promissory notes deposited as collateral security for loan. Cannot be sold before maturity and proceeds applied to payment of debt. If sold in violation of his duty the depository is responsible for full value.

APPEAL from Common Pleas Court.

COX, J.

Suit was brought by the plaintiffs, a corporation known as the Lafayette Bank against the defendants to recover upon five promissory notes of \$5,000 each, dated in October, 1878, and due at short intervals. It was alleged that the arch-bishop, being indebted to the bank, gave these notes and deposited as collateral security at the same time three notes of John Beckett for \$20,000 each, secured by mortgage upon real estate. These notes were dated July 19, 1878, and payable two, three and four years after date. The plaintiffs allege that the principal notes were due, and asked leave to sell the hypothecated notes and apply the proceeds to the principal notes. The defendant through his assignee, John B. Mannix, claimed that there was no agreement that the hypothecated notes should be sold in default of payment of the principal notes; that the hypothecated notes were choses in action and not liable to be sold, but the holders must wait until their maturity, and then proceed to collect them.

We think the true rule is laid down in 16 New York, 395-6, that there is a distinction between the pledging of ordinary chattels and promissory notes, and that where the latter are hypothecated they cannot be sold and

†This case was dismissed by the supreme court commission, November 18, 1883, for want of preparation.

the proceeds applied to the payment of the principal debt, but the holder must wait until their maturity, and then proceed to collect them. This principle does not apply to the case of bonds and stocks, which are bought and sold as property and have a regular value in the market. Where, however, the creditor assumes to, and does sell such notes before due, he is liable for their full value, irrespective of the amount which he may have received for them. Judgment for the defendants, in so far as denying the right of sale.

Hagans & Broadwell, for plaintiff.

Healy & Brannan, for defendant.

[Hamilton District Court, December, 1880.]

903

JOSEPHINE LAIRD et al v. CITY OF CINCINNATI.

For opinion see 6 Dec. R., 1006, (s. c. 9 Am. Law Rec., 479.)

BILLS AND NOTES—EVIDENCE.

933

[Hamilton District Court, December, 1880.]

Avery, Cox and Johnston, JJ.

H. A. LANGHORST, Assignee, v. PH. DOLLE et al.

In a suit on a non-negotiable note, the plaintiff sustains the burden of proof by producing the note and proving its execution. When the execution is admitted, the production of the note makes a prima facie case, and the plaintiff is not required to prove considerations.

COX, J.

This was a petition in error to reverse the judgment of the court of common pleas. In that court, Dolle brought suit against Wm. Albers to recover \$887 on a promissory note made by Albers, payable to Shuttledreyer & Co. The note was endorsed by them to Mary Duval, and by her to Dolle. Albers admitted his indebtedness and set up that he had been notified by Shuttledreyer & Co., not to pay it; that it had been passed without consideration, and paid the money into court. The assignee of Shuttledreyer & Co., in addition to the allegations of Albers, alleged that the endorsement to Mary Duval was by one of the members of the firm without the consent of the firm, in contemplation of insolvency, and in fraud of the partnership and its creditors. The court below held that the note was prima facie evidence of Dolle's claim, and that the defendant was entitled to the opening and closing of the case.

The rule is admitted that a negotiable note imports on its face a consideration, and that its production in evidence by the holder makes a prima facie case. The rule is claimed to be different as to a non-negotiable note, as then in addition to its production, the *consideration* must be proved, and that in this case the burden of proving the consideration was on the plaintiff below. But whether the note be negotiable or not, the plaintiff sustains the burden of proof by offering the note and proving its execution. It is evidence under the hand of the promisor of a contract made upon a good consideration, even if the words "value received" are omitted. *Dean v. Caruth*, 108 Mass., 244; *Townsend v. Daily*, 3 Met., 363; *Bernham v. Allen*, 1 Gay, 496. In this case it was not necessary to

prove execution, Albers having admitted that and paid the money into court. The burden was upon the defendants to show that the note was without consideration, the plaintiff having produced the note with its indorsement, and the admission that it was made by one of the members of the firm. It appears that the endorsement was made to Mary Duval by one of the members of the firm for an individual debt, in the presence of both members of the firm, two days before the assignment took place. Such a transaction will be upheld when done in good faith, and there was nothing in the evidence to show a contrary state of facts. There was nothing to show that Mary Duval took the note as collateral, or that Dolle received it without consideration.

Judgment affirmed.

934

[Hamilton District Court, December, 1880.]

LUCY M. BOAKE v. JOHN BONTE & SONS.

For opinion see 6 Dec. R., 1013, (s. c. 9 Am. Law Rep., 487.)

17

ASSIGNMENT FOR CREDITORS.

[Superior Court of Cincinnati, General Term, January, 1881].

Force, Harmon and Foraker, JJ.

GOEPPER & CO. v. JACOB PFAU, JR., et al.

1. Assignees who carry on the business of an insolvent by order of the probate court, and consent of creditors, are liable personally for goods sold and delivered to them as such for such business, unless it appear that the intent was to look only to the estate.
2. Mere knowledge of the seller that the buyers were assignees, and bought as such, is not sufficient evidence of such intent.

HARMON, J.

These cases reserved upon the evidence involve the same questions and were tried together. They are all brought against defendants personally to recover the agreed price of goods supplied to the Jackson brewery, while defendants, as assignees in insolvency of Geo. Weber, the owner, were running it under an order of the probate court with the consent of Weber's creditors. The petitions are in the ordinary form for goods sold and delivered, the answers are general denials.

It is admitted that the goods were ordered by the foreman employed by defendants as assignees to manage the brewery and that he ordered them by their authority, agreed with plaintiffs upon the price, and that the goods were delivered at the brewery. It is admitted too that plaintiffs knew at the time that defendants were carrying on the business of the brewery as assignees only, and on their books charged them to defendants as such. The question is, do these facts impose upon defendants a personal liability? And first it must be determined by what principles these transactions are to be judged. Were defendants agents or trustees? Facts which would impose personal liability upon them in one capacity, might impose none in the other.

It is contended for defendants that by consenting to the continuance of the insolvent's business by the assignees, the creditors and Weber became partners therein, or at least became the principals whose agents the assignees thenceforth were. The same reasoning which would make

them principals would also make them partners. If the business was carried on for their benefit by their means and subject to their direction and control, and they were entitled to its profits directly, as profits, they were the principals in it, and, the interest of each being definite, they of necessity became partners at least as to creditors. But whether the creditors were partners or not the assignees would be their mere agents, and in the transactions in question known agents of known principals.

It is clear, however, that the creditors assumed and could assume no such relation to this business. True, its continuance was for their benefit and the insolvent's together, but it was not subject to their direction or control, nor were they entitled to its profits as profits. The business was carried on by the order and under the directions of the probate court. But for this order their consent would avail nothing. That court never surrendered or attempted to surrender its control of the estate of which this brewery was part, nor were the assignees relieved of their relation to it by virtue of the assignment and the laws relating to assignments. While the court probably had no authority to make the order, it did make it, the persons competent to object consenting. The order and the consent were mere assurances to the assignees, that should they continue the business, there should be no proceeding against them for failing to reduce the estate to cash as directed by law, or to compel them to account for any loss which might result. But assignees they remained; as assignees they conducted the business. They were accountable to and removable by the probate court and it alone. And the creditors could receive the profits only as dividends upon, or payment of their claims proved against the estate, while the remainder would revert to Weber as the resulting beneficiary of the trust under the law.

Cox v. Hickman, 8. H. L. C., 268 presents a strong analogy. Creditors for whom the debtors' business was carried on under a conveyance to trustees, were held not to be partners in the business for the reason among others, that by the terms of the deed, the profits were to be received by them as the money of their debtor to be applied upon their claims so that they had no interest in profits, *qua* profits. What the deed expressed in that case the law supplies in this.

Defendants then were not agents. There were no principals. They were trustees of an express trust. They held the title to the property. They were to deal with and dispose of it as owners *pro hac vice*, and merely account for its proceeds to specified persons in a fixed order of priority. And while it might be said that in its broadest sense, agency includes trusteeship, (in which sense only can the expression in 8 Conn., 584 be taken,) they are radically different in the principles of law which apply to them. An authorized agent contracting for a known principal undertakes nothing in any capacity. He is the mere mouth-piece of another who does undertake. When the contract is made, the agent vanishes from it utterly. He is not concerned with its performance or its breach.

A trustee of an express trust, even when contracting within the limits of the trust, is not such a mere machine. One of the minds which meet in the agreement is his mind. What is undertaken on one side he undertakes. The contract, if performed upon his side, he must perform. If broken, he must break it. Granted, if the thing to be done on his side be the payment of money, that it is to be made from the trust funds, it is he who undertakes to make it. Whether his promise be express or implied matters not. The promise implied from requesting the sale and delivery of goods must be imputed to a person, and the trustee is the only

person to whom it can be imputed. The promise so implied is that he will pay from the trust fund. While it may be said the seller looks to that fund for payment; he looks to it *through the trustee* who alone knows the state of the fund and who alone has control of it. The trustee's obligation is personal as to the creditor. He looks to the trustee for indemnity. And whatever right the creditor may obtain by subrogation to this right of the trustee to indemnity or otherwise to pursue the trust fund *in rem*, his personal contract relation with the trustee can be avoided only by his consent, by stipulation or inference that it shall not exist. To say that he must be held to so consent from mere knowledge that the person with whom he is contracting is acting as trustee, is, if what has just been said is true, to beg the question.

Such is the conclusion to which we should logically come upon the ordinary principles of contract. Let us look at the authorities. In *Horsley v. Bell*, 1 Brown's Ch., 101n, laborers employed by commissioners for a navigation improvement, sought personal judgment. In reply to substantially the same argument advanced here, Ashurst, J. said "it is absurd" to say the laborers shall have no remedy "except against the fund." Gould J. said "they were to take care to have money to pay their workmen, then are the workmen to lose by their inattention?" The law raises an assumption to those who have done the meritorious act. The Lord Ch. said "it is their fault if they enter into contracts when they have no money to answer them." The absurdity referred to must have arisen in the mind of the judge upon the general principles to which we have just referred.

This decision was approved in *Eaton v. Bell*, 5 Barn., and Ald., 34.

In *Barry v. Rush*, 1 T. R., 691, defendant was held personally liable, though he signed *as administrator*, though it may have been because he bound *himself, his heirs, etc.*

In *Lucas v. Williams*, 4 DeGex F. & J., 436, though the decision seems to have turned upon a question of practice, the court say they cannot follow the argument that plaintiff should proceed to prove against the estate, instead of against defendant personally.

In *Kinder v. Howarth*, 2 Stark., 354, defendant an assignee was held personally liable for goods supplied for a business carried on for the benefit of the creditors, by their consent, although charged to the insolvent himself, who was carrying on the business as agent for the assignee. In *ex parte Garland*, 10 Ves., Jr., 110, Lord Eldon recognized the principle, though it was not necessary to decide it. He said of an executor continuing business by express direction of the will, "he becomes liable as personally responsible to the extent of all his own property; also in his own person, as he may be proceeded against as a bankrupt, though he is but a trustee." It was also held that creditors had liens upon the portion of the estate embarked in the business so that a double remedy was recognized.

So in the American cases. In *Lovell v. Field*, 5 Vt., 221, an action for goods sold administrator, the court said: "The promise is their own and they are personally liable" although it was said they may make it *on the credit* of the estate.

In *Trueman v. Tilden*, 6 N. H., 201, the court recognized the right of the creditor for goods sold and delivered, to look to the administrator personally, or to the estate at his election.

In *Liverman v. Rand*, 6 Foster, 90, the same court held, in an action against an administrator for services as attorney, "He stands to the plaintiff in the relation of any other employer. He might have made a special contract, excluding any personal liability on his part if he had chosen to

do so. But as the case stands, there is nothing to relieve him from his liability. No other promise is necessary than that implied from the employment."

See also *Luscomb v. Ballard*, 5 Gray, 403; *Gear v. Huston*, 8 S. & R., 402.

In *Harding v. Evans*, 3 Porter (Ala.), 221, an administrator was held personally liable for goods furnished to run the decedent's plantation the remainder of the year, although he was required by law to do so, the court remarking that his remedy was to retain the amount from his account.

In *Long v. Redman*, 58 Ind., 58, an administrator was held personally for services of an attorney rendered to the estate at his request in the absence of a waiver of such liability. The creditor's right to an election of remedies was also referred to.

We have been referred to only two cases as sustaining the contrary principle. *W. Cement Co. v. Jones*, by the St. Louis Court of Appeals, February, 1880, and *Chateau v. Suydam*, 21 N. Y., 179. In the former, the guardian of a lunatic was held not to be personally liable for goods purchased by him in continuing the lunatic's business. It proceeds entirely upon the theory that the guardian was an agent, known to be such, and known to have no authority to bind his principal. The court held that he was a mere agent for the lunatic. This was no doubt based upon the law under which he was appointed. If the title remained in the lunatic the guardian would be only an agent, not a trustee. We do not question the correctness of the decision, but its principles do not apply to this case for the reason just stated. The latter case is in point for defendant, but it was expressly repudiated in *Ferrin v. Myrick*, 41 N. Y., in which *Hunt, C. J.*, says *Choteau v. Suydam* does not affect the authorities he reviews, because the learned judge had not considered them. It was conceded in the opinion dissenting from the conclusion that the estate was not liable, that the administrator "could be sued and charged personally." See also to same effect, *Mygatt v. Wilcox*, 45 N. Y., 309, and *New v. Nicoll* 73, N. Y., 127. In *Myer v. Blakeman*, 2 Selden, 580, the court said: "It is undoubtedly true, as a general rule, that when a trustee employs agents in the execution of his trust, they are to look to him individually, etc. If he is in funds he is bound to protect the estate, in which case he has no lien, and consequently cannot assign any, having none to assign. But being without funds, and a necessity arising for expenditures, etc., he may either make them himself, and be allowed for them in the passing of his accounts, or may engage others to do it upon the credit of the fund." *New v. Nicoll* is very similar to the case at bar.

The same principle is recognized in *Lucht v. Behrens*, 28 O. S., 231: In *Conger v. Atwood*, *id.* 134, the creditor was permitted to proceed against the estate, it appearing that the money for which she sued had gone into it but the court admit her right to elect whether she will proceed against the administrator personally instead. It is the creditor who has this election. The defendant cannot plead that he might have proceeded otherwise. Also *Cincinnati Ice Co. v. Pfau*. Hamilton district court. 9 Am. Law Rec. 306; (s. c. 6 Dec. R., 969).

The executor of a tenant who continues occupation is liable for rent personally as well as in his representative capacity. *Taylor, L. & T.*, section 459.

The same has been held of assignees in insolvency.

In the opinion in *Hallam v. Maxwell*, 2 C. S. R., 136, cited by defendant's counsel, we think the learned judge failed to notice the difference between a trustee's liability for loss of trust funds and his liability upon his contracts. The former is to the beneficiary and depends upon want of ordinary care. The trustee is not liable if he take the same care of the trust property that a prudent man would take of his own. The latter is to one to whom he has made a promise, express or implied, to make payment. But this case would fall even within the principle deduced from the authorities in that case, p. 141 i. e. that though not primarily liable, at least, "when acting bona fide in discharge of a duty imposed by law," the trustee become so "when he departs from his actual duty and volunteers to do something outside of his duty for the benefit of the estate." The judgment in that case was reversed in 2 C. S. R., 384, and assignees held personally liable for legal services rendered the estate at their request and charged to them as assignees. It is argued that the decision was upon the ground that employment imports personal liability of the employer. This is true, but it does not follow, and we do not understand the court to hold that purchases do not import such liability. We can conceive of no difference between the relation of a trustee, to one who at his request has rendered services, and his relation to one who at his request has furnished goods to the estate. We may say here, too, that we can see no distinction between administrators and assignees in this respect. Their duties and relation to estates in their charge, are nearly, if not quite identical. *Kilbourne v. Fay*, 29, O. S., 264, 280.

Nor do we agree with counsel for defendants that the hardship of the case, if that can be considered to affect a rule of law, is upon their side. If either is to suffer, do not the principles of justice require that it should be the trustee who knew the condition of the estate, who was in fairness bound to keep its purchases within its means, and to whose management may be due its inability to pay when the time for payment comes, rather than the creditor, who had neither knowledge nor control.

If there be any hardships in this case, the evidence does not disclose it. For aught that appears, defendants have in their hands ample funds from which to pay plaintiffs, and they may have credit for such payments in their account if they satisfy the probate court that the purchases were fairly made for the benefit of the estate. Section 6357, R. S.

As there was no stipulation by plaintiffs, that they would look only to the business, and nothing which raises such implication, for plaintiffs describing defendants as assignees upon their books can have no greater effect that their admitted knowledge that defendants bought as such, we find that they are entitled to recover against the defendants personally, the agreed price of the goods sold.

Force & Foracker, J.J., concur.

Mitchell & Holmes, and J. H. Perkins for plaintiffs.

W. M. Ramsey and D. M. Hyman, for defendants.

SLANDER.

20

[Superior Court of Cincinnati, General Term, January, 1881].

Force, Foraker and Harmon, JJ.

JAMES GOLDRICK v. LIPMAN LEVY.

1. To say of a lawyer that, "he is crazy, has a soft spot in his head, not in his right mind, etc.," not actionable per se unless spoken of him in his profession.
2. Such language when spoken of him generally, without reference to his profession, is mere vituperation and abuse.
8. But to say of a lawyer that, "he has never been admitted to the bar; he has no right to practice law; is an impostor and is imposing on the courts;" is actionable per se because these statements necessarily refer to him in his profession and are calculated to prejudice and injure him therein.

FORAKER, J.

This is an action to recover for slander.

The petition states that the plaintiff is an attorney and counsellor-at-law, regularly admitted to practice in the state and federal courts of Ohio, of good name and reputation; that he had never been guilty of mal-practice, or any imposition or unprofessional acts, yet the defendant maliciously intending to injure and defame the good name and character of the plaintiff, and to cause it to be believed that plaintiff was an imposter, and had no lawful right to practice law, or to appear as an attorney or counsellor-at-law, and had never been admitted to practice as such attorney and counsellor-at-law in the courts of Ohio, and to cause it to be believed that the plaintiff was not a person of sound mind, but was an imbecile and unfit to be intrusted with business, in a certain discourse which he had of and concerning plaintiff, in the presence and hearing of divers good people, spoke, uttered and published of and concerning the plaintiff, among other things, the false, scandalous, malicious and defamatory words following; viz: "He," meaning plaintiff, "is not a member of this bar," meaning the Hamilton county bar, "and he," meaning plaintiff "is a fraud. He never has been admitted to practice law, and has no right to appear as counsel for any one, and that if never admitted he never could be admitted." "That he," meaning plaintiff, "is crazy, he is top-heavy, and does not know what he is doing." "That he," meaning plaintiff, "is an imposter, and is imposing on our courts, and I intend to challenge his right to appear as an attorney."

The plaintiff further says that by reason of the speaking of these words, he has been injured in his good name and character to the damage of twenty-thousand dollars.

For a second cause of action, the plaintiff says that the defendant, knowing the premises, and maliciously contriving and intending to injure and defame plaintiff in his good name and reputation, in a certain discourse which he had of and concerning plaintiff, in the presence and hearing of divers good people falsely, wickedly and maliciously spoke, uttered and published of and concerning the plaintiff, among other things, the false, scandalous and defamatory words as follows, viz.: "That he, James Goldrick, is a fraud and an impostor. That he has no right to practice law in any of our courts. That he has never been admitted to practice law. That he is not in his right mind, and has a soft spot in the head," to plaintiff's damage in the sum of thirty thousand dollars.

Prayer for judgment for \$50,000. To this petition the defendant filed a general demurrer which is now before the court upon motion.

The question to be determined is, therefore, whether or not the petition states facts sufficient to constitute a cause of action.

It is clear that the words set out, if spoken generally, of one having no office, trade or profession, would not be actionable without special damage shown.

The question is, therefore, stated in another form, whether these words are actionable because spoken of one who is by profession an attorney and counsellor-at-law.

It is manifest that some of these words were spoken of the plaintiff in his professional character, and we think it equally apparent that others were not.

For instance, the words, "He is not a member of this bar. He is a fraud. He never has been admitted to practice law, and has no right to appear for any one, and that if never admitted he never could be admitted," clearly enough relate to him in his profession. So also the words, "He is an imposter, and is imposing on our courts, and I intend to challenge his right to appear as an attorney."

While on the other hand we think the words, "He is crazy; he is top-heavy, and does not know what he is doing," have relation to him individually, and generally, without regard to his professional character or duties. It is argued that these words, "He is crazy; he is top-heavy, he has a soft spot in his head, etc., are actionable *per se*, when merely spoken of one who is an attorney, and therefore actionable here, without special damage shown, on the ground that they necessarily imply a lack of that talent and the mental attainments that are considered necessary to a safe and successful practitioner of the law, and hence are calculated to prejudice and damage the plaintiff in his profession.

There are authorities which seem to go to the extent of supporting this claim.

Section 112 of Starkie on Libel and Slander says:

"Where the office, profession, or employment of the plaintiff requires great talent and high mental attainments, general words, imputing want of ability, are actionable, without express reference to his particular character, for they necessarily include an ability to discharge the duties of such a situation. Thus to say of a barrister generally that he is a 'dunce,' has been held to be actionable; the word dunce being commonly taken to mean a person of dull capacity who is not fit to be a lawyer."

If to say of a man who is a lawyer, but without reference thereto, that he is a dunce, be actionable, it would seem to be also actionable to say of such a man generally that "he is crazy, top-heavy, has a soft spot and does not know what he is doing, for certainly these statements would show him "not fit to be a lawyer."

But while there is this authority, and others of similar import that might be referred to, there is another class of cases which hold that words that are not actionable *per se*, when spoken of one generally do not become so when spoken of one who has an office, trade or profession, unless spoken of him in his vocation and pertain and apply to it.

Secor v. Harris, 18 Barb., 425; Carroll v. White, 33 Barb., 425; Camp v. Martin, 23 Conn., 86; Johnson v. Robertson, 8 Port. Ala., 486.

To say of a lawyer "that he is ignorant of his profession, and is no lawyer, and that fools only go to him for law, or that he is guilty of malpractice, or is a cheat, a rogue, are a knave in his profession, are actionable *per se*.

But mere vituperative language or general abuse of a professional man is not actionable unless it has reference to his conduct in his profession.

Note 1, to section 88, Starkie on Libel and Slander, citing:

Banks v. Allen, 1 Roll, Abr., 54; Baber v. Morfue, 1 Sid., 327; Day v. Buller, 3 Wils., 29.

Adopting the language first quoted, and following the rule last stated, we think the words "He is crazy, top-heavy, has a soft spot, etc." were mere vituperation and general abuse of the plaintiff, without reference to his professional character, and for that reason not actionable.

But as to the other words complained of we think differently.

To say of a lawyer that, "He is not a member of this Bar; that he has never been admitted to practice law, and has no right to appear as counsel for any one, and that he is an imposter, and is imposing on the courts," is, beyond question, so speaking of him in his professional character as to tend to prejudice him in his profession.

But words are actionable without proof of special damage, which directly tend to the prejudice of any one in his office, trade or business. Starkie, section 88.

The demurrer is overruled.

E. P. Dustin, attorney for plaintiff.

R. D. Jones, attorney for defendant.

LANDLORD AND TENANT.

22

[Superior Court of Cincinnati, General Term, January, 1881].

Force, Foraker and Harmon. JJ.

†SAMUEL S. BROWN and JAMES M. SCHOONMAKER, Administrators, v.
CANAL ELEVATOR AND WAREHOUSE CO.

Lessees brought suit against their lessor, under a clause in their lease, which entitled them, at the end of their term, to payment for improvements placed by them on the premises. The lessor defended on the ground that by a clause in the lease the lessees were required to renew, if the lessor should, during the term, "purchase the title in fee simple to said premises," in which event the lessees should not be entitled to payment for improvements until the expiration of the term in renewal; and that he had, during the original term, purchased such title in fee simple and given the lessees notice that he required them to renew. Held: In such action it is not sufficient for the lessor, in proving his title, to show that he had, during the term, made an agreement with the owners of the fee for the purchase of the premises, the evidence further showing that he had not, during the term, paid the purchase-money or received a conveyance.

FORAKER, J.

This case was reserved upon the evidence.

The petition states that on the 21st day of April, 1871, the defendant leased to the said Wm. H. Brown and one Samuel B. Murphy, partners as Brown & Murphy, their legal representatives and assigns for the term from May 1, 1871, until the first day of September, 1879.

1. The privilege of occupying and using the space from ten to twenty feet over and above the west fourteen feet of lot 57, on the subdivision of lots made by the Bank of the United States.

2. Also the privilege of occupying and using the space over the race or water-way adjoining, and next west of said fourteen feet, being twenty feet wide and ninety feet deep—with an agreement in the lease contained providing that the lessor might make certain improvements on the premises to be used by lessees in

†This decision has been affirmed by the supreme court. See opinion 36 O. S. 660.

22 Brown and Schoonmaker, Admr's v. Canal Elevator and Warehouse Co.

carrying on their business. Said improvements to be paid for by the lessees, but to remain upon the land, and binding the lessor to repay to the lessees the amount of the cost of the improvements, without interest at the expiration of the term.

That the said lessees paid the rents reserved, except \$50 for the last month's rent, and observed all the other conditions of the lease on their part to be observed; that they constructed the contemplated improvements at a cost of \$2,849. That said Murphy sold and assigned to Wm. H. Brown all his interest in the lease. That the term has expired and by reason thereof, said sum has become due and payable, and the same is owing to these plaintiffs as the legal representatives of Wm. H. Brown, who is deceased, less said sum of \$50, with interest from September 1, 1879.

The defendant files an answer admitting that plaintiffs are the legal representatives of Wm. H. Brown and the execution of the lease, but denying all the other allegations of the petition, and by way of cross petition, says the lease contained also the following provision, to-wit:

"It is further covenanted and agreed by and between said parties, that in case the said lessor shall, during said term, purchase the title in fee simple to said premises, the said lessees hereby agree and bind themselves and their legal representatives to renew this lease, at the expiration of said term, and take said premises for the further term of eight (8) years from the said 1st day of September, 1879, upon the same terms, conditions, covenants and agreements as above set forth."

That during said term the lessor did purchase the title in fee simple to said premises, and notified the plaintiffs thereof, and thereby said lease was renewed for the further term of eight years from September 1, 1879, upon the same terms, conditions, covenants and agreements as contained therein, and the same is now a valid and subsisting lease. Also that plaintiffs after notice of said purchase occupied said premises and held possession of the same under said lease after the expiration of said original term, September 1, 1879, and then and there covenanted to pay the rent therefor for said renewal term.

This cross petition concludes with a prayer for judgment for the rent accruing since August 1, 1879.

For their reply plaintiffs admit that the lease contained the provision set forth in defendants' cross petition, but deny each and every other allegation thereof.

Upon these pleadings two general questions are raised:

1. Did the defendant, before the expiration of the original term, purchase the fee simple title to the premises, according to the terms of the provision relied upon by the defendant, so as to bind plaintiffs to renew, and if not,

2. Did the plaintiffs so hold over after the expiration of the original term as to thereby work a renewal by operation of law.

The evidence shows that at the time of the execution of the lease by the Canal Elevator Co. to Brown & Murphy, it held the premises by lease, the fourteen feet first described, by a short term lease, and the balance by a perpetual lease from the state of Ohio.

Only a day or two before the expiration of the lease the Canal Elevator Company procured from the owners of the fourteen feet a contract of sale of the same, which, without stopping to consider the various questions raised and argued by counsel as to its effect, we think was sufficient to amount to a purchase of the title in fee simple within the contemplation of the provision for a renewal, so far as this part of the "said premises" was concerned.

The defendant did not, within the term, purchase the fee simple title to the premises held under perpetual lease from the State.

The first question is then, in another form, whether or not the purchase of the fee simple title to the one piece, and not to the other, was a performance of the condition precedent binding plaintiffs to renew. This depends upon the construction to be given the language used by the parties in the provision. In determining this construction the intention of the parties must prevail, if it can be ascertained, and be consistent with the language used. To ascertain this intention it is proper to look to the facts and circumstances surrounding the parties at the time, consider what it was they were dealing about, what knowledge they had of the same, and, in short, grasp the entire situation as nearly as possible.

To this end it is urged by counsel for the defendant that the fact, appearing in the evidence, that the lease held by the defendant on the fourteen feet was for a short term, expiring about the time the lease here in controversy was to expire, while the other lease was perpetual, should be considered; also the further fact, appearing by the evidence, that there was no way by law provided whereby the fee simple title could be purchased from the state. And they forcibly argue from these facts that purchasing the fee simple title to said premises must be held to have meant the fee simple title to only the fourteen feet, since the purchase of the

fee simple title from the state was not necessary to enable the defendant to re-let while either a purchase or a new lease to the other premises was. This circumstance they contend, in connection with the fact that a fee simple from the state could not be obtained without an act of the legislature authorizing it, an authority probably difficult to get, warrants the construction they claim.

While these facts may be said to be not only consistent with such a claim, but to go further, and tend to prove such to have been the intention of the parties, yet they are, at the same time, at least not inconsistent with the claim of plaintiffs, that both pieces were intended to be covered by the expression "said premises."

The immateriality, if such it was, to the plaintiffs whether the defendant held a perpetual lease or a fee simple title from the state is not inconsistent with the idea that the provision related to this title as well as the other, since it is by no means an uncommon thing for practically immaterial matters to be the subject of contract. And granting that it was immaterial we know of no authority that would warrant the court in disregarding it for that reason. But we are not prepared to say it was immaterial. From the perpetual lease from the state to the defendant, in evidence, it appears that a great number of conditions were imposed upon the defendant and those holding under it by virtue of that instrument. It might have been that some of these terms and conditions were regarded by the lessees of the defendant as onerous, and it might have been with a view to escape responsibility to the public officers of the state for the performance of them, that it was made a condition precedent to a renewal that the fee simple should be acquired by the defendant.

Neither was the difficulty of getting a fee simple from the state inconsistent with the idea that the expression of the parties means both pieces. That is a circumstance to be considered, but nothing more, and manifestly mere difficulty in carrying out what may be expressed cannot be said to be inconsistent with the expression. And so we might go on with every fact and circumstance that has been cited to show that while it may be consistent with, and tend to prove, the construction claimed by defendant to be what the parties intended, yet at the same time none of them is inconsistent with the opposite view.

Looking at the lease and reading the whole of it in connection with this provision we find that after describing the premises, both pieces, and naming the term it proceeds to name the purposes for which "said premises" are demised; then follows the reservation of rents for "said premises;" and next a provision about under letting "said premises;" a re-entry of "said premises;" then a covenant against waste in "said premises," and to deliver up "said premises." All these expressions occur in the lease before the provision in controversy is reached, and manifestly all of them refer to both pieces.

Then follows the provision under construction, and it provides that in case the lessor during the term purchases the fee simple title to "said premises," the lessees will again take "said premises."

The expression "said premises," as used here, is just as broad as it is when used in any of the other places mentioned. If it means both pieces when used elsewhere, why not here? But it must be further observed that what the defendant was to purchase in fee simple title to, and what the plaintiffs were to take a renewal lease upon, were both expressed by the term "said premises." It cannot be claimed that plaintiffs intended to renew their lease, upon the same rents, etc., upon only the fourteen feet. It is evident they were to have the other premises also. But if they were to have both pieces it was simply because the expression "said premises" meant both, and if that expression meant both when applied to the plaintiffs, it must also have meant both when applied to the defendant. We think, therefore, that without regard to its materiality or difficulty, the condition precedent to the obligation of plaintiffs to renew was the purchase of the fee simple title to both pieces, and that inasmuch as the fee simple title was not purchased to both during the term the plaintiffs did not become bound to renew.

Having come to this conclusion with respect to this question, it becomes necessary to consider whether or not there was such a holding over by the plaintiffs as to work a renewal by operation of law.

The evidence upon this branch of the case shows that plaintiffs expected to vacate the premises at the end of the term, and that they were, with the knowledge of the defendant, making preparations to do so. They had presented to the defendant a bill for the cost of the improvements, and there had been some talk about the condition for renewal. Mr. Bauer, plaintiffs' agent and manager, saying, to Mr. Wood, the president of the defendant, that they were not bound to renew unless the fee simple title was purchased during the term, was told by Mr. Wood that the lease had still "some time to go," as the witness expressed it, "and not to be in a hurry."

This was before the contract of sale of the fourteen feet. Afterward, on Saturday evening, a formal written notice was served upon plaintiffs' manager, informing him that the defendant had purchased the fee simple title to the premises and requesting a renewal in accordance with the terms of the provision of the original lease.

The plaintiffs are non-residents and were not present in person, but their manager, Mr. Bauer, testifies that, having received this notice, and supposing it to be correct in its statements, and therefore believing that the defendant had acquired title in fee simple so as to bind plaintiffs to renew, he continued in possession for two or three days, and that a quantity of coal (about 375 bushels) that was in one of the bins, remained there, because he could not sooner sell it until the 18th of September.

We do not think such a holding over ought to work such an effect as defendant claims.

It was a holding over not only under a mistake of fact, but under a mistake of fact induced by the defendant. Such a holding over may be not only explained but relieved against.

In accordance with these conclusions, the plaintiffs are entitled to judgment as prayed for in their petition.

Sage & Hinkle, for plaintiffs.

Stallo & Kittredge and A. B. Huston, for defendant.

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CONTRACT—EVIDENCE.

[Hamilton District Court, February, 1881].

Cox, Johnston and Longworth, JJ.

HENRY W. TAYLOR v. LOUIS BECKER.

A contract made by the vendee of real estate not to use it during his ownership for saloon purposes may be enforced by injunction, and parol evidence will be received to show that such agreement was a part of the consideration of the sale, and by mistake and fraud was not executed and delivered by the purchaser at the time the title papers passed.

This case comes into this court by appeal from the common pleas, and was there instituted to compel the defendant to execute and deliver to plaintiff the following agreement as a part of the consideration of the sale of the lot therein described, to said Becker, to-wit:

"In consideration that the executors of David H. Taylor have sold me lot number nine for eight hundred dollars, I hereby pledge myself to said executors of David H. Taylor's estate, that the improvement hereafter to be erected on lot number nine, Carrolls' subdivision shall not during my ownership of said lot and premises be used for saloon purposes."

The plaintiff alleges that said agreement should have been signed and delivered to him by defendant, when he delivered the deed for the property to him, and when said defendant delivered the mortgage, notes, and cash to him, plaintiff, about the 11th day of October, 1879. He avers that said agreement was a part of the consideration of the sale and delivery of the deed; that by mistake and fraud it was not delivered by defendant to him. He further avers the defendant has improved the property, and that on the 22d of February, 1880, he proposed to open and conduct therein in violation of said agreement, a saloon. He prayed in addition to the delivery of said agreement that the defendant might be refrained from using said property for saloon purposes while he remained the owner thereof. He further avers that he had tendered back the first payment made and the mortgage and note delivered to him by said defendant, and

that he had offered to compensate him for his improvements, all of which offers had been refused.

The defendant denied that he agreed to buy the property with any such limitation upon its use. The plaintiff at first desired that such a limitation should be inserted in the deed, to which he objected, and then showed him some such papers as set forth in petition, and asked him to sign it. He avers that he refused so to do, and the plaintiff thereupon waived and abandoned said propositions and made him a clear deed to the property, without any limitations for the consideration of \$20 per foot, \$500 cash, balance in one, two and three years, secured by mortgage, and he prayed that the petition might be dismissed.

JOHNSTON, J.

Upon the trial the defendant objected to introduction of parol testimony to show that anything else was agreed upon than what the deed contained. Evidence of that character was received, subject to his exception, but we think properly for two reasons.

It is well settled in this state, in fact everywhere, that the consideration named in a deed for the conveyance of real estate, is not conclusive upon either party, but either may introduce parol evidence to show that other and additional considerations entered into and formed part of the consideration of the sale or grant. Parol evidence was also competent to show that the defendant agreed to execute and deliver to plaintiff such an agreement at the time of the delivery of the deed, for plaintiff avers that he so agreed, but that by mistake and fraud of defendant it was not done. It is only by parol evidence that a mistake can be shown to have occurred. That equity will relieve either party to a deed against a mistake or the fraud of either party is equally well settled and it is unnecessary to refer to the cases. Such being the rule in equity, the question then for determination in this case is, did Becker in fact agree as a part of the terms of sale to execute and deliver to Taylor's Executors, the agreement not to use said property for saloon purposes, while he owned it. That the owner of real estate may by agreement with the purchaser, place such a restriction or limitation upon the future use of property about to be conveyed, there can be no doubt. It becomes a binding obligation upon both parties provided it be not an illegal restriction, or of a character inimical to public policy, or in restraint of trade or the like. The restriction in this case, it is not claimed is open to any of these objections. The parties deal at arms' length. The vendor names his terms. The vendee may accept them or reject them. It is the vendee's folly to buy a property with limitations upon its use, if he expects to use it for any purpose he may thereafter see proper. Ordinarily the restriction appears in the body of the deed. Here it was to be contained, as it is claimed in a contemporaneous written obligation at defendant's request. As to the policy or wisdom of a grantor in placing such a limitation upon his grant, we have nothing to say. Upon that we express no opinion.

In a case in the New York court of appeals, 41 New York, 448; *Plumb v. Tubbs*, where a grantor placed a perpetual restriction of this character upon his grant, that court said:

"Whether this plan is wise or unwise, is not for us to say. No man is bound by law to be wise. He has a legal right to be wise or otherwise, in his own judgment, or as his caprice may determine." It is but proper to say that this estate owned a number of acres of salable land adjoining this lot, and it was claimed that being well adapted for residence purposes

in the village, and held for sale for that purpose only, that if a building for saloon purpose should be erected thereon it would keep away a desirable class of people, and greatly injure the value of the remaining property.

Looking then at the evidence in the case, we find that when Becker first examined the lot with a view of buying it, he was told that it would not be sold to be used for saloon purposes at any price—that the estate was not obliged to sell it—this by Mr. Carroll. When he first saw Taylor, he told him the same thing and that the price was \$25 per foot, and that the deed should contain a provision that the property never should be used for saloon purposes—this Becker declined to accede to, and negotiations were broken off for several weeks. To Mr. Carroll, Becker said: "I have seen Mr. Taylor and he wants \$25 per foot, and to bind me in the deed not to use it for saloon purposes. He then called to see Mr. Carroll, and not seeing him, Carroll called on him. His son, a young man, called with him. He told Carroll of the restrictions Taylor insisted upon. Carroll told him that they were all interested in preventing its being used for saloon purposes. His son heard him say this to Becker, and further that he could not get it for that purpose. Carroll suggested to Becker the outside written agreement as being less objectionable than putting it in the deed. Becker then said to Carroll: "You see Taylor and tell him I will pay \$20 per foot for the lot and agree in writing that I will not use it for saloon purposes while I own it." He had before told Mr. Carroll, that as far as he was concerned he was willing to agree not to use it for saloon purpose, that he wanted it for a family residence and cigar manufactory, that being his occupation; that he was living too near saloons, and wanted to get his family away from them and their influence. Carroll saw Taylor for Becker and he yielded the \$5.00 per foot, but insisted upon the restriction while Becker should own it, and the next day submitted a paper to Carroll covering that question which is in evidence; that was the first or second of October, 1879. Becker then saw Taylor on the third, and Taylor testifies that the said mortgage note and this article of agreement were all drawn up by him according to the terms proposed by Carroll and the paper handed to Becker. The deed was sent to New Jersey for the co-executor to sign. Becker being desirous of starting his building at once, the deed would be delivered to him on its return, upon his complying with the terms of payment as agreed upon. That on the 10th or 11th of October the papers passed, but Taylor testifies that through mistake he did not get the outside writing from Becker with the mortgage note and Taylor gave him a memorandum that he might commence at once, and cash payment, that he entirely forgot it, his mind being much engrossed at the time in moving his family from Oakley to College Hill. Becker made no mention of this paper. The testimony of the Mayor of Riverside is important. To him, Becker said before he opened his saloon: "I have beaten both Carroll and Taylor; I did agree when I bought the property that I would not use it for saloon purposes, but I did not sign any writing, and I can do now just as I please with the property."

It is but proper to say that this paper was not withheld by Becker by the advice of his attorney, who was present when the title papers passed. Evidence was offered that the saloon was a nuisance and a damage to the adjoining property. The evidence of the defendant consisted of his own testimony and the memorandum of October 3d, giving him permission to go on with his improvements, etc., hereinbefore referred to. His testimony was of too negative and evasive a character, consisting mainly of a denial or want of recollection of the conversations with the

witnesses named. He said that while Taylor at first insisted on the saloon matter going in the deed and to be perpetual, and that he wanted \$25 a foot, he finally on their last negotiation agreed to take \$20 per foot, and give him a clear title without any limitations whatever. This briefly is the evidence before us. To establish a mistake or fraud in a transaction of any character, the party averring it must establish it by clear and convincing testimony. It is the opinion of the court that by mistake this agreement forming a part of the consideration of the grant was not executed and delivered as it was agreed between both grantor and grantee, it should be. Taylor says he wholly forgot it, and that Becker also forgot it or purposely withheld the paper or any reference to it, we have no doubt. His statement to Mayor Lord strongly inclines us to believe the latter. 2 Johns Ch., 595-6 Gillespie, v. Moon. As the case presents itself to the court upon the evidence, Becker has obtained this property without the payment of the considerations he agreed to give Taylor for it. The delivery of this agreement, signed by Becker to Taylor the day the title papers passed, was just as essential and obligatory upon him as was the payment by him of the cash payment. Our supreme court in *Stines v. Dorman* 25 O. S., 580, 583, where the grantee had agreed not to use the property conveyed, as a hotel or boarding-house, while the grantor continued in the business in the same village, says: "The stipulation relates to the mode in which the premises conveyed are to be enjoyed, and qualifies the estate. The limitation on the use enters into the consideration of the conveyance, and if not unlawful, it ought, upon plain principles of justice, to be enforced." * * * "the consideration is sufficient, for the restriction formed a material part of the consideration by which the property was obtained, and under the circumstances, must be regarded as reasonable and not oppressive," and the defendant was enjoined.

The paper given to Becker by Taylor, October 3d, giving him the right to take possession of the lot to commence his building, etc., was not the contract of sale between the parties. It named no consideration, nor did it state any terms, but referred to them as "agreed upon." It was but a license to take possession in advance of the delivery of the deed and payment of anything on the lot. The contract of sale was by parol, followed by part performance which relieved it of the statute of frauds.

The defendant will execute and deliver to plaintiff the paper in the petition described, and he is enjoined from using the premises for saloon purposes as long as he remains the owner.

William Disney, for plaintiff.

Gray & Tischbein, for defendant.

MORTGAGE.

33

[Superior Court of Cincinnati, General Term, January, 1881].

Force, Foraker and Harmon, JJ.

ELLEN MAHONEY, by guardian, v. GOEPFER, et al.

A mortgage executed by an insane person is valid and enforceable, so far as the consideration was for the benefit of or on account of the mortgagor, and its lien will be limited to the extent of the amount not paid to, or for, or by direction of such person, and also in so far as it is given to secure the antecedent debt of the mortgagor's husband without new or other consideration, it will be avoided.

FORCE, J.

Decree having been rendered in favor of Goepper and of Metz upon mortgages held by them respectively, given by Ellen Mahoney and her husband upon land owned by her, and the term at which the judgment was entered having passed, she filed petition by her guardian, alleging that she was insane, at the time the mortgages were executed, and at the time the judgment was rendered, and is so still; and that before the rendition of the judgment, she had been declared insane by the probate court, and a guardian had been appointed. The prayer is that the judgment be set aside and vacated. Answers are filed to this petition.

It sufficiently appears from the evidence that when the judgment was rendered, she had been judicially found to be insane, and her guardian had been appointed. Her guardian, not having been made a party to the suit, there was error in fact. And, there being no claim for a personal judgment, and no issue requiring a jury, the case is now heard upon the validity of the defense to the mortgages.

The rule that a lunatic's conveyance by deed is void, comes from the case of *Thompson v. Leach*, decided in 1697, reported 3 Mod., 301; 12 Mod., 173, and in various other reports of the reign of William and Mary. The deed in that case was a surrender by tenant for life to a contingent remainderman in tail. It was ruled "the surrender is void, for whatever is done by an infant or *non compos mentis* which takes effect only by deed, is void; but it is otherwise in case of a feoffment by reason of the notoriety and solemnity thereof."

It is stated in *Hobart*, p. 224, and in other of the older books, that a lunatic's conveyance by fine, or by common recovery, when the lunatic appeared to the precipe in person, not by power of attorney, was avoidable not void.

The distinction between an insane person's void and voidable deeds, was between such public and solemn acts as a feoffment, a fine and a recovery, and secret conveyances as surrender and release.

It further appears from the report of the case as determined before it went up to the House of Lords the first time, that the surrender in this case was by a deed, technically delivered, but retained by the surrenderer, which was without consideration, and did not come to the knowledge of the surrenderee till more than five years after its execution. 3 Lev., 284, 3 Mod., 296, Salk., 427, 565, 576.

Lord Mansfield in his thoroughly considered opinion in *Zouch v. Parsons*, 3 Bur., 1794, declared that the ruling in *Thompson v. Leach*, so far as it referred to infants, was not law. It is not accepted now in England as settled law as to insane persons.

Coke defined a *non compos mentis* as a person wholly without memory or understanding. He was understood to be a raving maniac, a maundering lunatic, a staring idiot, or one afflicted with mental disease in such pronounced form that his very appearance proclaimed his infirmity. The growth of medical science has enlarged the boundaries of admitted insanity. A person is now recognized as insane, though sound and reasonable upon all topics but one. A person may be insane though his disease be not observed till some exciting cause inflames it to display. The insane sometimes with great cunning conceal their infirmity. It thus often happens that a person, really insane, lives and transacts business a long time without exciting suspicion of his condition. Accordingly since the case of *Molton v. Camroux*, the rule is well settled in England that the contract of an insane person, if fair in itself and fairly made with one who has

not knowledge or notice of the infirmity, and is executed, will not be set aside, but will be sustained.

Lord Chancellor Truro, in *Price v. Berrington*, 3 M. & G., 498, said he did not consider it settled law that the conveyance of a lunatic is void, but he would treat it as an open question if it should come before him. Later, Lord Chancellor Cranworth in *Elliott v. Ince*, 7 D., M. & G., 475, more pointedly intimated the doubt. And afterwards, when a bill was filed to declare void a deed made by a lunatic, the complainant did not venture to rely on lunacy alone, and the court found that as the "deed was a *purely gratuitous* deed, executed by an insane man under a *total misapprehension* and for a *purpose which has not taken effect*, no effect can be given to it in favor of one claiming under such grantee." *Manning v. Gill*, L. R., 13 Eq., 483.

Accordingly where a mortgage, fair in itself, was given to one who had no knowledge or notice of the insanity, such mortgagee had a right to foreclose, and the insanity of the mortgagor was no defense. *Campbell v. Hooper*, 3 Sm. & Giff., 153.

In the United States, the cases are not all in accord. In New York it is held that if the grantor is so insane that he does not know what it is that he is doing when he executes the deed, the deed is void. *Vandeuson v. Sweet*, 51 N. Y., 378. And a mortgage executed by one whose mind is enfeebled and affected, yet who understands what he is doing, if the transaction is in all respects fair, is valid and will be enforced. *Hicks v. Marshall*, 15 N. Y., 327.

The supreme court of Pennsylvania held that *Thompson v. Leach* is still a correct statement of the law, and as we have no feoffments but only conveyances by deed, the deed of conveyance of an insane person is void. *Estate of Sarah De Silver*, 5 Rawle, 111.

The supreme court of the United States held, as all courts hold, that a power of attorney executed by a lunatic is void. The learned judge who delivered the opinion argued further, on the same ground with the supreme court of Pennsylvania, that the deed of conveyance of a lunatic is void. *Dexter v. Hall*, 15 Wall., 9.

But in the United States, a deed of bargain and sale operates as a feoffment; the delivery of the deed transfers seisin. *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Hare v. Jernigan*, 76 N. C., 471. And deeds now being executed before witnesses who attest, acknowledged before a public officer, and placed on record where they are open to the inspection of all, have as great "notoriety and solemnity" as a feoffment. Hence all the reasons which induced the court of King's Bench, two hundred years ago to hold the feoffment of an insane person voidable only, exist in the United States as reasons for holding the deed of bargain, and sale of an insane person to be voidable only. And it is generally so held. *Harvey v. Hobson*, 53 Me., 453; *Allis v. Billings*, 6 Metc., 415; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Riggan v. Green*, 80 N. C., 236. *Elston v. Jasper*, 45 Texas, 409; *Breckenridge Heirs v. Ormsby*, 1 J. J. Marsh., 239; *Nichol v. Thomas*, 53 Ind., 42; *Scanlan v. Cobb*, 85 Ill., 296.

The ruling in Indiana is the more pointed because the statute there enacts that "every contract, sale or conveyance of every person, while a person of unsound mind, shall be void." The court holds that this applies only to persons under guardianship, not to insane persons for whom no guardian has been appointed.

The English rule as to executed contracts of an insane person is generally followed in the United States. *Young v. Stevens*, 48 N. H.,

133; *Matthieson v. McMahon*, 38 N. J. Law, 537, *McCormick v. Little*, 85 Ill., 62.

Deeds executed by a person under circumstances where his executed contract would be sustained, and where the parties could not be put *in statu quo*, have been held valid and binding. *Scanlan v. Cobb*, 85 Ill., 296; *Riggan v. Green*, 80 N. C., 236.

And a mortgage executed under the same circumstances has been enforced. *Crouse v. Holman*, 19 Ind., 30.

Whatever be the rule as to conveyances, it seems upon both reason and authority that a mortgage executed under such circumstances should be held valid, at least so far as the consideration was for the benefit of or on account of the mortgagor.

In this case, \$110 of the \$1,500 secured by the mortgage, held by Goepper, was not paid to Mrs. Mahoney or for her benefit, or on her account, or by her direction. The lien of this mortgage must be limited \$1,390. The mortgage for \$442, held by Metz was given simply to secure an old debt of her husband already due by him to Metz. There was no new or other consideration. This mortgage is not binding on her. Judgment modified accordingly.

Clerke, Mannix & Cosgrove, for plaintiff.

Mitchell & Holmes, for defendant.

FRAUDULENT CONVEYANCE.

[Hamilton District Court, February, 1881].

Cox, Johnston and Longworth, JJ.

†*HARRIET M. SEWELL v. OSCAR S. LOVETT*, et al.

Conveyance of real estate to enable party to go on bond of indicted persons, with condition to reconvey as soon as prisoner is released on the bond, is a fraud on the court, and reconveyance cannot be enforced by suit.

LONGWORTH, J.

Plaintiff alleges that she was the owner of certain property on Mount Auburn; that at the June term, 1877, of the court of common pleas one Eph. Martin was indicted by the grand jury, and desiring to enable Lovett to go upon Martin's bond, that he might be released from jail, she executed to Lovett a deed of general warranty for this land; that Lovett thereupon was accepted as bondsman for Martin; that the condition of the bailbond was complied with, and she now asked that the court decree a reconveyance to her from Lovett for this property. The defendants denied these allegations, and the court said that the evidence offered at the trial upon all these points was conflicting. Most of the important witnesses have been impeached, but other witnesses have been brought, who testified that they would not believe them under oath from what they knew of their general reputation for truth and veracity.

†This case was dismissed by the supreme court for want of preparation, January 29, 1884. A motion to reinstate was overruled, June 17, 1884, the entry being "There is no bill of exceptions in the record, and without one there seems to be no ground to disturb the judgment below."

Although a parol trust upon a deed absolute upon its face, when clearly established, will be enforced by a court of equity, such trust must be very clearly and very satisfactorily proved. The warranty deed from Mrs. Sewell to Lovett, bears date of 8th September, 1875. She alleged, that, in fact, it was executed in June, 1877. This was denied by the defendant. Assuming that what she said was true, that the deed was executed at the time it bears date, she testifies that, at that time, she lived in Indianapolis. Her son and her two daughters, whose testimony is not impeached, testify that in the month of June, 1877, the son received a letter from his father, who was then in Cincinnati inclosing this deed and requesting that his mother execute it and return it for the purpose of enabling Lovett to go upon the bond of Martin, and that this was done. It was not pretended by Mrs. Sewell that she herself made any agreement with Lovett about a reconveyance of this property, nor by the son or daughter. Such an agreement, if made at all, must have been made between her husband, as her agent on her behalf, and Lovett. The only evidence that such an agreement was ever made was found in a quitclaim deed, which was introduced in evidence dated June 25, 1877, purporting to be made by O. S. Lovett, conveying the property to M. F. Gregory, the sister of Mrs. Sewell. Lovett denied that this deed was ever executed by him, and the notary public who took the acknowledgment, Mr. McClymon testified that Sewell brought to his office a man whom he did not know, whom he introduced as Lovett, and who acknowledged this deed. From his description this man bore no resemblance to Lovett whatever, and being confronted with Lovett in court, McClymon said he could not recognize him at all as the man who had acknowledged the deed.

As against this the testimony of experts was to the effect that the signature of this deed was probably the signature of Lovett, written by the same hand that wrote the admitted signatures in the case.

Assuming this deed as Lovett's deed, it would tend to show an agreement between him and Sewell that this property should be reconveyed by him to Mrs. Sewell through Mrs. McGregory, on the 25th of June, 1877, immediately after the warranty deed from Mrs. Sewell to him and immediately after his acceptance as bondsman by the court of common pleas. If the court were to believe all the evidence for the plaintiff therefore, and disbelieve all the evidence for the defendant, the plaintiff had succeeded in establishing an agreement between herself by which she was to convey the title to Lovett of this property, to the end that he might be accepted as a bondsman in the court of common pleas, and he then immediately reconveyed to her the property, thereby committing a fraud upon the court, persuading the court that the defendant, Lovett, was possessed of property to which he never had and never expected to have any title whatever. If such an agreement were established, it was an agreement that no court of equity would enforce, and if this was not the agreement, there was no evidence whatever tending to show there was any agreement to reconvey at all. All conveyance to a person on consideration that he will go upon a bond was a good conveyance. Going upon the bond was a sufficient consideration for the deed, and the agreement to reconvey must be clear, satisfactory and honest, before the court would assert its extraordinary jurisdiction to enforce it as against a deed absolute on its face made for a sufficient consideration. Petition dismissed.

I. M. Jordan and H. L. Cooper for plaintiff.

Herbert Jenner, for defendant.

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Brannon v. Purcell et al.

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[Hamilton District Court, February, 1881].

STATE OF OHIO, ex. rel., OUTCALT v. JAS. F. CHALFANT, et. al.

For opinion in this case see 6 Dec. R., 1033 (s. c. 9 Am. Law Rec., 633). The decision was reversed by the supreme court. See opinion, 37 O. S., 60.

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[Hamilton District Court, February, 1881].

CHARLOTTA SEELMEYER v. PAULINE SEELMEYER, et. al.

For opinion in this case see 6 Dec. R., 1021 (s. c. 9 Am. Law Rec., 551).

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[Hamilton District Court, February, 1881].

HENRY DANBY v. ANTHONY FAY, Admr. of H. S. VAIL.

For opinion in this case see 6 Dec. R., 1020 (s. c. 9 Am. Law Rec., 550).

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FRAUDULENT CONVEYANCE.

[Hamilton District Court, March, 1881].

Cox, Johnson and Longworth, JJ.

†PATRICK BRANNON v. JOHN B. PURCELL, et al.

In a conveyance where good faith is not doubted, but which in fact hinders, delays or prejudices creditors, fraud will be implied. It will, however, only be set aside on the application of the parties actually prejudiced thereby.

Action to set aside a conveyance of John B. Purcell to his brother, Edward Purcell, as made to defraud the rights of creditors, and in contemplation of insolvency, with intent to prefer creditors.

LONGWORTH, J.

John B. Purcell is the Archbishop of the Roman Catholic Church of the Diocese, and his brother, Edward Purcell, was a clergyman or priest in that church, and known as the chancellor or business manager of the financial affairs of the Archbishop. It was the custom, for a long time, of the Archbishop to receive money on deposit from his parishioners to be kept for them, he paying interest on the deposit, and gradually the custom grew so that a regular banking business was carried on for the benefit of the parishioners and the church. The disastrous failure of these reverend gentlemen is a matter of public history; whether caused by the financial panic that ruined so many business men, or by inexperience in business affairs, naturally to be expected from persons of their profession, or perhaps by an undue faith that their endeavors would be blessed by a power whose kingdom is not of this world, it is unnecessary to consider. The result was disastrous alike to the parishioners and the church, and especially to the reverend gentlemen who represented it.

There can not be a question that their only desire was to benefit the church and their parishioners, and that their object was to benefit others, and not themselves: that they were without blame for any of these losses, in so far as bad faith or dishonesty can be charged. We are persuaded that the object of making the deed was not to defraud or prefer creditors, but to protect those who had claims against the Archbishop and his brother. The honesty of the motives of these gentlemen is beyond question. It is urged the effect of this deed is to defeat and defraud certain creditors, and to prefer others. If this was the effect of the deed the law will impute fraud. The law includes many things in imputing fraud which are not in themselves dishonest. But if the deed has the effect to injure creditors,

†The judgment in this case was affirmed by the supreme court. See opinion, 41 O. S. 187.

fraud will be inferred, even though the motives of those making the deed are perfectly honest. The sole question is as to the effect.

On the 4th of March, 1879, for the nominal consideration of one dollar and "other good and sufficient considerations," the deed was executed. It is claimed by counsel for the defense that the Archbishop was largely indebted to Edward Purcell, and that this would be a sufficient consideration for the deed, apart from anything else. The Archbishop states that the object of the deed was to avoid the unseemly effect of an assignment by the Archbishop of the church; that the real trust was that Edward Purcell should make an assignment for the benefit of the creditors of both.

That the deed was not intended to be a conveyance to Edward for his benefit is clear from the evidence. That it was intended for the benefit of the creditors of the Archbishop as well as those of Edward Purcell is also clear. The question is, does it operate for the benefit of the creditors of the Archbishop or in fraud of their rights.

It is in testimony that the debts of Edward Purcell were those of the Archbishop, and the debts of the Archbishop were the debts of Edward Purcell; that the Archbishop did not owe anything that Edward did not owe, and that Edward did not owe anything that the Archbishop did not owe; that they were joint trustees of the fund they held, not as their own property, and not for their own emolument or enjoyment, but as the property of the church or their parishioners; or, in another sense, that they were partners in treating this fund, and that the debt of either was the debt of both. On the other hand, evidence was introduced to show that there were debts of Edward Purcell that were not those of the Archbishop. If this were true, the deed would be in fraud of the creditors of the Archbishop, because Edward Purcell, making an assignment, his creditors, who were not the creditors of the Archbishop, would share equally with those of the Archbishop in the distribution of the proceeds.

It is shown that Edward Purcell was a guardian of minors, appointed by the probate court, and that judgments were rendered against him on this account, which were paid by the sureties on his bond, and for which he is liable, the Archbishop not appearing in the matter, and these are claimed to be debts of Edward Purcell, not debts of the Archbishop.

The money Edward received as guardian went into the general fund held by him and the Archbishop, and was used in their business; and, if the testimony is to be relied on, the Archbishop is as liable as his brother, although he was no party to the bond and was not a joint guardian. He treats those debts as his debts, and they are his debts, and he is liable in law and is estopped from disputing that they are and always were his debts.

It is claimed there is a class of creditors who hold the obligations of Edward Purcell, not knowing he was the agent of the Archbishop, and who had the right to elect whether they would hold the agent or hold the undisclosed principal.

The rule of law is plain. Where one deals with an agent, not knowing he is an agent, when he discovers the fact he has his election whether he will hold the agent or pursue the undisclosed principal, and having made that election once, it is final. He can not hold both, and must choose once for all which he will hold. Such is said to be the relations of these parties, and it is said if these creditors are compelled to proceed under the assignment of Edward to collect their claims, they thereby lose their right to proceed against the Archbishop, and if they elect to proceed against the Archbishop they lose the right to proceed under the assignment of Edward, and do not share in the proceeds of this property, which is the property of the Archbishop.

However this may be, neither the petitioner nor cross-petitioners are creditors of this class. There are no such creditors before the court complaining. There are a large number of creditors who deposited money with Edward Purcell and took his individual obligation, but there is no evidence to show they did not know that the Archbishop was interested in the matter. The probability seems to be that they deposited their money with Edward Purcell, believing they were depositing with the Archbishop. Even if such creditors were before the court, it is doubtful if the principle would apply. We hesitate, however, to decide the question, inasmuch as it is not necessary in our view of the case. For myself, I do not think the principle has any application here. Edward Purcell did not deal as agent of the Archbishop, nor the Archbishop as principal. Both dealt jointly as partners or trustees of the fund they held, not as business men hold property for their own emolument, but as a trust fund, and the business they carried on was not for their own profit, but the profit of their parishioners and the church, and each one being

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Conahan, Adm'x. v. Purcell and Mannix.

liable for the debts of both, the release of one would not operate as the release of the other.

We are of opinion that the creditors of the Archbishop by proceeding to collect a dividend under the assignment of Edward Purcell did not lose the right of resorting to any other property of the Archbishop's. Such is the view the Archbishop takes of it, and such was the view Edward took of it, and whatever the antecedent liabilities may have been, their own pleadings would estop them from escaping any such liability, the escape of which is claimed to be fraud in or asserting this deed.

The petitioner and cross-petitioners under the statute, if the deed were set aside, would obtain a preference over other creditors. This is claimed to be inequitable. We do not so understand it. Whether it is according to natural equity, just or unjust, it is not for the court to say. If they were to succeed in establishing the fraudulent character of the deed, the preference they would obtain is such as the statute gives them. If there is any injustice in it, the legislature is to blame, not the parties or the court. But to obtain this preference, the parties must succeed in establishing what the law does not presume, namely, the fraudulent character of the deed. It is not claimed there was actual fraud in the sense of dishonesty. The claim is that the deed works a fraud, and this they have not succeeded in establishing. The petition and cross-petitions are dismissed with costs.

Stallo & Kittredge, Wilby & Wald, King, Thompson & Maxwell, and Healey & Brannan, for plaintiffs.

Hoadly, Johnson & Colston and Mannix & Cosgrave, for defendants.

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[Superior Court of Cincinnati].

MALLON & COFFEY v. ALEXANDER STEVENS et al.

For opinion in this case, see 6 Dec. R., 1042 (s. c. 9 Am. Law Rec., 702).

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[Hamilton District Court, 4881].

PHILIP KUMLER, City Solicitor, v. CITY OF CINCINNATI et al.

For opinion in this case see 6 Dec. R., 1018; (s. c. 9 Am. Law Rec., 547). This case was affirmed by the supreme court. See opinion 38 O. S., 445.

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PAYMENT—EVIDENCE.

[Superior Court of Cincinnati].

Force, Foraker and Harmon, JJ.

ELIZA S. CONAHAN, Admx., v. PURCELL and J. B. MANNIX, Assignee.

The presumption from payment of money, that it was paid in discharge of a legal obligation, may be rebutted by proof.

HARMON, J.

In her original petition plaintiff sought to recover 69½ shares of stock of the Ohio Candle Co. of the value of \$69,500, belonging to her husband's estate which she averred she had deposited with J. B. & Edward Purcell, and which they in a general assignment under the Insolvent Law had transferred to defendant Mannix. The object of the deposit not having been alleged she must be presumed to have meant that defendants were mere custodians. In an amended petition she charges them as trustees and pledgees, she avers that they bought the stock, for the nominal price of \$43,125, though nothing was paid, at a sale made by her at public

auction; that they so bought and she so sold it under an agreement she also made with them that they should apply the dividend to the payment of a debt due them from the estate, after deducting therefrom such an amount as should be necessary for the support of the heirs of her husband, and after the satisfaction of such debt should convey the stock to such heirs.

She prays an account and a decree for the surrender of the stock.

The several answers deny the trust and agreement and allege absolute ownership by virtue of said purchase.

No question was made as to plaintiff's right to sue upon the alleged contract of which she was not a beneficiary, nor as to the sufficiency of the petition which does not allege that any part of defendants' debt has been paid by dividends or otherwise, or that there has been any tender or offer to pay it, or that defendants have ever received or realized anything upon the stock for which to account; but the case has been tried upon the merits and will be so decided. The heirs having acquiesced in the bringing of the action by her and aided in carrying it on, it being for their benefit, will, upon a familiar principle, be bound by the decision. *Stoddard v. Thompson*, 31 Ia., 80.

The only direct evidence which tends to prove the existence of the contract referred to, is that of plaintiff herself. Her memory is very vague and uncertain. Her deposition was taken and retaken and every means adopted to refresh her memory, yet her testimony is far from being satisfactory as to the existence of any contract at all, much less as to its terms. The remarkable variance between her two petitions also militates against the weight of her testimony, and she is contradicted by her husband's surviving partner, Mr. Woods, who acted a prominent part in the matter and has no interest whatever in the result of the action, as well as by Edward Purcell, who no longer has any pecuniary interest in it.

The various remarks of Edward Purcell after the purchase and before the assignment, might have some weight as recognitions of only qualified ownership of the stock, if they were not clearly referable to another course than the existence of a trust. That cause is the somewhat remarkable state of affairs disclosed by undisputed evidence.

Edward Purcell had been the lifelong friend of Mr. Conahan. He had advanced large sums of money to start him in the business in which he acquired the stock. One of the heirs bears the name of Edward Purcell Conahan. On his death bed, Mr. C. disclosed to his friend the fact that he was insolvent and asked him to care for his family which Mr. P. promised to do. Accordingly, during the period of over two years between Mr. C's death and the sale of the stock, Mr. P. advanced large sums of money, amounting in all to nearly \$10,000, in paying debts of the estate and supporting the family, although himself a creditor to the amount of over \$30,000, which he proved and about \$15,000, which he did not prove against the estate. He did this too in such a way, by having Mr. Woods advance it for him as if from the business of the Candle Co., that the family probably did not for a long time know that they were the objects of his bounty. His only object in paying off the debts of the estate was a wish to protect the memory of his friend by concealing the fact that he died insolvent.

During all this time the stock, which was the only property of the estate, paid little or nothing: It finally became necessary to settle the estate by a sale of the stock, and the necessary steps were taken under the direction of reliable attorneys. The business had been unfortunate, the

company's stock had no market value, its real value was low and uncertain, and there was serious question whether it would sell at all. Mr. Woods who was carrying on the business, was anxious that Mr. Purcell should buy it, partly because, being the only remaining creditor, he could afford to bid the entire amount of his claim and advances, and thereby prevent injury to the concern by a low sale of the stock or its failure to sell at all, he being unable to buy it himself, and partly because he thought that, should the business improve and the stock pay well, Mr. P. would be more likely to continue the support of the family, which was wholly without means, most of the children being so young as to be rather a burden than an aid.

Mr. P. at first declined to buy the stock, but, upon explanation by Mr. W. that he would simply be giving to it a claim, otherwise worthless, authorized him to attend to the sale and bid on his behalf the entire amount of his proved claims. This Mr. W. did, and the stock was struck off to Mr. P. by the auctioneer at his bid of \$43,125. He thereupon surrendered his evidences of indebtedness. The stock was transferred to him upon the books of the company, all but one or two shares, which without his knowledge, Mr. Woods, who had however full authority, placed in the name of Mrs. C. to keep the name of Conahan in the concern for the sake of the good will. The Ohio Candle Co. and Mr. Woods constituting a partnership under the style of Woods & Conahan. The sale was reported to the probate court and the estate settled, Mr. Purcell having to pay a few hundred dollars by reason of an error of Mr. Woods in computing the amount of his claims. And until his financial troubles began to loom up before him, Mr. P. continued to advance money for the support and education of the family.

The presumption which the law raises from the payment of money, that it was paid in discharge of a legal obligation, is not flattering to human nature. But the law recognizes the possibility of money being paid from other than selfish motives, for it permits this presumption to be dispelled by proof. I am very clear in the conviction that the money paid for the support of this family by Mr. P. after the purchase of this stock was paid, like that before the purchase, as mere bounty. I am as clearly convinced that he fully intended, should the stock prove lucrative, to turn it over to the family after it should have repaid his claims, possibly even before. And his various remarks, which are in evidence, are probably referable to that intention though it is quite common for laymen to speak of a debt as still existing under circumstances like those in question, although lawyers would consider it paid. But this intention was born of the same beneficent spirit which prompted his advancements of money. It rested upon no legal obligation. It was an admission of none. And when he found that he had not enough to pay his own creditors, it was his duty to do what he did do, be just before he was generous, by stopping further advances and abandoning his intention of turning over either the stock or any profit there might be in his purchase of it to the family of his friend.

It is urged further on plaintiff's behalf that the relations of Mr. Purcell, or at least of Mr. Wood, to plaintiff, were such that the purchase of the stock by the latter for the former created a trust by operation of law, or at plaintiff's election. The principles which apply to purchases by agents and trustees are invoked by her counsel. But neither of these gentlemen was her agent, neither was her trustee. Nor did Mr. W. act for her in selling the stock. It was sold by a regular auctioneer, under

the direction of her attorneys, at their office. I can see nothing in the suggestion that she had upon his recommendation employed these attorneys, who were also his own in his private business. Mr. P. and Mr. W. were simply friends whom she trusted and upon whom she relied for such advice and assistance as every woman situated as she was seeks from friends of business experience. There was no reason in either law or morals why either of them might not have bid upon or bought that stock at that sale for himself. They were a part of the public which she invited and which the law required her to invite to attend and bid. The most that can be said is that they occupied so confidential a relation to her that the aims of showing the utmost fairness would be cast upon them in any private transaction they might have with her for their own advantage. This is all that is required even of an attorney dealing with his client. 1 Story's Eq., p. 311.

But in this case, their influence with her could have no effect either in inducing her to part with the stock or in gaining her assent to the price, the only things upon which influence could possibly operate in such cases. The law imposed upon her the duty of selling the stock and fixed the mode of determining the price *i. e.* by public auction after advertisement. There is not even a suspicion or a suggestion that either of them interfered with the conduct of the sale in any way, or that it was not in every way fairly and lawfully made. Others appeared and bid, but they were bidding money, P. only a debt which had no value above the proceeds of the stock, and he outbid them, because there can be no question upon the evidence that his bid was far beyond the then value of the stock.

Other suggestions made in argument I do not find it necessary to consider. Finding and judgment for defendants.

Judge Oliver & C. S. & W. W. Symmes, for plaintiff.
Mannix & Cosgrove, for defendants.

SEAL—OFFICIAL BONDS.

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[Hamilton District Court, March, 1881].

Cox, Johnston and Longworth, JJ.

†JOHN B. BOBE v. THE MOON BUILDING ASSOCIATION et al.

Any mark or blot intended as a seal is sufficient. An official bond of the treasurer of a corporation will be enforced against the sureties, whether the bond be sealed or not, and the fact of placing trust in the officer and exposing itself to a loss, is a sufficient consideration from the corporation to hold the sureties regarding the unsealed bond as a mere contract.

Error to the common pleas court to reverse a judgment in favor of the Association upon the bond of John B. Honer, one of its former Treasurers, for the amount of \$363, for which he failed to account. The defense was made by the sureties on the bond, who claimed that it had not been sealed by them, and that no consideration passed between them and the Association whereby they became obligated to it.

JOHNSTON, J.

The sureties had signed the bond both in the body and at the end of the instrument, and after their signatures at the end there was a flourish with a pen, leaving there a dot or blot. The statute did not require that

†See also s. c. 6 Dec. R., 1032 (s. c. 9 Am. Law Rec., 632).

the seal should be a scroll, wax, or of any particular form. Any mark intended for a seal would be sufficient. Section 4, Revised Statutes. Technically it was sealed. The paper alleges that it was sealed with "their seal"—using the singular number. But it was not necessary to rest the decision on this technical ground. The judgment below must stand, because if the paper be not a bond under the statute, it was at least a good contract in writing for a sufficient consideration, by which the sureties had become bound to the Association, and under which Honer had acted as treasurer of the association. So far as there was no consideration passing to the sureties from the association was concerned, it was not necessary that there should be. The fact that the society elected Honer treasurer—that it placed trust and confidence in him, that furnished a sufficient consideration.

Any act of the party to whom the promise is made from which the party in whose favor it is made derives a benefit or advantage, or from which the former derives any labor, detriment, or inconvenience, or incurs any liability, or is exposed to any loss, is a sufficient consideration. It is not necessary that the party promising should derive any benefit. Burge on Securityship, 11.

Here the association not only becomes exposed daily to a loss, but sustained one.

The record also shows that while there was money paid to him by the association before this paper was accepted, there still was evidence showing that the money appropriated by Honer came into his hands after the acceptance thereof. Judgment affirmed.

Moulton, Johnson & Levy, for plaintiff in error.

Buchwalter, for defendant.

BASTARDY—TRIAL.

[Hamilton District Court, March, 1881].

Cox, Johnston and Longworth, JJ.

SMITH v. JONES.

The presence in court of the plaintiff in bastardy is not absolutely necessary at the trial. If the defendant insist on a trial it is within the discretion of the court to order the trial to proceed.

A petition in error was filed to reverse the judgment of the court of common pleas upon a trial of bastardy.

COX, J.

When the case was called for trial in the court of common pleas, the plaintiff was not present. Thereupon the defendant insisted upon the trial, and the case went to trial and resulted in a verdict for the defendant. A motion for a new trial, upon the ground of the absence of the plaintiff at the trial, she not knowing the time of the trial, was overruled by the court, and judgment entered upon the verdict. It was claimed that this was error.

Under section 5621 of the statute it was left to the discretion of the court to continue the case if the plaintiff be absent, and if the court saw proper under the circumstances to proceed in her absence, it was a discretion which this court could not control. The motion for a new trial, made upon the ground of the absence of the plaintiff, was addressed also to the

sound discretion of the court, and no testimony or affidavit being embodied in a bill of exceptions, we cannot interfere with the judgment.

Judgment affirmed.

[Hamilton District Court, March, 1881].

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LEOPOLD BURKHARDT v. FOURTH NATIONAL BANK OF CINCINNATI.

For opinion in this case, see 6 Dec. R., 1036 (s. c. 9 Am. Law Rec., 691). The case was affirmed by the supreme court without report. March 4, 1884.

[Hamilton District Court, March, 1881].

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JAMES C. CALDWELL v. GEORGE HIGH et al.

For opinion in this case, see 6 Dec. R., 1037 (s. c. 9 Am. Law Rec., 692). The case was affirmed by the supreme court commission December 4, 1883, without report.

SALE.

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[Hamilton District Court, March, 1881].

Cox, Johnston and Longworth, JJ.

MARIA L. WALTERS v. WURLITZER & BROS.

One who leases an article (a piano) on terms that, after a certain time it shall be the lessee's property, cannot be held accountable to the lessee for having resumed possession, although a large part has been paid.

ERROR to the Superior Court.

This was an action brought to recover for the alleged unlawful conversion of a piano. It appears that the piano was leased, with the privilege of purchase, under a contract frequently made by piano dealers for the sale of their pianos, and it contained the usual provisions contained therein against removal, abuse, etc.; that the lid, having been injured by the explosion of a coal-oil lamp, the plaintiff caused it to be taken to a place for repairs, and thereupon the defendants, for this and for nonpayment of the rent, claimed that there was a breach of the contract of lease, and took the piano, and, as the plaintiff claims, disposed of it. Thereupon the plaintiff sued to recover the value.

The court held that leases of this kind had been passed upon by the supreme court in a case similar to this in the 25 O. S., where it was held that a simple renting with the privilege of purchase unless the purchaser complied with the terms of the lease did not entitle him to the possession of the instrument. While it seemed like a hard case where a party had paid three-fourths of the purchase money of the instrument that it should then be taken from him, yet they had made their contract, and this court could not vary the terms of it. Therefore, the judgment would be affirmed.

MUNICIPAL CORPORATIONS--INJUNCTION.

[Hamilton District Court, March, 1881].

Cox, Johnston and Longworth, JJ.

JOHN W. RYAN v. CHARLES JACOB, JR., et al.

Municipal authorities having the right to arrest the proprietor of a variety show for exhibiting without a license, cannot, under either sections 2669 or 1992, close up the place or abate the business, at least not before conviction; and although an injunction will not be granted against a threatened illegal arrest, for there is a remedy at law, yet an illegal interference with the enjoyment of property will be enjoined.

This action was commenced originally in the court of common pleas, and reaches the district court by appeal. It is one of a number of actions that were instituted in that court for the purpose of enjoining the mayor and the superintendent of police, with the police force at their command, from closing up the plaintiff's place of business on West Fifth street, and of other parties elsewhere in this city.

The petition in substance is that the plaintiff is the owner and proprietor of the premises on the south side of Fifth street, between Central avenue and John, which property he fitted up at a great expense for the purpose of rendering musical performances on the stage. He alleges that he is giving such performances and entertainments on said premises, and that said performances and entertainments are in no wise indecent, lewd, lascivious or immoral, and that neither money nor any other reward is in any way demanded from those who witness the performances and entertainments, but that admission is free to all: that it is the intention of the plaintiff to give such performances in the future free to all, but that the defendants, Charles Jacob, Mayor, and Enoch T. Carson, superintendent of police, threaten to arrest the plaintiff and his performers, and unlawfully enter upon and close the premises of the plaintiff if he should continue his performances without a license.

The plaintiff avers that this threat of the defendants is based upon the ordinance of the city council of Cincinnati, passed January 27, 1881, and that unless the defendants are restrained by the order of this court, they will carry out this threat and close up his business if he continues his performances without obtaining a license, thereby causing him great and irreparable loss and damage. He therefore prays that an injunction may issue from this court restraining the defendants from arresting this plaintiff or his said performers, or from closing up his place of business for the cause aforesaid, and, on final hearing, he asks a perpetual injunction.

JOHNSTON, J.

As already stated, this case was instituted in the court of common pleas and a temporary restraining order granted. There was a hearing of the case on demurrer to the petition, and the demurrer was sustained and judgment entered for defendants. From that judgment Ryan appealed the case to this court, and the case stands in this court upon the petition substantially given, and the demurrer of defendants thereto, and is thus submitted upon a motion for a temporary restraining order.

It is a general demurrer to this petition on the ground that it does not state facts sufficient to constitute a cause of action, and hence admits the truth of all the facts therein alleged.

It is claimed on the part of Ryan that, inasmuch as he was engaged in conducting a business and giving entertainments, for admission to which

he did not make any charge in any wise, that that class of performances or exhibitions did not come within the meaning of the amendatory act of the legislature of March, 1880; that the intention of the legislature by that act was simply to authorize the city council, and that the city council might devolve the duty upon the mayor, to require a license from only that class of persons who are conducting exhibitions for reward, charging an admittance thereto; and he claimed, therefore, that he had a right, without applying for and receiving a license, to conduct his exhibitions, and that the police authorities would have no right to arrest him if he undertook to conduct exhibitions without a license; and his prayer is in part, as read and contained in his petition, that this court may enjoin the mayor, his superintendent of police and the police from arresting him in case he undertook to give these exhibitions, which were free to all, without a license.

So far as this branch of the petition is concerned, it was substantially waived by the plaintiff during the argument of the case.

A court of equity cannot be invoked for the purpose of enjoining either the commission of a criminal offense recognized by statute or by an ordinance of a municipal corporation, much less for the purpose of enjoining a threatened arrest of a person charged with the commission of a criminal offense. In both cases the courts of law are open to the party, and if the accused be aggrieved he has his right of trial in a court of law. He has the right to have the proceedings of the court below reviewed. If improperly arrested, he goes acquit, if guilty, he is punished.

But a court of equity will interfere, and its aid is properly invoked, where, aside from the criminal part of the act, there is an alleged threat of interference with an individual's property rights or his civil rights where it appears that the interference threatened would be of such a character as to be irreparable in its nature. This principle is well defined in *Kerr on Injunctions*, page 2.

"The subject matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights * * * But if an act which is criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property;" and also *High on Injunctions*; section 20.

Now, it is admitted by the demurrer that here is a plaintiff who sees proper, according to the language of the petition, to conduct an exhibition free of charge upon his property, having fitted up his property in the manner described in the petition for that purpose. We do not determine the question whether or not it is necessary for Ryan to take out a license for such exhibition. If it were necessary and he should proceed in defiance thereof to give an exhibition and the authorities should threaten to arrest him, this court could not interfere to enjoin such an arrest. The courts of law are open to him.

But the petition proceeds further, and charges that the mayor and superintendent of police and the police under them threaten not only to arrest him, but they threaten to close up his place of business. Now, the ordinance enacted in January, 1881, by the city council is not before us. We are unable to say whether it provides that, in case he continues to exhibit without a license, the police authorities are warranted in closing up his place of business or not. If it did, we should have little hesitancy in saying that the city council exceeded the mandate or authority conferred upon them by the legislative grant. The amendatory act of 1880 simply

provided that the city council might devolve upon the mayor the right to issue licenses in certain cases with power of revocation. The legislative grant does not say, neither in section 2669, as amended, or in section 1692 that, in addition to arrest for violation of the ordinance, the authorities have the right at the same time, or at any time to close up a man's place of business. The statute law alone defines the cases wherein for a criminal offense of the owner or proprietor, his house or place of business may be closed up or abated. That right does not otherwise exist.

The first section of the Bill of Rights of our constitution provides among other inalienable rights, that of acquiring, possessing and protecting property. If a party should see proper, was financially able to give exhibitions without expense to any person, not indecent or immoral and enjoy his property in that way, it would be not an easy matter to take away from him that right.

Now, it is admitted that these defendants, in addition to arresting the plaintiff, threaten to close up his place of business. Our statute, under the head of nuisances, has defined a great many things that constitute nuisances, and it provides very carefully that, before a nuisance may be abated, a conviction must first take place. That is to say, a police officer shall not be invested with a power greater than the courts, because a court cannot order a nuisance to be abated, as if it be a building where anything unlawful is carried on, and the statute authorizes an abatement unless the party unlawfully carrying on such business has had a trial and has been convicted, section 6919. So also, must there be a conviction under the liquor law before there can be an order shutting up the place as a nuisance and so as to lewd houses. See sections 6942 and 7625.

Now, we think that that part of the petition wherein the complainant says, that independent of his arrest, the authorities threaten to take possession of and close up his place of business and deprive him of the possession thereof presents a case entitling him to the equitable interference of this court. If he violates any law of the state or any ordinance of the city, of course, he is liable to arrest and the defendants can enter the premises for that purpose. This court will not enjoin an arrest. He has his remedy in the courts of law. The judgment of the court, therefore, will be that a temporary order be granted preventing the authorities from closing up the plaintiff's house, but not to prevent his arrest, should he violate any law of the state or ordinance of the city therein.

O'Connor, Glidden & Burgovne and E. P. Dustin, for the plaintiff.

P. H. Kumler, for the defendant.

ACKNOWLEDGMENT.

[Mahoning District Court, March, 1881].

Sherman, Myer and Woodbury, JJ.

W. J. HORTON v. COLUMBIAN BUILDING AND LOAN SOCIETY.

That the notary before whom a mortgage to a corporation is acknowledged is a stockholder and also an officer, being the secretary and treasurer of the corporation, does not disqualify him or invalidate the mortgage.

The plaintiff in error executed and delivered a mortgage to the defendant in error to secure a loan made by the society to him, one of its stockholders.

The mortgage was acknowledged before Owen O'Donnell, who at the time of taking the same, was a stockholder in, and secretary and treasurer of the defendant in error, the Columbian Building and Loan Society, a corporation. In a suit in foreclosure brought by the society upon the mortgage the defense was made that the mortgage was not properly executed, for the reason that the notary public, O'Donnell, being a stockholder and officer of the society, the mortgagee occupied such a position as disqualified him from acting in his official capacity as notary.

Held: That the official connection of O'Donnell with the society, did not disqualify him from acting in his notarial capacity, in taking the acknowledgement to the mortgage to the corporation of which he was an officer and stockholder.

MUNICIPAL CORPORATIONS.

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[Montgomery Superior Court, March Term, 1881].

WM. H. HITES et al. v. CITY OF DAYTON.

The legislature cannot authorize a city to convert streets into a market-place, nor to rent out space along the curb of such street to the obstruction of travel or of access to abutting property.

HAYNES, J.

This is a suit for injunction. The plaintiffs, Hites & Holl, say they occupy a room in the Odd Fellows' Temple, and carry on the business of clothing; that the city of Dayton leased the curbstone space in front of their store for market purposes; that these spaces are rented by hucksters and others; that one August Hupple rented the space in front of the plaintiffs' place of business, and sold the same line of goods as the petitioners, and that Hupple pays \$12 per year for said privilege to the city. Plaintiff claims that the city council has no right to rent these curb-stone spaces for market purposes, and asks that Hupple be enjoined from using said space and that the city be perpetually enjoined from letting said spaces.

The case was tried to the court upon the pleadings and testimony. The court held: By act of the legislature of 1873, 70 O. L., 159, revised statutes, section 2232, each city is authorized to "appropriate and hold real estate for a market-space," and by act of 1869, 66 O. L., 225, revised statutes, etc., 2578, the council "may appropriate, enter upon and hold real estate within the corporate limits for market-spaces, erect market-houses, establish and regulate markets and market-places for the sale of meats, provisions, etc., prescribe times for opening and closing the same, make provisions for lighting, etc., and prescribe the kind and description of articles which may be sold therein and the stands and places to be occupied by the vendors." In 1876 the city council passed an ordinance providing that not only the market-house extending from Main to Jefferson streets and the space on either side, but one or the other side of the streets for a dozen or more squares "are established and declared to be a public market for the sale of provisions." It further provided that the city-engineer should make a plat and mark off and number spaces on the curb-stone, on Third, Main and Jefferson streets, which spaces should be rented to hucksters and others for one year at \$12 per year, under the same terms and in the same manner as provided for butcher-stalls. The question presented by this case, is whether the ordinance is within the powers of the council, and whether it can under this law and the constitution of the state by such an ordinance convert all or half or one-third or any portion of the

public streets of the city into a market-place. The statement of the question would seem to answer it in the negative. The streets of the city are dedicated to the use of the public for purposes of travel and passage and transportation and the transaction of the general business. The owners and occupants of buildings, the citizens and the public generally, have a right to the free and unobstructed use of them for such purposes without any discrimination.

The city does not own the streets. It has control of them only with the duty of keeping them in repair and unobstructed; whether owners of property upon the streets own them or not, they have a right to their free use, and to unobstructed access to their houses and places of business for themselves and their tenants and customers. Having been so dedicated the city council cannot by a simple declaratory ordinance convert them into market places, give special privileges therein to particular persons and rent to them spaces for their exclusive occupation. In *State v. Laverack*, 34 N. J. Law, it is held that an act of the legislature could not confer such power upon the city council. The injunction against leasing curb-stone spaces is made perpetual.

D. B. Corwin & Warren Munger, for plaintiffs.

A. W. Kumler, for city council.

The remedy for contest of an election upon the question of removal of a county seat is under the general statutes for contesting elections and mandamus will not lie to compel the clerk of the court to count a voting precinct which the canvassing board threw out.

BARKER, J.

This case comes into this court by removal from the district court of Wood county. It is a motion for mandamus to compel the clerk of Wood county to perform a purely ministerial duty enjoined on him by law, which it is charged he has neglected and refused to perform. The duty he has neglected and refused to perform, as charged, is to count the vote of Perrysburg township, a voting precinct in Wood county, cast at a general election, held according to law, October 12, 1875.

The question of removal of the county-seat of Wood county from Bowling Green to Perrysburg was, by a special act of the legislature, submitted to the voters of Wood county at that election, and it is to compel the counting of the votes on that question that this motion is made.

An alternative writ of mandamus was duly issued by a judge of the district court of Wood county, which was duly served upon the respondent, and he has returned the writ with his answer thereto.

†See also *Witmore v. Stewart*, 26 O. S., 216.

In his answer the respondent admits that he was clerk of Wood county at the time named, and that he was required by law, with the aid of two justices of the peace, to canvass and count the votes cast in the different voting precincts of Wood county, at that election, and says he did perform all the duties required of him by law in relation to the counting, abstracting, certifying and recording all votes cast, in all the voting precincts of Wood county, at said election, except that he, and the said justices, refused to count the votes returned on the poll-books and tally-sheets of Perrysburg township, and that they were thrown out and not counted for the reason that the poll-books of that voting precinct contained over 3,000 names as the names of persons having voted in that precinct, at that election, when, in fact, there were not over 1,300 votes all told in the precinct; that the poll-books were a fraud and that he and the justices refused to be a party to the fraud, and for that reason threw them out and refused to count them.

The writ and the answer were the only pleading allowed by law at the time this writ was issued. A motion is now made for a peremptory mandamus on the answer of the respondent. It is admitted that if this motion should not be granted, the court may find the fact to be as alleged by the respondent in his answer so far as the poll-books and votes of all the precincts, except Perrysburg township, are concerned, and the case submitted and fully disposed of by the court on the facts as they appear in such findings and in the papers filed in the case.

The statute expressly provides that this writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. The respondents claim that having performed their duty as a canvassing board, he and the justices disbanded and separated and that he has no power now to call the board together again to canvass the votes of this precinct, if the court should be of the opinion that the vote of that precinct should have been counted by the board; that the relators have a plain and adequate remedy at law, by a contest of the election under the statute providing for contesting the validity of the vote given upon the question of adopting a law for the removal of a county-seat.

The relators claim that they have no such adequate remedy at law, and that the respondent, having admitted he had not performed his duty, they are entitled to have the vote counted, and if the validity of the vote, when the vote of this precinct is counted, is to be contested, it must be by those who claim its invalidity.

The question, as we view it, depends upon the decision we make as to whether or not the relators have a plain and adequate remedy at law. A case similar to this has been decided by the supreme court, *Witmore v. Stewart*, 26 O. S., 216, brought on relation of a candidate for a county office against the same clerk to compel him to count the votes cast on the county ticket in this same voting precinct at the same election. It was held by the supreme court in that cause, that the relator had a plain and adequate remedy at law by a contest of the election in the mode provided by statute, and mandamus would not lie. The relators claim that that case decides nothing as to the question before us, because the mode provided by law for this contest is not the same in the two cases; that the contest of the vote for a county office is by appeal; that the result of the election is vacated by this appeal when it is perfected, and that remedy in that case may be adequate as the whole question may be tried *de novo* before the appellate court.

But they claim that in this case the remedy provided by law is not adequate, for the reason that it is not an appeal—the result of the election as recorded by the clerk is not vacated and that the burden is cast upon them of showing the illegality of the clerk's action and the validity of the whole vote, and that before a non-judicial officer, when the burden should be cast on those who claim the vote was illegal.

It is conceded by all parties, and has been decided by the supreme court that it was the plain duty of the clerk to count the votes of all the precincts in his county, and that he was guilty of a neglect of duty, and of an illegal act when he threw out the vote of Perrysburg, even though everything he alleges in regard to it is true. But the question now is what is the remedy or rather can it be remedied by mandamus.

In our opinion, the statute in regard to contesting elections in force at that time; which is the same as the one in force now, furnishes the only remedy that can be resorted to, to redress the grievance complained of by the relators.

Article 2, section 21 of the constitution, provides that the general assembly shall determine by law before what authority and in what manner the trial of contested elections shall be conducted. The general assembly has provided by a general act, revised statutes, sections 3015 to 3022 inclusive, which provides a tribunal and mode of procedure for the contest of elections for the removal of county-seats, and, in our opinion, it is a plain and adequate remedy for the grievances complained of in this writ.

Sections 3015, 3016 and 3017 provide for the practice in perfecting the appeal.

Section 3017 requires the governor, on receiving due notice that the appeal is perfected, and the proper person having been named by him, to appoint a disinterested person to act as commissioner.

Section 3018 prescribes his duties, among which are to examine all such witnesses as are produced or brought before him, and take testimony in writing touching the validity of the votes cast for such election upon the question of the adoption of the law and touching the validity of the result of the election upon the question. And he is armed with full power to compel the attendance of witnesses and to secure their testimony.

Section 3019 provides that the testimony so taken shall be filed in the office of the clerk of the court of common pleas, duly certified and sealed, and for its being opened by the judge of said court at the next regular term, and to be kept for the inspection of the parties to the contest and their counsel.

Section 3020 provides for a hearing before court upon the contest; that no evidence shall be rejected for any mere technicality, and then it provides, "if upon the hearing of the matter, the court or judge hearing the same, find that illegal votes were cast at the election upon the question submitted, by reason whereof or for any other reason to be found by the court or judge, the result of the election or vote, as the same has been returned or certified, is contrary to what it would have been but for such illegal votes or other reasons so to be found, the court or judge shall enter and certify the same accordingly on the records of the court." And if he finds the contrary, he shall, in like manner, certify the result.

Section 3021, provides for a continuance of the case from time to time if necessary.

Section 3022, provides that any citizen of the county may appear as contestee of such an election.

It is thus provided for the taking of testimony and final hearing before the court of common pleas of Wood county. On that hearing the burden of proof to show that the clerk neglected to count the votes of Perrysburg township, would be on the relators, they being the contestees. When they had made that appear, the burden of showing that the votes on the poll-books of Perrysburg township were illegal would be cast upon the respondent in this case, which would substantially make the issues in that case precisely the same as the one now before the court. The remedy in that proceeding would be plain and adequate for all grievances complained of in this case.

If we entertained any doubt as to the correctness of our construction of the statute for contesting the validity of that vote, we are supported by the opinion of all the judges of the supreme court in the case of *Peck v. Weddel*, 17 O. S., 271, in which a paragraph of the syllabus says that the only remedy for grievance of this character is by a contest under the statute I have referred to.

The syllabus, we understand, was agreed to by all the judges of the court, and even, if as counsel for the relator claims, it was mere diction, we have the satisfaction of knowing at least that all the judges of the supreme court at that time construed that statute the same as do we.

But we do not think it was diction. It was a proper question in that case to show that the plaintiff had an adequate remedy at law, and for that reason the injunction should not be allowed. We think it a legitimate question in that case and that case decides this. The motion will therefore be denied.

NEGLIGENCE.

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[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

†JOSEPH COURSEL v. CINCINNATI, HAMILTON & DAYTON RY. CO.

When the only testimony of the plaintiff shows that he jumped from a railroad car while in motion and was thereby injured, the court is warranted on motion of defendant to withdraw the case from the jury and enter a judgment for the defendant on the ground that no negligence has been proven against the defendant.

COX, J.

This was a petition in error to the court of common pleas to reverse a judgment there rendered for the defendant. In that court plaintiff brought an action to recover damages for injuries alleged to have been sustained by him through the negligence of the defendants, as he claimed. He testified that about two years ago he boarded the defendant's train at 11:30 at night to go to the Stock Yard's station; that as the train passed Brighton station it was customary to give one whistle, and when it stopped at the Stockyards it gave two whistles; that on this evening he heard the one whistle at Brighton, but did not hear the two whistles for Stockyards; that he got up and went to the rear of the car he was in, the next to the last one, and that the next thing he knew was that he found himself lying on the track at two o'clock in the morning terribly wounded; that he crawled from the track to avoid the passing trains, where he remained until five o'clock, when he was dis-

†This case was affirmed by the supreme court commission, without report. April 22, 1884.

covered by a lady in the neighborhood; his leg was terribly shattered, the bones protruding from his pantaloons, and injured to such an extent that he was laid up for several months, and for fifteen months was unable to attend to any business at all, and to this day suffers from the effects of his injuries. On cross-examination the witness testified that he saw the train was not going to stop, and he supposed he could get off safely without the train stopping. He did not remember how it happened, but that was his impression of it.

Upon this testimony the case was withdrawn from the jury upon the motion of the defendant, and judgment rendered for the defendant.

The court held that the plaintiff was bound to make out a case of negligence on the part of the defendant; to show that the injury which he suffered was an injury to which his own negligence did not contribute, but that it was occasioned by the negligence of the defendant. If the plaintiff's testimony shows injury by the defendant's negligence, and does not raise an implication that his own contributed to it, the burden of proving contributory negligence rests upon the defendant to defeat the claim; but if the plaintiff's testimony raises the presumption of his own contributory negligence, then it is his duty to remove that presumption, otherwise he will fail in his action. A party is bound to exercise ordinary care, and not attempt to jump from a train when it is in motion. It is no defense to say that the defendant should have stopped, for plaintiff's negligence consisted in jumping from the train while in motion.

For failing to stop the company might be liable for violation of contract, having taken his fare and agreed to carry him there. When the fact was shown that plaintiff jumped from the train while it was in motion, there was nothing to go to the jury. It was a question of law, and for the court to instruct the jury to return a verdict for the defendant.

Judgment affirmed.

LIFE INSURANCE.

[Superior Court of Cincinnati, General Term. March, 1881].

Force, Foraker and Harmon, JJ.

†EMMA A. CHEEVER v. UNION CENTRAL LIFE INSURANCE CO.

1. If a question in the application contained the names of many diseases, and the applicant's answer is that he never had any of them, it may be proved that the insurer read the questions, keeping the paper in his hands, and wrote down the applicant's answers, and that the applicant did not know what diseases were named.
2. Representations and warranties.—A question in an application required the applicant to state whether, within the last seven years, he had had any sickness or disease, and if so, the name of the physician who was consulted, to which he answered "No," and the company claimed that a sore was cancerous. Held: It is for the court to define the words "sickness or disease," and for the jury to say whether the ailment proved was within the definition, but if this is not the law, the error is cured by other charges, practically leaving the question to the jury. That these words do not mean mere temporary disorders or functional disturbances, but are used in their ordinary sense, which is such as may have had or ordinarily do have an effect on the general health and longevity, and also such as indicate a vice in the constitution, though not themselves causes of danger. The answer to such question is a representation and not a warranty, and is sufficient if substantially and not literally true.
3. Where an insurance on written application is issued in consideration of the representations in the first application, and contains a condition that the state-

†The decision in a former trial of this case is found, 5 Dec. R., 268 (s. c. 4 Am. Law Rec., 155), and a judgment of Affirmance, 7 Dec. R., 254 (s. c. 2 Bull. 19).

- ments in the application for this policy are true: Held, such application is to be deemed the application on the faith of which the new policy was issued.
4. The truth of answers in the application, which is made the basis of the policy by the terms thereof, is made material by the act of the parties, and its materiality cannot be left to the jury, but only their truth or falsity; but they differ from a warranty in this, that a warranty must be literally true, while such representations need only be true in substance.

HARMON, J.

This is an action upon a policy issued by the defendant upon the life of the plaintiff's husband, for her benefit. The first trial, some years ago resulted in a verdict for the plaintiff, which was set aside upon reservation to the general term as being against the weight of the evidence. The second trial resulted in a similar verdict, and a motion for a new trial was overruled by the general term, but the judgment was reversed by the supreme court (36 O. S., 201) without touching the merits of the case. A third trial has resulted in the same way, and the motion for a new trial has been again reserved for decision here.

The grounds of the motion are: First, that the verdict is contrary to the evidence, and not sustained by the evidence. Second, that it is contrary to law and the charge of the court. Third, that the court erred in its charge to the jury. The fourth ground, that the court erred in excluding testimony, was not presented in argument, and will not be considered.

The alleged error of law arises upon a special charge asked by plaintiff, and given before argument. The defense was based upon certain alleged false answers which the insured made in his application. Several answers have been filed by the defendant alleging that various answers in the application were false, but upon the last trial in his opening statement, counsel for defense announced that the defendant now stood upon only one of these defenses, and that was that the answer to the fourteenth question was false. The fourteenth question inquired of the insured whether within the preceding seven years he had had any sickness or disease, and if so, required him to disclose the name of the physician or physicians who prescribed or were consulted. To this the applicant answered no, and that answer the defendant alleges to be false, because the applicant had had within seven years an ailment upon the side of his neck, which the defendant averred was a sickness or disease, because the ailment was either cancer, recurrent or fibroid tumor, or an enlarged and suppurating gland, or some other local disorder whose nature the defendant could not state, and that he had consulted and been treated by various physicians.

It is evident, upon looking at this question, that it did not ask the applicant to disclose the fact, if fact it were, that he had been treated by a physician. He was asked if he had had sickness or disease, and if so, what physicians had treated him, so that if he had had physicians to treat him for something, which in fact alarmed him, but was not sickness or disease within the proper meaning of the terms, he was not required in his answer to disclose that fact.

That being the issue set up by the defendant, the plaintiff replied that the facts were known to the agent who took the application, and known to the officers of the company, who had waived defendant's rights. But under the rulings of the court the testimony upon that subject was excluded from the jury, upon the ground that the application had been taken by the agent of another company, who was not the agent of the defendant when it issued its policy now sued upon in place of the policy of the other company, referring to this written application as its basis. This left the

plain issue to the jury, which was presented to them, whether or not this ailment, whatever it was, was sickness or disease. The court was asked to charge the jury, and did charge the jury in the special charges given before the argument, that "before any temporary ailment can be called sickness or disease within the meaning of this application or contract, it must be such as to indicate a vice of the constitution, or to be so serious as to have some bearing on the general health or the continuance of life."

The objection urged is that the charge did not add, in the language of the case of *Cushman v. The U. S. Life Ins. Co.*, 70 N. Y., "or be such an ailment as is commonly known as a sickness or disease," it seeming to be claimed by counsel for the defendant that it must be left to the jury to define the term "sickness or disease" as well as to say whether the ailment came within the definition. It will be seen, however, if this objection be well taken, that the other special instructions asked and given at the same time leave that question for the jury, if it be necessary, the third, being that "If the jury find that deceased had had a local ailment or disorder but which was temporary—not amounting in the ordinary acceptation of the words to sickness or disease," plaintiff should recover, and the fourth, "That if the alleged sore for which deceased had been treated was of such a character as not in the common acceptation of the words to amount to sickness or disease and had been healed before he made the application," plaintiff should recover. So that taking all the special charges together, all the alternatives presented by the case in 70 N. Y. were met. But the expression "such an ailment as is commonly known as a sickness or disease" could only apply to the well known diseases of which everybody knows the name and understands something of the nature. And even if the defendant had had a right to have this charge, and it had been refused, he could not object, on the well known principle that an abstract proposition cannot be asked in a case. One thing is clear, and that is, that this sore upon his neck was not, and was not claimed to be, one of the class of ailments commonly known as sickness or disease, it was something unusual, something the nature of which the physicians differed about, and it would not have been error to decline a charge upon the subject of what is commonly known as sickness or disease. In the general charge, taken in connection with the special charges, we are all of the opinion that the law was correctly stated to the jury. The court in the general charge undertook to define the meaning of these words as used in this application, and it certainly is for the court to define terms used by parties in written instruments, and it is for the jury to say whether the facts in evidence satisfy them that the thing in question comes within that definition.

It certainly would be dangerous to leave to a jury the definition as well as the finding of the fact. The court in the general charge, after plainly excluding all other issues, told the jury that the issue was this, and this only, whether this sore amounted to sickness or disease as the court defined those words; and the jury were told that "the issue was not whether Mr. Cheever had or had not recovered from any sickness or disease he may have had during the seven years preceding; his recovery however complete, would not excuse his false answer, if you find in fact that he had any ailment so serious while it lasted as to amount to sickness or disease, as I will shortly define those terms, for the question related to its existence and not to its cure. You are, however, to consider the his-

tory and condition of the ailment at the time of the application in reaching a conclusion as to its nature."

The jury was further told that neither the honest opinion of the deceased that what he had had was not sickness or disease, nor his alarm about it, if it proved unfounded, would make any difference, the question asking for the fact, not his opinion. The court then proceeded to define to the jury the meaning of these terms sickness and disease, and told them, that the plaintiff might recover if the answer was substantially if not literally true, as this was not a warranty, but a mere representation. Sickness or disease taken literally might be said to include almost every bodily ailment. In this case, however, those words were not used by the parties in that sense, but in their common ordinary sense. The manifest object of the question reflects light upon the sense in which they were used by the company in the question and understood by the applicant in his answer. That object was to elicit information which would be useful in determining whether it would be prudent to take the risk of insuring his life. He was therefore asked by the question to disclose, and was bound to disclose, whether he had had within the period named not such merely slight or temporary disorders or functional disturbances as had and ordinarily can have no effect upon his general health and the continuance of his life, but such as either may have had in fact or ordinarily do have such effect. The latter would only come within the meaning of the terms sickness and disease, as used in this case. This is the common acceptance of the words. The jury were further told that "this meaning included not only such ailments as were calculated to impair the general health, or produce death unless arrested, but also to such as indicate by their presence, history or development, a vice in the constitution—such as are signs or warnings of danger to life or health, rather than direct causes of danger" and "that it was not necessary that they should determine the exact name or nature of this ailment, but whatever its name or nature, if they were satisfied by a preponderance of the evidence that while the deceased was afflicted with it, it amounted to sickness or disease, plaintiff could not recover."

This ground for a new trial therefore is not well taken. It is very clear that the applicant was not bound to disclose every ailment, however trifling, however little the probability was of its affecting his general health or impairing his chances of life, but he was only bound to state such as may reasonably be expected to have that tendency, and the only authorities which we have been able to find, or to which our attention is called, are those in New York which lay down this rule.

As to the ground that the verdict is against the weight of the evidence, and not supported by sufficient evidence. It was conceded in the argument of the motion, and if not conceded it is quite clear, that if the question were whether this ailment was cancer, the verdict either way would have to be sustained. Who but jurors shall decide, where doctors disagree as in this case, as to whether or not this ailment was cancerous in its nature? And the fact that the answer which the applicant had made to the ninth question, which inquired of him among other things specifically whether or not he had cancer, to which his answer was "No," was not assailed at this trial, is not without weight, because if he had been specifically inquired of as to cancer, he might very naturally conclude that when generally inquired of for sickness or disease, the inquiry did not apply to those things of which he had been specifically asked before.

Therefore we must assume that the jury found, and that their finding

must be respected, the testimony being conflicting, that this ailment was not cancer, that when he said "no" in answer to this question, his answer cannot be assailed upon the ground that this sore was cancer. The question therefore is, was this sore which he had upon his neck which was not cancer, and cancer was shown by the testimony, if not by all of it at least by sufficient of it to make the question one of the greatest doubt, that there is no such disease as cancer, but the term cancer is rather applied to a class of sores or ulcers, which are in their nature malignant, whose tendency is to invade the surrounding tissues, to attack the health, to undermine the foundations of life, as opposed to what the physicians call benignant or curable sores. The question is, considering this as we must consider it, as not a malignant sore or ulcer, was it such a one that we must say from the testimony that it was sickness or disease. If so, the verdict must be set aside, otherwise it ought to be sustained. Now the physicians, who testified to this, while the majority of them were of the opinion that it was cancerous, did differ in opinion as to its real nature, and a great deal of testimony in the case, by the most reputable physicians, was to the effect that if it had been cancerous it would not have cured so as to present a healthy scar, but it was undisputed in this case that it did heal, although it was stubborn and took some eight months from its inception to its cure, that no recurrence of it came, that the cure was apparently healthy, and that all the time he had it, as well as before and afterward, his general health was excellent. He did not stop his business at all, but called at the physician's office for treatment on his way to and from it. And we are not prepared to say from the evidence, that, considering this as a mere sore, whatever its nature or name, bound as we are to say that it was not a malignant one, it was a sickness or disease, although it was a stubborn sore which took so much time to cure. The test must be, in inquiring for sickness or disease, whether it was such a one that its presence would reflect light upon the chances of life, upon the chances of the preservation or impairment of the general health, and that was a question for the jury. The testimony was conflicting, and we are not prepared to say that it is at any rate so grossly against the weight of the evidence that the verdict ought to be disturbed.

The motion therefore will be overruled.

Force and Foraker, JJ. concur.

C. D. Robertson, I. M. Jordan and E. S. Throop, for plaintiff.

W. M. Ramsey and E. M. Johnson, for defendant.

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

LUCY A. COLEMAN et al. v. SARAH K. MILLER et al.

1. Where a loan of money is secured by a deed of property and a lease back, the lease is a mere mortgage, although there is no right to a personal judgment for the debt, and the fact that the value of the property granted is greatly in excess of the amount given is strong evidence of a loan.

†For subsequent decision of superior court, see *post*, 6 B. 412. For decision of the superior court reversed by this opinion, see *ante*, 44.

2. If the rent reserved in such lease is ten per cent. of the loan, and the law allows but six, a subsequent settlement and new lease at a ten per cent. rent, the law having been changed so as to allow that rate, discharges the original obligation, and the excess of interest cannot be credited upon the principal.
3. The decree in the case, which was brought to foreclose the lien for unpaid rent, must be for the sale of the whole property, and not the leasehold merely, unless the amount found necessary to redeem be paid.

ERROR to the Superior Court.

JOHNSTON, J.

This action was brought by Sarah K. Miller against the Coleman heirs to foreclose a leasehold estate that had been granted by her ancestor to Coleman. The lease reserved a lien upon the premises for the rent. Mrs. Miller claimed that the Coleman heirs were about \$5,000 behind in rent, and asked that the leasehold estate might be sold for payment of rent due. For answer and by way of cross-petition to this petition, the heirs of Coleman say that this transaction was a loan of money in fact; that the transaction took place in 1842 under these circumstances: That their ancestor, Coleman, desiring a loan of \$20,000, applied to Griffin Taylor, the ancestor of Mrs. Miller, for the loan of that sum at 10 per cent. interest, that the loan was consummated and secured in this manner. Coleman delivered to Taylor a deed absolute of the property described in the petition embracing the ground upon which the hotel near the courthouse (on Main, near the canal) stands, and several other pieces of property in the vicinity of the courthouse. Taylor then immediately made a lease back to Coleman, with privilege of purchase at \$20,000. The consideration in the deed was \$20,000. The ground-rent reserved in the lease was \$2,000 per annum, which was claimed to be in fact the interest at 10 per cent. on a \$20,000 loan. The heirs alleged that ever since 1842 they paid this ground-rent, or, as they call it, interest, until 1876. They alleged that this being a 10 per cent. interest loan the rate of interest was usurious, and that they had a right to an account, and that all interest in excess of 6 per cent. should be applied to the principal, and that being so applied they claim that the debt had been wholly paid, and they asked to have their title quieted to the property.

The court below made a special finding of facts and of law, finding that there was not existing between these parties the relation of creditor and debtor, but that the transaction was in fact what it purported to be—a deed with lease back with privilege of purchase. The court found for the plaintiff below for the amount of rent due, and decreed a sale of the leasehold premises, to which the Coleman heirs excepted. *Ante* 000.

From the bill of exceptions this testimony is disclosed: That Coleman, in 1842, being owner of five pieces of property, made an absolute conveyance of it to Taylor for \$20,000. On the same day Taylor executed a lease back to Coleman of the same property, at an annual rental of \$2,000. There was a right of repurchase in the lease, for \$20,000, at any time *after* thirteen years. The testimony clearly shows the property was worth \$55,000 at the time this transaction took place. The testimony shows that on three occasions, for the nominal consideration of \$1 Taylor quit-claimed to Coleman portions of this property, which Coleman immediately thereafter sold for large and valuable considerations and retained the money. In 1862 Coleman sold a piece of property for \$10,000, and on that day paid to Taylor \$10,000, and thereupon the rental was reduced to

\$1,200 per annum. In 1855 Coleman was behind \$2,000 in rent. At that time there seemed to have been a settlement, for a new lease was executed, fixing the purchase price at \$22,000, and the rental at \$2,200. At about this time the hotel-property was released by Taylor to Coleman, and he at once sold it for \$48,000, retaining all the money. Taylor not long before his decease told Hulbert that Coleman had borrowed money of him, securing it by deed with lease back with right of purchase, and that he liked that form of security. Coleman always retained possession of the premises, paid taxes and improved the same. Taylor died in 1866, and Coleman died in 1868.

There were many other more or less important circumstances in the case, and having very carefully considered the whole testimony, the conclusion was irresistible that this transaction was a loan and not a sale: that the relation actually existing between Taylor and Coleman was that at least of borrower and lender, and not that of grantee and grantor, lessee and lessor. In the cases of *Slutz v. Dresenberg* and *Wilson v. Giddings*, report 28 O. S. 371, 554, cited by counsel for defendants, it was held that it is sufficient if the relation of borrower and lender exists at the time the transaction was consummated. It is not always that a mortgagee either insists upon or receives the personal obligation of the mortgagor. He may be satisfied with the security afforded by the property, and loan his money upon its credit alone, and the relation of borrower and lender exists between them nevertheless, while that of debtor and creditor, strictly speaking, may not.

Now, as to the question of usurious interest: In 1842, when this loan was contracted, the legal rate of interest was six per cent., but under the statute and supreme court decisions at that time, the excess of six per cent. was not recoverable back, nor could it be applied to payments on account of the principal. In 1850 the legal rate of interest was made ten per cent. In 1852 it seems they came together, and they had some sort of settlement. The fee of the property was again conveyed to Coleman, and then another deed and lease were executed, placing the property in the same condition it had been before. The new lease was on the same terms as the prior one. Perhaps this was expressly for the purpose of defeating the usurious interest claim. At any rate it was a new agreement of ten per cent. interest, at a time when ten per cent. interest was legal, and that contract is not usurious. Notwithstanding the ten per cent. law was repealed in 1859, it did not invalidate that contract. The settlement made in 1853 was voluntary. No action had been commenced to recover the money loaned. It is when an action is brought to recover the debt that the usurious interest may be credited upon the principal as payments on account thereof, and this by order of the court. Otherwise if the parties meet and settle, and the original obligation is discharged, the usurious interest cannot be recovered back.

We are of the opinion the court below erred in finding as a conclusion of fact that the transaction was a sale with lease back with privilege of purchase and that therefore only the leasehold estate should be sold. It is the opinion of the court upon the facts found, that the transaction was a loan, and the conveyance to Taylor in equity, simply a mortgage and the Colemans have the right to redeem. The parties may by consent have the judgment entered here that should have been entered below, and it would in that event be, that there is still due to Mrs. Miller \$12,000, and that she is entitled to 10 per cent. interest thereon, payable quarterly, to be com-

puted from time of last payment made by the estate of said Coleman, and in default of payment, that she have an order of sale.

Judgment reversed.

Jordan & Bettman, for plaintiffs in error.

Hagans & Broadwell and Judge Stanley Matthews, for defendants in error.

FIRE INSURANCE.

200

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

†JAMES S. KIRK & CO. v. OHIO VALLEY INSURANCE CO.

1. A policy of insurance provided that proof of loss must be presented forthwith; that the loss should be payable within sixty days; and all claims should be barred unless prosecuted within one year from the date of loss. Held: 1st, That forthwith meant within a reasonable time under all the circumstances after the loss, and the question of reasonable time was one for the jury to determine.
2. When the policy contains a provision that a loss is payable within a certain time after presentation of proof of loss, the limitation of time does not begin until the proof is furnished.

COX, J.

The action was brought to recover \$1,500 upon a policy issued by the defendants to the plaintiffs upon their stock of soap and candles in their store in Chicago and destroyed by the conflagration in that city in October, 1871. The action was commenced in May, 1879. The defense was that the action was not commenced within one year from the time of loss, as required by the policy.

The court held that there are three sections of the policy which are properly to be read in connection with this claim, one providing for notice forthwith of loss or damage by fire; another that payment of loss should be made within sixty days after the loss is ascertained; and that all the claims should be barred unless prosecuted within one year from the date of loss. The plaintiffs introduced testimony to show that the defendants had sent agents to Chicago to waive all the conditions of the policy and to pay the losses, and that all the companies had agents there, who, in view of the great calamity, voluntarily waived the conditions of the policies issued by them; that all their books and papers were destroyed, and that therefore they were unable, in view of all the circumstances, to render an account of their losses any sooner than they did; that they had no recollection of having a policy in defendants' company; that defendants, although they knew the fact, did not inform them of it, and that they only discovered the fact within a year before the commencement of this suit, having been told of it by the ex-president of the company, and having brought suit within a year after proof of loss, they were entitled to recover. The court refused to permit plaintiff to prove the fact as claimed that they had forty or fifty policies in different companies. The court below refused on application of plaintiff to charge the jury that if the plaintiffs had presented their proof of loss as soon as possible, under all the circumstances of the case and brought suit within one year after the presentation of proof, they were entitled to recover. The authorities are very

†The judgment in this case was affirmed by the supreme court commission, two judges dissenting, and no report, April 22, 1884.

strong that where a question becomes one of reasonable diligence, within the terms of such a policy as this, it is a question for the jury to determine whether the party did, as soon as possible after the fire, give a proof of loss or a particular account of the loss. The courts are uniform in their decisions that where a policy contains a provision that a loss is payable within a certain time after presentation of proof of loss the limitation of this clause does not commence until the proof is furnished. The court below submitted to the jury a single question, whether the suit was begun within one year from the loss; and if it were not, instructed them to find for the defendant. The jury found that it was not so commenced, and returned a verdict for defendant. The court erred in refusing the charges asked, overruling this testimony and in its charges.

Judgment reversed.

J. F. Follett, for plaintiffs.

C. W. Baker, for defendant.

JUSTICE OF THE PEACE.

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

†JAMES C. CALDWELL v. GEORGE HIGH et al.

1. The authority of a magistrate cannot be collaterally attacked.
2. A resident householder of one township being sued before a magistrate in another township, going to trial on the merits of the case without objection to the jurisdiction of the magistrate over him, will be taken to have waived his right to so object.

COX, J.

Appeal. A petition was filed in the common pleas court against High as a magistrate in Fulton township and a constable to enjoin them from collecting judgment by High against Caldwell of \$1 for impounding two cows and \$28 costs. It was claimed that there was no law under which High could act as a magistrate, and that he had no jurisdiction over the plaintiff by reason of the fact that Caldwell lived in that part of the city, which originally had been Spencer township, while the magistrate was claiming to act in what was formerly Fulton township.

The court held, that High, having been elected a magistrate in Fulton township and received his commission, and having acted as magistrate, his acts were good *de facto* until his official character was terminated by proceeding in *quo warranto*, striking at his existence as an officer. This was decided by the supreme court in the case of Strang, ex parte, 21 O. S., 610, in regard to a *pro tempore* Judge of the police court. His acts as said *de facto* officer cannot be attacked collaterally. The plaintiff, having submitted himself to the jurisdiction of the magistrate by assisting in striking a jury, subpoenaing witnesses, and also testifying in the case without objecting to the jurisdiction of the magistrate over him, has waived his right to say that he did not live in Fulton township. Petition dismissed.

S. Miller, for plaintiff.

Johnston & Dunton, for defendants.

ATTACHMENT.

202

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

A. B. VORHEES et al. v. C. B. FISHER et al.

A plaintiff in garnishment, before a justice, against a non-resident defendant, loses his priority of lien on the fund garnished by failure to have the cause continued for a definite time, between 40 and 60 days, (Revised Statutes, section 6496), and not advertising for service on the defendant, although the garnishee did not answer for three months before.

ERROR to the Superior Court.

COX, J.

On the ninth of April defendants brought suit against Daniel Callahan to recover \$500, making R. D. Huston & Co., contractors for the Southern Railroad, garnishees in the case. Wilby & Wald, having money in their hands belonging to Callahan, were also made garnishees. During the progress of the trial plaintiffs were made parties on their own request, claiming a prior attachment upon the property. The case was referred to a referee to take testimony. It appeared plaintiffs had brought suit before a magistrate against Callahan, making Huston & Co. garnishees. The constable returned not found as to Callahan, and that he had served Huston & Co.

Nothing further was done in that case until July 12, when the garnishees appeared and filed an answer before the magistrate. When this answer was filed, Vorhees & Co. proceeded to advertise for Callahan as a non-resident. It was claimed that by reason of the neglect of Vorhees & Co. to have their case continued before the magistrate to a definite time, not less than forty nor more than sixty days, the magistrate had lost jurisdiction. The referee so found, and that Hubbell & Fisher's claim was a first lien upon the money. The report was confirmed.

The court held that the finding of the referee was correct, and affirming the judgment of the court below.

Jordan & Williams, for plaintiffs.

C. W. Moulton and M. L. Buchwalter, for defendant.

EXECUTION.

202

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

†SAMUEL SHORTEN v. THOMAS M. DRAKE.

An estate in possession can be levied on by execution, and the possession being seized draws with it the equity the tenant in possession has.

COX, J.

Petition in error to reverse a judgment of the superior court. The questions in it arose in regard to the distribution of the proceeds of sale of certain property on Walnut Hills. It appeared that in 1865 A. C. Clark conveyed to Thomas M. Drake the property in question, the purchase money being furnished by Samuel A. Sargent, who was then largely insolvent; that Sargent with his family at once entered into possession of the premises and continued to reside therein until 1868,

†The judgment in this case was reversed by the supreme court. See opinion, 88 O. S. 76. See also 34 O. S., 645.

when Drake at the request of Sargent conveyed the premises to Sargent's wife, she not having paid any portion of the purchase money; that Sargent continued to keep the property until the day of sale under the proceedings in the superior court; that in April, 1870, Samuel Grant levied an execution upon the property; that in May, 1870, one McMillen seized the property in attachment, both on claims against Sargent; that in January, 1872, Sargent and wife executed a mortgage to Samuel Shorten for the payment of a previously existing debt. The question in the case was whether the execution and the attachment had priority over the mortgage executed by Sargent and wife to Shorten.

The court held that it was true, as claimed by counsel, that a mere equity in real estate could not be seized either in execution or attachment. But there was something else in the case besides the mere equity which Sargent had, which Shorten knew at the time he took his mortgage. It was the possession, and that possession was subject to the levy and attachment, and the seizure of that drew with it, whatever right Sargent had in the property. That being the case, the right of these judgment creditors was prior to the mortgage made to Shorten. Decree accordingly.

D. Thew Wright, for plaintiff.

Herron & Anderson and C. B. Matthews, for defendant.

BILLS AND NOTES—LIMITATIONS.

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

†GEO. WILLIAMSON v. AMZI MCGILL.

Forbearing to bring suit on a note until after the death of the maker, on his agreement that it should be paid out of his estate, is a good consideration for a contract and it will be enforced, although after such contract the statute of limitation would bar the note.

ERROR to the Superior Court.

COX, J.

In this case suit was brought by Rozina Williamson in her lifetime against the administrator of John C. Williamson upon three promissory notes, dated in 1860 and 1861, payable eighteen months after date. The action was commenced in 1875. The petition sets forth that John C. Williamson was the brother of Rozina Williamson; that they lived together for many years, neither of them having been married. The plaintiff sets forth that she was prevented from bringing her suit within the fifteen years provided by the statute of limitation by reason of the duress of her brother by his rough treatment of her; that she was sick and confined to her house, and her brother would not permit her to have any counsel but himself, and told her that the notes never would run out, and that if she forebore bringing suit on them until after his death they would be paid out of his estate. Another ground upon which the plaintiff sought to recover was that the notes were given as part consideration for the purchase of real estate, and she claimed to have a vendor's lien for the money.

Judge Cox announced the opinion of this court. The case below had been tried upon a single issue, and that was whether a promise had been made to Rozina Williamson by her brother that if she would forbear to bring suit upon the notes after his death she could be paid out of his estate. The court below refused to receive testimony offered by the plaintiff tending to prove such promise. This was erroneous, and the judgment should be reversed.

Jordan & Betman, for plaintiff.

E. W. Kittredge and E. F. Kleinschmidt, contra.

†This case was affirmed by the supreme court commission, without report, April 29, 1884.

FORFEITURES.

203

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

MARY STEIN et al. v. THOMAS SHERLOCK et al.

Before a fine or forfeiture can be enforced for violation of the rules of an association, the party complained of must have notice of the charges, and the time when they will be heard, and the hearing must be before the tribunal provided by the articles of the association.

COX, J.

Two cases were consolidated and tried under the above style. They had for their object the settlement of the affairs of the Cincinnati, Louisville and New Orleans Packet Company. In October, 1877, the owners of the steamboats running between this city and New Orleans entered into an agreement to form a line for freight, the owners of each boat to contribute \$1,000 and 10 per cent. of their gross earnings of freight. That fund was to be a guarantee to pay the expenses of the association, the \$1,000 to be held as a guarantee that each owner would conform to the rules of the association. The association was to continue its existence for the season from October, 1877, to July, 1878. The plaintiff, Mary Stein, the owner of the Charles Morgan, averred that the amount of her contribution under the rule was \$1,650, and that the defendants refused to pay it over to her. The defendants set up that the Charles Morgan violated the rules of the association in regard to their running arrangements; that she left New Orleans on one occasion out of time, and thereby inflicted damage upon the A. C. Donnally; and that she, on another occasion, left Cincinnati out of her time, thereby inflicting damages upon the U. P. Schenck, both of which boats had entered into the agreement; that charges had been preferred against the Morgan by the board of directors of the association, of which her owner had notice, and that certain amounts were found due the other two boats mentioned as a fine.

The court held that the power of forfeiture by the board of directors must be strictly construed; the charges against the person against whom the forfeiture or fine was sought to be enforced must be properly proved; such person must have notice of the fact of such charges, the time when they are to be heard and the opportunity to present his defense. The court below erred in finding that the proper charges were filed and notice given the owner of the Morgan, and the proper opportunity given her to be heard. It appeared that when the case was heard before the directors in each instance, it being heard twice, persons not members were called into the board for the purpose of filling it up, so that it was not properly constituted to hear the matter. The time of the dissolution of the association having passed when the board sat in the case, there was some doubt with one member of the court as to whether the board could assess any fine. Judgment reversed and cause remanded, with instructions for the court below to try the case as an original proceeding without any regard to the action of the board of directors. If there are any charges against the Morgan to which she is amenable for a violation of the rules of the association, that court having control of the funds, and the parties can proceed to try it now originally as well as the directors might in the first instance.

P. J. Donham, for plaintiff.

Lincoln, Stephen & Slattery, contra.

LAND GRANT.

[Cuyahoga District Court, April, 1881].

†ZENAS KING v. MISSOURI RIVER, SCOTT & GULF R. R. CO.

1. The 500,000 acres granted by congress to new states for internal improvements cannot be converted into school lands by the state without the consent of congress.
2. The conversion of these lands into school lands by the constitution of Kansas, without consent of congress, invalid.
3. The title to these lands remained in the state for internal improvements.

ERROR to the Court of Common Pleas of Cuyahoga county.

DOYLE, J.

The plaintiff below (the defendant here) filed its petition in the court of common pleas against Zenas King, the plaintiff in error, alleging that it was duly incorporated under the laws of Kansas and Missouri; that on the 16th of October, 1869, it entered into contracts in writing with the defendant whereby it undertook and agreed to sell and convey to the defendant certain lands in the State of Kansas, described in the petition and in the contracts attached thereto, and to execute good and sufficient warranty deeds therefor, upon the payment of the sum of money in said contracts designated as the purchase price of said lands. The defendant agreed to pay the plaintiff, for said lands the sum of \$27,141.30 in certain installments in said contracts named. That the execution and delivery of all of said contracts, of which there are some sixty-eight in number, was but one single transaction. The petition then alleges that there are certain amounts due under said contracts according to their terms, in the aggregate amounting to the sum of \$20,972.32 with interest. That on the 19th of April, 1878, it tendered to the defendant a good and sufficient deed of the premises, and demanded of the defendant performance of the contract on his part, and defendant refused to perform or pay the amount due. It therefore prays for a judgment for the said amount.

The answer of King contains a number of defenses, but the petition in error is based solely upon the action of the court below upon the second and fifth defenses, and those only will be noticed. The second defense is as follows: "That by the express terms of each of said contracts it is provided that in case the second party (the defendant herein) shall fail to make the payments aforesaid, and each of them punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all the rights and interests hereby created or then existing in favor of the second party, or derived from him, shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted shall revert to and revest in said first party, without any declaration of forfeiture or act of re-entry or any other act of said first party to be performed and without any right of said second party of reclamation or compensation for moneys paid, or services performed, as absolutely, fully and perfectly as if this contract had never been made." Then follow some allegations as to the effect of that language, which need not be noticed further than to say that they are the legal conclusions of the pleader, and assert the claim made in

†The common pleas decision affirmed in this case is found 4 Dec. R., 325 (s. c. 1. Clev. 313).

argument, that these provisions were not optional with the plaintiff, but contained a penalty for non-performance, which excludes any other remedy. To this defense the plaintiff demurred, and the sustaining of that demurrer by the court below is alleged as error.

There is, perhaps, no doubt that parties may, if they choose, make a contract and provide therein that the forfeiture of all rights under it shall be the only liability arising from a breach of it; but before a contract will be so construed, it must pretty clearly appear, from its express terms, that such was the contract of the parties. We do not find any such provisions in this contract. While the terms of forfeiture are strict, and contained in vigorous language, there is nowhere any provision that the defendant may be released from his obligation under the contract by simply refusing to perform that obligation. The provisions for the forfeiture are for the benefit of the vendor. He may insist upon them, or waive them and if without fault himself sue for a specific performance, 10 Ill., 204. Hence the demurrer was properly sustained, and in that there is no error.

The fifth defense is as follows:

"And for a further defense the defendant says that the plaintiff, as he is now informed and believes, has not now and never had any title, good or valid in law, to convey to the defendant the lands mentioned in said contract, or any part thereof, but is wholly without title thereto." The defense is denied by the reply, and upon that the parties are at issue.

The evidence is contained in a bill of exceptions, and consists of an agreed statement of facts. The judgment below was for the plaintiff below; a motion for a new trial was duly filed and overruled, and, it is alleged, that the court erred in the judgment rendered and in overruling the motion for a new trial. It appears by the agreed statement that on the 4th of September, 1841, the congress of the United States passed an act entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights." Section 8 of that act provided, in substance, that there shall be granted to each state, specified in the first section of the act, 500,000 acres of land for purposes of internal improvements, the selection in all of said states to be made, within their limits respectively, in such manner as the legislatures thereof shall direct, after the lands of the United States in said states shall have been surveyed according to existing laws. The section then proceeds, "And there shall be and hereby is granted to each new state that shall be hereafter admitted into the Union, upon such admission, so much land, including such quantity as may have been granted to such state before its admission and while under a territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

Section 9 of the said act is as follows: "And be it further enacted, that the lands herein granted to the states above named shall not be disposed of at a price less than \$1.25 per acre, unless otherwise authorized by a law of the United States; and the net proceeds of the sales of said lands shall be faithfully applied to objects of internal improvements within the states aforesaid respectively, namely: Roads, railroads, bridges, canals and improvements of water courses, and draining of swamps, and such roads, railways, canals, bridges and water courses, when made or improved, shall be free for the transportation of the United States mail and munitions of war, and for the passage of their troops without the payment of any toll whatever." 5th U. S. Stat. at large 453, *et seq.* This act of congress constituted a present grant of the 500,000 acres to each new state,

to take effect upon the admission of such state into the Union. No further action on the part of congress was required. No patent or deed from the general government to the state was required. The act itself, so far as the general government is concerned, constituted the grant complete, but for the purpose named in the act. 10 O. S., 93; 19 Curtis, (12 How.), 31; 9 Cal., 554; 16 Cal., 296, 315.

The state was not probably bound to accept the grant, but they had the right to accept it, and the only act on its part, required to complete the title, was by its legislature, to prescribe the manner of selecting the lands, and, in accordance therewith, to make the selection of the land from the general domain within its state boundaries.

The state of Kansas was admitted into the Union on the 29th of January, 1861. After the admission of the state, to-wit: June 3, 1861, the legislature of Kansas passed an act entitled, "An act providing for the location of lands granted by congress to the state;" and without reciting the act in full, it is sufficient to say that it authorized the governor to select the lands granted to the state by congress in the act of admission, and also, the 500,000 acres of land granted in the act of congress of the 4th of September, 1841. (See laws of Kansas, in 1861, page 164.) The selection was accordingly made, including the lands in controversy here.

Then, on the 23d of February, 1866, the legislature of Kansas passed an act entitled, "An act providing for the sale of public lands to aid in the construction of certain railroads.

Section 1. "Provided that the 500,000 acres of land donated and granted to the state of Kansas by the act of congress entitled an act, etc., approved September 4, 1841, which was located, etc., (reciting the location, the approval by the secretary of the interior and the steps taken to designate the lands) shall be set apart to be sold for the benefit of each of the railroad companies hereinafter mentioned, and the proceeds arising from the sale thereof be donated, etc., to railroads named, to aid in the construction of their roads between certain named termini." The act then provided for the manner of sale, the price, the execution of deeds, to purchasers and the terms of payment.

These lands described in plaintiff's petition were conveyed by the State of Kansas, December 26, 1868, to James F. Joy and by him to the plaintiff below.

Now all this appears to be regular and in accordance with law, and if there was nothing else which affected the title, the plaintiff below would confessedly be the owner of the lands with the power to convey them in fee.

But it is claimed that the people of Kansas, in adopting their state constitution and the congress of the United States in admitting Kansas into the Union, have provided legal fetters, which so bound both as to prevent the use or sale of these lands in the manner or for the purpose for which they were used and sold or as was contemplated in the act of 1841.

The constitution of Kansas was adopted in convention assembled at Wyandotte, in said state, on the 20th of July, 1859, and was afterward ratified by the people. It consisted of an Ordinance, Preamble, Bill of Rights, fifteen articles and a schedule, and was accompanied by certain resolutions.

In the ordinance it was recited that "Whereas, the government of the United States is the proprietor of a large portion of lands included in the limits of the state of Kansas, as defined by the constitution; and, whereas, the state of Kansas will possess the right to tax said lands for the pur-

poses of government and for other purposes. Now, therefore, Be it ordained by the people of Kansas, That the right of the state to tax such lands is relinquished forever. * * * Provided that the following conditions be agreed to by congress:

Section 1. "That sections sixteen and thirty-six of each township be granted for school purposes, etc. Section 2. That seventy-two sections be granted for a state university. Section 3. That thirty-six sections be granted for public highways. Section 4. That seventy-two sections be granted for charitable and benevolent institutions. Section 5. That certain salt-springs be granted for public improvements. Section 6. That 5 per cent. of the proceeds of public lands be paid to Kansas for public schools; and, Section 7. That the 500,000 acres of land to which the state is entitled under the act of congress, entitled 'An act, etc., approved September 4, 1841,' shall be granted the state for the support of common schools."

And in the constitution were the following provisions:

Article VI, Section 3. "The proceeds of all lands that have been, or may be, granted by the United States to the state, for the support of schools, and the 500,000 acres of land granted to the new states under an act of congress distributing the proceeds of public lands among the several states of the Union, approved September 4, 1841, and all estates of persons dying without heir or will, and such per cent. as may be granted by congress on the sale of lands in this state, shall be the common property of the state, and shall be a perpetual school fund, which shall not be diminished, but the interests of which, together with all the rents of the lands, and such other means as the legislature may provide by tax or otherwise, shall be inviolably appropriated to the support of common schools.

Section 5. "The school lands shall not be sold, unless such sale shall be authorized by a vote of the people at a general election, but subject to revaluation every five years; they may be leased for any number of years, not exceeding twenty-five, at a rate established by law."

Now it is claimed, first, that by the admission of Kansas into the Union with this constitution, congress has assented to the diversion of these lands from the purposes of the original grant, so that instead of being used for internal improvements, they were to be devoted to schools; and second, that a fair construction of these two sections of article 6 requires us to hold that these 500,000 acres of land could not be sold by the state without the vote of the people first obtained at a general election authorizing such sale, and it not being claimed that any such vote was had, the title must fail.

First—Did congress assent to the diversion of these lands for the purposes of the original grant, as contained in the act of 1841? It no doubt had the right to do so, as it had the right to insist upon the state taking the lands under the terms of the act of 1841, or not taking them at all. Certainly the people of Kansas could not alone, and without the consent of the grantor, change the terms of the grant no more than one party could if the contract was between individuals. They had three courses of action, either of which they might adopt. First, to accept the grant as made, upon all its terms and conditions, and acceptance of the thing granted would be, on the part of the grantee, an assent to the terms of the grant. Second, to refuse the grant altogether, and in such event they were not bound by the terms, or, third, to negotiate with the grantor for a change or modification of its terms, which, like any other contract, would re-

quire the assent of both parties. If these negotiations failed, then either of the other two courses was still left open to them.

Let us see what course the state did pursue. Before the admission of Kansas into the Union it was necessary that its people should adopt a constitution; that that constitution and the government under it should be republican in form; the duty was imposed on congress to see that this requisite existed, and as a condition to its admission into the Union. But no condition of that state constitution could, of itself and by its own power, have the effect of repealing an act of congress, or of imposing upon the general government a forced modification of the terms of a grant already made to it, to take effect upon its admission as a state; and the people of Kansas recognized this. In the ordinance adopted and sent with the constitution to congress, they proposed certain terms to congress, which, if it approved, would be binding upon the two governments. And to some extent they framed their constitution to cover these terms, if congress assented to or ratified them. And among these propositions was the seventh section of the ordinance already quoted, proposing that congress shall allow these lands to be used for school purposes. What did congress do with this proposition in the way of accepting or rejecting it? Why, on the 29th of January, 1861, congress passed an act, reciting in the preamble that the people of Kansas had formed for themselves a constitution and state government, republican in form, and had asked congress to admit them into the Union as a state, on an equal footing with the other states. Therefore, Be it enacted, etc., "That the state of Kansas shall be, and is hereby declared to be, one of the United States of America," etc. The act then goes on to declare its boundaries, saving certain rights to Indians under treaties, etc., and fixing its representation in congress; and then follows section 3 of the act, which is as follows: "And be it further enacted that nothing in this act shall be construed as an assent by congress to all or any of the propositions or claims contained in the ordinance of said constitution of the people of Kansas, or in the resolutions thereto attached, but the following propositions are hereby offered to the said people of Kansas for their free acceptance or rejection, which, if accepted, shall be obligatory to the United States, and upon the state of Kansas." Then follows the propositions. The first one is that sections 16 and 36 in every township, and where those sections are sold, an equal quantity of contiguous land is granted for public schools. Sixth, that 5 per cent. on all sales of public lands shall also be granted for public schools. The other propositions are not necessary to be noticed, further than to say they are, with some modifications, similar to those contained in the ordinance, except that the seventh proposition of the ordinance is omitted altogether, and the 500,000 acres are not mentioned at all. Section 4 of the act is as follows: "And be it further enacted, That from and after the admission of the state of Kansas, as hereinbefore provided, all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that state as in other states of the Union;" (12 U. S. statutes, at large, page 126). One of those laws which was to have force and effect, was the provision of the act of 1841, that those lands should be appropriated to certain internal improvements, which improvements the United States was to have the free use of for transporting mail, munitions of war and troops. Whereupon the legislature of the state of Kansas, by joint resolution, approved January 20, 1862, accepted, ratified and confirmed the propositions contained in the act of congress admitting Kansas into

the Union, and declared the same to be irrevocable, without the consent of the United States, (Gen. Statutes, Kansas, page 71).

Congress, therefore, did not assent to this diversion from the original grant, unless directly refusing to assent to the proposition to do so, contained in the ordinance, is overcome by the mere act of admitting the state with a constitution, which had a provision in another part of it in relation to these lands, to the same effect as the rejected provision in the ordinance; or in other words, the silence of congress in respect to one provision of the constitution.

There would be more force in the claim that such is the effect if congress had been wholly silent; but in view of the fact that it expressly dissents from the proposition directly made in one part of the instrument, it can hardly be maintained that passing in silence the same thing (if it is the same) in another part of the same instrument amounts to an assent.

If the grant was between individuals, and a proposition was made to change its terms, or an assertion by one that the terms were changed, it would not be ratified by the mere silence of the other, unless that silence was under circumstances, and of such a nature, as induced one of the parties to rely upon it and change his status; in other words to work an estoppel. (1 Parson's Contracts, 475 and cases noted.) Here the state of Kansas, instead of relying upon or treating this alleged silence as a ratification, understands and acts upon the understanding, that it is not ratified, for as we have seen, after the terms proposed by congress, she through her legislature at once proceeds to select and then to sell these lands, and appropriate the proceeds in exact conformity with the terms of the act of 1841.

I am by no means prepared to admit the claim made that the general government is bound by the provisions of a state constitution, merely because congress admits the state, with that constitution, into the Union, to the same extent as if those provisions were enacted by congress in their own deliberate legislative action.

Such was not the view taken by congress or the people of the states, in other case, in dealing with lands granted by this same act. In the case of Wisconsin (9 U. S. Statutes at large, page 233), congress expressly assented to the use of these lands for school. Nevada used these lands for schools, and in 1866 came to congress, asking that such use be approved and in effect that the title be confirmed, and an act was passed by congress for that purpose. Alabama obtained permission by act passed August 11, 1848, (9 U. S. Statutes, 281), to use these lands for school purposes. The state of Iowa was admitted very much in the same way that Kansas was, (9 U. S. Statutes at large, page 117), and at the same session of congress at which she was admitted, an act was passed declaring "That by the act admitting Iowa, December 26, 1846, the United States assented to the application to the use of common schools of the 500,000 acres of land granted by the act of 1841."

It is claimed this is a legislative construction or interpretation of what is meant by admitting a state with such a provision in its constitution, and that thereafter all such acts are to bear that construction. On the contrary the effect of all of these acts is to establish that, at least by custom, if not by law, an express act of congress is required to authorize or ratify any diversion or departure from the terms of the grant.

Kansas, after its admission, never asked and never obtained from congress any act of this kind. Her people seem to have acquiesced in what was, probably, the views of congress, that two sections in each town-

ship, one-eighteenth of the entire domain, and five per cent on the proceeds of the sale of all the rest, was sufficient for school purposes, and that it was for their interest, as well as the interest of the general government, that these lands should be devoted to the purposes contemplated in the original grant.

It follows, then, it seems to me, that unless Kansas by her state constitution has disqualified herself from receiving these lands, or has limited the power of her legislature over them, if received, so that they cannot be sold without a vote of the people, that this title must be sustained. It is not seriously contended that the state did not get title to the lands for some purpose, and it is not necessary for me to discuss the question whether, in view of what congress did in admitting the state, such a provision of the state constitution, adopted before the state obtained the title, could have any such effect after the purposes for which the constitutional enactment was made, had been, as we have seen, expressly rejected by congress, except to deny it: for the reason, that, in my judgment, the constitution itself will not bear such a construction.

Section 3 of article 6, already quoted, provides that proceeds of four distinct species of property shall be a perpetual school-fund. First, all lands granted to the state for schools. Second, 500,000 acres of land granted by the act of 1841. Third, all estates which may escheat to the state. Fourth, such per cent. as may be granted to the state by the government on the sales of public lands. It provides that the proceeds of all that property and such other means as the legislature may provide by tax or otherwise, shall be used for the support of common schools.

Whatever limitation on the power of sale is found in the constitution, is contained in section 5, "The school lands shall not be sold," etc., unless authorized by a vote of the people. What school lands are meant here? The state had not yet been admitted; whether any of the public domain would become school lands depended on the act of congress or the contract of the two governments. Such lands as were ceded to the state for school purposes would no doubt come within this prohibition, and would be within the first class of property mentioned in section 3; but this 500,000 acres never became school lands. The state got title to them upon an agreement that they should not be school lands, but should be devoted sacredly to internal improvements. It seems to me that the most that can be claimed is that the state bound itself, in advance, to use the proceeds of these lands for school purposes, but not being able to get them for that purpose, accepted and used them for the lawful purpose under the grant.

Whether the state used the proceeds in accordance with the law of the United States, or this provision of the constitution, is no concern of the purchaser. In buying these lands from a sovereign state, he is not bound to look to the proper application of the purchase moneys as a condition to his title.

To declare this title invalid is to declare the law of Kansas authorizing the sale unconstitutional. A court ought not to so declare in a doubtful case. The violation of the constitution must be clear and free from doubt. 1 O. S., 82. Where the legislature is free from doubt, as evinced in their act, the judge should not annul while in doubt. No court of the state of Kansas has, by any decision which has been brought to our notice, declared this law unconstitutional or the title to any of these lands invalid. In the case reported, 5 Kan., the question was argued somewhat by counsel, but was not noticed or passed on by the court.

Who can question this title? The general government can find no fault, for the lands were used and sold for the purposes for which they were granted. Would it not present a very novel spectacle to see the state of Kansas applying to the court to eject her own grantees, who bought from and paid her for the lands upon the faith of the title received from her? The state has not assumed that attitude, she never will assume it, and she could not sustain it if she did. The court below therefore, did not err in finding this issue for the plaintiff below.

Judgment affirmed.

Terrell, Beach & Cushing, for plaintiff in error.

Pennewell & Lamson, for defendant in error.

[Superior Court of Cincinnati, General Term, April, 1881].

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ELIJAH JONES v. THOMAS TURNER, et al.

For opinion in this case, see 6 Dec. R. 1059; (s. c. 10 Am. Law Rec., 31).

[Superior Court of Cincinnati, General Term, March, 1881].

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W. B. RICHARDSON v. LEWIS WESTJOHN and CHARLES JONES.

For opinion in this case, see 6 Dec. R., 1043 (s. c. 9 Am. Law Rec., 723).

[Superior Court of Cincinnati, General Term, April, 1881].

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L. S. WORTHINGTON v. GLOBE ROLLING MILL.

For opinion in this case, see 6 Dec. R., 1038 (s. c. 9 Am. Law Rec., 698).

MUTUAL BENEFIT ASSOCIATIONS.

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[Hamilton District Court, December 14, 1880].

Avery, Cox and Johnston, JJ.

CINCINNATI LODGE No. 3, I. O. O. F., v. GEORGE LITTLEBURY.

The right to benefits in a benevolent society is concluded by a decision of the body to which, under the articles of association, it is left.

ERROR to Court of Common Pleas.

EVERY, J.

In the court of common pleas, Littlebury recovered judgment against the lodge for sick benefits.

The evidence, as shown by the bill of exceptions, was to the effect, that being a member of the lodge, and having been disabled by a sun-stroke, he had for a number of years received benefits at the hands of the

officer appointed by the lodge for the purpose, until upon objection made at a lodge meeting an investigation was had, the result of which was that the lodge resolved not to pay him benefits.

The constitution of the lodge, as it was called, in other words the rules or articles of association, provided that each member in good standing disabled from following some legitimate business by sickness or injury, not occasioned by his own improper conduct, should be entitled to receive, as benefits according to his degree, a specified sum, weekly, during the sickness or disability. The amount was to be drawn from the treasury and paid over by an officer styled the "Noble Grand," whose duty, as prescribed by article III, section 8, was to visit the sick weekly, and, if they were entitled thereto, to cause payments to be made. But no benefits should be paid, as the section went on to provide, unless the intention to make the payment were announced at a meeting, and if there was objection by any member, it was provided that the payment should be suspended until the objection was investigated, and an order passed by the lodge which should govern the Noble Grand in the discharge of his duty.

From the evidence in the bill of exceptions, being the minutes of the proceedings, it appears that at a meeting of lodge, February 14, 1877, the Noble Grand having reported Littlebury the same as last reported, objections were made to the payment of benefits, and a committee of investigation was appointed which reported, February 28, that for several years he had been engaged in the manufacture of paper boxes, thereby obtaining a livelihood, and therefore in the opinion of the committee not entitled to benefits. Upon the same day the secretary of the lodge notified him that his case had been under consideration and that the lodge had decided he was not entitled to benefits, but as a matter of fact the minutes show that the report was simply received and the committee discharged. Afterward a physician employed on behalf of the lodge certified that he was suffering from an impairment of mental powers, whereupon a motion that the certificate should be received and entered on the minutes, was amended by appointing a new committee further to investigate. This committee reported, May 16, and the report was laid over until May 23, to allow the meeting to be advertised. In substance it was that while suffering from the effects of sunstroke preventing him from transacting business to any extent, he was nevertheless engaged in the making of paper boxes, from which he realized \$100 a year, and was able to do more, if he had the work and inclination. This report was received and adopted at the meeting May 23, and motion being made to authorize the Noble Grand to pay benefits, an amendment was offered, "not to pay," which carried. Of all these proceedings, Littlebury was duly informed; indeed, during the course of them, he was represented before the lodge by counsel.

Afterward from time to time, he was reported as suffering from his old complaint, but as still continuing to perform manual labor, and therefore not entitled to benefits, until January 16, 1878, when, upon motion to donate him \$25 a committee was appointed to inquire into his condition. This committee reported January 23, but left the question of the donation for the lodge to determine. Their report was received and adopted, but upon motion to donate him \$25, the motion was lost. Afterward he was reported sick, then again as well, and finally, April 3, 1878, notice was given on his behalf for appeal. The result of the appeal was that the action of the lodge was sustained by the Grand Lodge of the state.

The dispute was not one arising with the Noble Grand, and therefore to be referred for decision to a physician, under article IX, section 7; and

even had it been, it required approval by the lodge to become binding. Upon the contrary, the opinion of the physician employed was never approved by the lodge; more than all, the question was never referred to him. The Noble Grand did not dispute the payment of benefits, but reported Littlebury sick, and it was only upon objection to the payment by a member, that the investigation was had which resulted in the order complained of, and which was still governed by the provisions of article III, section 8, although, in the course of it, the opinion of a physician was asked.

The order ultimately made May 23, not to pay benefits was final. It governed the Noble Grand, and only through him were the benefits to be obtained. The right rested upon the rules and articles of association. They constituted the contract with the lodge. The question in the first instance, was left to the Noble Grand, and if he disputed the payment, or there were objections by other members, it was to be determined by the lodge. Without this provision for referring the question to the lodge, the decision of the Noble Grand must have been final, and when referred to the determination of the lodge, such determination would likewise be final, unless there were provisions for appeal. *Toram v. Howard Beneficial Association*, 4 Penn. St., 519; *Vandyke's case*, 2 Whart, 309; *Anacosta Tribe, Red Men v. Murbach*, 13 Md., 91, *Dolan's case*, 128 Mass., 437.

In *Mohawk Lodge v. Wentworth*, 7 Dec. — (s. c. 4 B. 513), it was held by this court, under similar articles, that there could be no appeal where, upon objection to the payment of benefits, the matter had been investigated, and payment ordered. This would be conclusive here, and leave the decision of the lodge, although against payment of benefits, final.

Upon the other hand, should the ruling be departed from, the decision of the lodge would still be final. It was made May 23, 1877, and although there was a movement to donate \$25, the question of the right to benefits was never opened up. Under article XXI, containing the only provisions upon the subject of appeal, it is required that notice be given at the meeting at which the trial takes place or the next meeting thereafter. The notice here, was given April 3, 1878. True, there was a notice at the next meeting after February 28, 1877, but at that time there was nothing to appeal from, nor was there ever, so far as appears, until April 3, 1878, the written assignment of errors which required at the time of giving notice.

Judgment of the court of common pleas reversed and cause remanded.

J. & J. H. Clemmer, for plaintiff in error.

Fox & Bird, for defendant in error.

JUSTICE OF THE PEACE.

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[Hamilton District Court, April, 1880].

Cox, Johnston and Longworth, JJ.

†WM. DUMMICK v. ELMIRA HOWITT.

1. The liability of a justice for the acts of a special constable appointed by him obtains in replevin where such constable took an insufficient bond.
2. The failure of the plaintiff to object to the bond within twenty-four hours does not alter the liability.

†The judgment in this case was affirmed by the supreme court. 40 O. S. 646.

ERROR to the Court of Common Pleas.**JOHNSTON, J.**

The action below was an action upon the official bond of the plaintiff as a justice of the peace of Storrs township, to recover against him and his sureties the sum of \$60, being the amount of a judgment found in favor of the defendant in error in an action of replevin tried before said Dummick. The action in replevin was commenced by E. H. Jeffras against Mrs. Howett to recover from her the possession of a sewing machine. It appeared from the record of the case, the regular constable being absent, that a special constable was sworn in, and executed the writ of replevin, and delivered the property to Jeffras on Jeffras giving bond. The justice found the right of possession in Mrs. Howett and rendered judgment in her favor for the value of the machine, \$60. Execution issued, returned, no goods, and it was then found that the constable, instead of taking a bond with sufficient sureties thereon, took a bond with one Cottle as surety, who, as it was shown, was not only worthless, but was a non-resident, residing in Chicago. Thereupon, this action was brought to recover upon the bond of Dummick and his sureties.

The court said that the main error relied upon by the plaintiff in error was, that no objection was made by Mrs. Howett as to the sufficiency of the sureties on the bond within twenty-four hours after it was given, as provided in section 5823, Revised Statutes. That provision does not apply to proceedings before justice of the peace, but section 6619 is conclusive of the question. That section provides that the constable shall be held responsible if he takes an insufficient bond. Thus the responsibility is put upon the officer, not upon the party. While the defendants below took exception to a question asked of one of the witnesses concerning the residence of Cottle, and the court improperly overruled it, which overruling gave the defendants below a valid exception, they had omitted to set that out as one of the grounds for a new trial, and must, therefore, be held to have waived that ground, and the judgment would, therefore, be affirmed. Assigning that as error in the petition did not entitle them to a review of that ruling.

Fox & Bird, for plaintiff.

J. R. Challen, for defendant.

DEMURRER—CHATTEL MORTGAGE.

[Hamilton County District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

A. G. LYONS et al. v. G. & B. GEDDES.

1. Withholding a judgment for two days, after a demurrer has been sustained and no leave to amend taken, is not to the prejudice of the losing party.
2. The interests of a mortgagor and mortgagee of chattels are in conflict, and they cannot join as plaintiffs in replevining them from a third person.

JOHNSTON, J.

This was an action in replevin. The petition in error was prosecuted by the plaintiffs below for the purpose of reversing a judgment in favor of the defendants below for the value of certain property seized by the plaintiff below in replevin. The plaintiff in error claimed that the court below erred in sustaining a demurrer to their petition on the ground of misjoinder of parties, and in failing at once, upon sustaining the demurrer to the petition, to enter a judgment against them, the plaintiffs, for the full value of the property taken in replevin. It appeared that as to A. G. Lyons he was the general and Sarah Wilson the special owner of chattel property described in the petition; that their ownership in the property was that of mortgagor and mortgagee, and in June, 1880, Lyons gave the mortgage to one R. H. Wilson, who subsequently assigned the mortgage to Sarah Wilson, that a judgment was recovered by Geddes against the firm of Riley & Wilson, and that the constable levied upon this property as the property of Riley & Wilson, whereupon Sarah Wilson and A. G.

Lyons brought this action in replevin. They asked that the property might be adjudged to belong to them. The defendants below, Geddes and the constable, demurred to the petition on the ground of a misjoinder of parties plaintiffs, it appearing that the interest of the parties was not joint, but several. The court below sustained the demurrer.

The demurrer was property sustained. The interest of Lyons and Mrs. Wilson were not in harmony, but in conflict, and therefore their being joined together in one action to recover possession of the property was clearly erroneous, and the court below should have sustained the demurrer on the ground of misjoinder of parties. But there was no error in the court not immediately rendering judgment, as claimed by the plaintiff in error. The record disclosed the fact that the demurrer was sustained, but it did not appear that either the plaintiff asked leave to amend or take any further action in the case. The entry sustaining the demurrer was made on the 19th of October. On the 21st of October the record shows that upon application of the defendants the court proceeded to find the damages to which the defendants were entitled, and assessed the sum at \$100 and entered judgment therefor. The record did not disclose anything further in point of fact than an irregularity, not an irregularity to the prejudice of the plaintiffs. Withholding a judgment against a party for two days is not to his prejudice; ordinarily the debtor would have a judgment delayed indefinitely—the longer the better for him.

Judgment affirmed.

ASSIGNMENT FOR CREDITORS.

248

[Hamilton County District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

HENRY H. HAMILTON, assignee, v. GARVIN H. COCHRAN et al.

Where the defendant, in an action against an assignee for creditors, for the amount of a dividend, instead of insisting upon his demurrer, answers over after it has been erroneously overruled, and makes an issue as to whether the claim has been or should be allowed. He waives the demurrer, and the judgment ordering allowance of the claim will not be disturbed.

ERROR to the Superior Court.

JOHNSTON, J.

The action was commenced in the superior court by the defendants as partners against Hamilton as assignee of Williams to recover \$997 as so much money had been received by him for their use.

By amendment they set out that Williams & Lawson had made an assignment to Hamilton for the benefit of creditors; that at time of assignment, Williams & Lawson were indebted to them in the sum of \$3,322; that they presented their claims to the assignee for allowance, and they were allowed; and that subsequently a verdict of 24 per cent. was declared, and that thereupon they presented their claim to the assignee for their share of the dividend, and he refused to pay it; and therefore they prayed for judgment against them for the amount of the dividend. The assignee filed an answer denying that the claim was allowed, but that it had been presented and rejected. Subsequently the assignee, by amendment, set up a claim for damages sustained by his assignors growing out of an attachment suit that the defendants in error had commenced against them. The court below found that the claim had not been disallowed by the assignee and ordered that it be allowed as a valid claim against the estate

of assignors and gave judgment against the assignee for the costs, not giving judgment for the 24 per cent. claimed in the petition. The ground of error claimed was that the court below overruled a demurrer to the amended petition.

The plaintiff in error would have had a good ground of exception had he permitted the court below to enter up judgment on the demurrer to the amended petition. The court below did not have jurisdiction to entertain that character of action. But the defendant below joined issue with the plaintiffs below upon the allegation that the claim had been allowed, averring that it had been presented but had been rejected. Where a demurrer is erroneously decided against a party, and he afterward answers, setting up a different and repugnant case abandoning the original defense the final judgment against him on the new case or defense will not be reversed for such error. The answer made up an issue which the court had jurisdiction to determine. The court had undoubtedly the right to proceed to hear the question and determine it as to whether or not the claim of the plaintiff had ever been allowed and whether the claim should be allowed against the trust estate. That was the question that was tried below without objection on the part of the plaintiff in error. In fact, it was an issue that was in one sense tendered by him, and while the court erred in overruling the demurrer originally, it was not an error to the prejudice of the assignee upon the whole record.

Judgment affirmed.

Levy, for plaintiff in error.

Hewett, for defendant in error.

267 MUNICIPAL CORPORATIONS—EMINENT DOMAIN.

[Huron Common Pleas Court, April, 1881].

D. E. MOREHOUSE et al. v. VILLAGE OF NORWALK et al.

A municipal corporation has no inherent power to tax and can levy taxes only for such purposes as the state has permitted, and a tax for other purposes may be restrained by the courts on proper application. If, therefore, a municipal corporation seeks to use its power of eminent domain and of taxation, colorably to open a street, declared by it to be necessary, but it is shown to the court that this is really to provide a right of way for a railroad, an application for an injunction by a taxpayer, on the refusal of the solicitor, will be granted. This is not an interference with the legislative discretion of the council.

DOYLE, J.

September 20, 1880, the village council passed an ordinance to lay out Norwalk avenue, and also a resolution declaring it necessary, in the opinion of the council, to open such avenue. December 4, 1880, the council passed an ordinance to levy a tax to the amount of \$20,000 to pay for the opening of said avenue, the same to be first submitted to a vote of the citizens, to be taken January 11, 1881, and on the 12th of January, 1881, the vote having been taken and a majority of votes being in favor of the tax, the council passed a final ordinance levying the tax, and sent a certificate to the auditor of the county to have the same charged upon all the property in the village, real and personal, on the duplicate for the year 1881. The petition is filed to restrain the council from proceeding to condemn the property for this street and to restrain the levy of this tax.

I do not intend to review either the pleadings or the proof, but to

say that it is sufficiently alleged, and sufficiently appears upon the face of the proceedings themselves, as well as by proofs, that the city council, in laying out and establishing what is called in the proceedings "Norwalk avenue," and in levying this tax to raise money to pay for it, is providing a right of way through the town for the W. & L. E. R. R. Co. at the expense of the village, and that proceeding to do this under the grant of the right of eminent domain and the power of taxation to the municipal council is merely colorable, and designed under the pretense of opening an avenue for public convenience and to meet a public necessity, to compel the citizens to aid in the construction of this railroad by furnishing them this free right of way.

While to me this is very apparent in the case, I say also that it is very clear to me that the village authorities in this matter have been acting in what they honestly believed to be the best interests of the village, and as they were advised and believed, within the limits of their authority and according to law; but, unless the point is well made, that the courts have no authority to review or control the council in a matter of this kind, that the acts complained of are legislative, and hence not subject to judicial interference, for my own part I would be compelled to grant an injunction were I applied to for it, after due notice, and hence compelled to deny the motion made to dissolve the order already granted.

Is that position correct? The council is here exercising, it is claimed, authority under two distinct grants of power. First, that of eminent domain, and second, that of taxation; but it must be remembered that the power is not granted, in either case, to the extent that it is possessed by the state, but that the purposes for which property may be appropriated by the municipal corporation, and the purposes for which taxes may be levied, are distinctly and clearly defined and limited; and that it is only where the right is clearly conferred that it can be exercised. Where the right is conferred and is being exercised for the purpose specified in the grant, it is true that the courts cannot control it, even though in their judgment it is improvidently or unwisely used. Section 2232, Revised Statutes provides that "Each city and village may appropriate, enter upon and hold real estate within the corporate limits for the following purposes, *but no more shall be taken or appropriated* than is reasonably necessary for the purpose to which it is applied." Then follows the distinct purposes, including opening of streets. The power to tax is conferred in equally specific terms, and limited to specific purposes, in the various sections of the statutes relating to that subject.

It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose. The decision (by a municipal council) to lay a tax for a given purpose involves a legislative conclusion that the purpose is one for which a tax may be laid; in other words, is a public purpose. But its determination on this question is not, like the decisions of the legislature on ordinary questions of public policy, conclusive either on the municipality or the citizen. The question what is and what is not a lawful purpose in taxation is one of law. It is no doubt true that the presumption must always be in favor of the action of the legislative body which levies the tax, and the courts have been very reluctant to interfere where the question whether the tax is levied for a lawful or unlawful purpose is involved in doubt.

Sometimes these questions are embarrassing equally to the legislatures and courts, and the legislature is invested with a power which the courts are not at liberty to interfere with if lawfully exercised; but that the

courts have the right to inquire into the validity of the tax, even though that question may wholly depend on an inquiry into the real purposes of the council or municipality in levying it, admits of no doubt. Cooley on Taxation, 42, 70; 21 Penn. S. 147, 174; 9 B. Monroe, 330, 345; 13 N. Y., 143; 1 Duer, 496.

There is a difference in the grade of government levying the tax. A municipal government is one of delegated and limited powers whose authority is generally to receive a strict construction, and which must find the purposes for which it may tax clearly confided to its charge by the state. It is otherwise with the state, which has all the power of taxation not withheld from its exercise by the state and federal constitution, and in support of whose action consequently the most liberal if not conclusive intendments are to be made.

The municipality has no inherent power to tax; it can levy taxes only as the state has seen proper to permit, and that power of permission is subject to such limitations as are prescribed in the constitution of the state.

When the municipality, therefore, levies a tax, or attempts to exercise the powers granted to it in the matter of opening streets, or appropriating private property, it is competent for the courts to inquire whether this power is exercised for the purpose for which it was conferred, or for some unlawful purpose, or whether the council is exceeding the power thus conferred.

In speaking of the power of eminent domain, Judge Ranney, in *Giesy v. C., W. & Z. R. R. Co.*, 4 O. S., page 326, thus treats it: "The power of eminent domain is rather a political than a judicial power, and by our constitution its exercise is intrusted to the general assembly, so far as determining the necessity and propriety of the appropriation is concerned. The power may be exercised directly by that body or through subordinate agencies. * * * In saying that the exercise of this power properly belongs to the general assembly, and not to the judiciary, I do not intend to express a doubt that in case where its limits have been exceeded, or its spirit and purpose abused, a judicial remedy may not be afforded. If the legislature, by a direct exercise of authority, should undertake to appropriate property for purposes beyond the scope to this power; or if any subordinate agency under a power properly conferred, should abuse the authority by using it irregularly, oppressively, or in bad faith, there can be no doubt of the power of the courts to furnish an effectual remedy against such illegal acts."

And Judge White, in *Iron R. R. Co. v. Ironton*, 19 O. S., 299, 304, says:

"Under the statute the authority and discretion of determining the quantity of ground required by the public for wharf purposes are vested in the corporation; and there is nothing in the petition showing that in making the appropriation, the municipal authorities acted in bad faith, or that the property is intended to be used for any other purpose than that for which it was appropriated. Under these circumstances the action of the city is, on this question, final."

Under different circumstances, and when those things are alleged and do exist, which are absent in the case decided, the inference is left, that the action of the city would *not* be final. See also 16 O. S., 60, where the court says: "Proceedings of the city council, *merely colorable*, and designed under the pretense of removing a nuisance, to compel the lot owners to improve their property of course could not be sustained." Also

18 O. S., 302, where the court review the action of the city council in fixing the price of gas, and: "Both public and private rights are to be protected, and for that purpose we must recognize the fact that a municipal as well as private corporation can do wrong." Also 19 O. S., 299, 304; 23 O. S., 510; 68 Mo., 41; 1 Duer, p. 451, 494 *et seq*; Cooley on Taxation, 76, 77; High Injunction, section 1275, 561; High Injunction, 1282.

In the case of State ex rel. v. Ironton Gas Co., 37 O. S., 45, the court in the third proposition of the syllabi, says: "The presumption is in favor of the good faith and validity of the action of the city council in passing such an ordinance, and this presumption can only be overcome by the averment of *issuable facts* showing the contrary. It is only where facts show, not a *real*, but a *colorable* exercise of the authority vested in the council that the ordinance can be held invalid."

A very interesting discussion of this question will be found in the case of Davis v. Mayor, etc., 1 Duer's, 493, *et seq.*, and I quote from the opinion of Judge Duer:

"In reply to a question by the court it was expressly affirmed by counsel that, should the common council attempt by an ordinance and from motives manifestly corrupt, to convey, for a grossly inadequate or merely nominal consideration, all the corporate property of the city, neither this nor any other court, would have power to suppress, by an injunction, the meditated fraud, or when consummated to rescind the grant, or punish its authors or divest them of its fruits. There could be no remedy we were told but from the force of public opinion and the action of the people at an ensuing election, and all this upon the ground that neither the propriety nor the honesty of the proceedings of the legislative body, nor while they are pending, even their legality, can ever be made a subject of judicial inquiry. * * *

"The doctrine, exactly as stated, may be true when applied to the legislature of the state, which, as a co-ordinate branch of the government, representing and exercising in its sphere, the sovereignty of the people, is, for political reasons of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not true when applied to a subordinate municipal body, which, although clothed with some legislative and even political powers, is yet, in the exercise of all powers, subject to the authority and control of the courts, to legal process, legal restraint and legal correction."

Notwithstanding these observations, the question still remains, has this court, or any court of equity, the power to interfere with the legislative discretion of the common council of any municipal corporation? And to this question I at once reply, certainly not, if the term discretion be properly limited and understood. This court has no right to interfere with and control the exercise not merely of the legislative, but of any other discretionary power, that the law has vested in the corporation. A court of equity has no right to interfere with or control the exercise of a discretionary power, no matter in whom it may be vested. The meaning and principle of the rule are, that the court will not substitute its own judgment for that of the party in whom the discretion is vested, and thus assume to itself a power which the law has given to another; and the limitations to which it is subject are, that the discretion must be exercised within its proper limits, for the purpose for which it was given and from the motives, by which alone those who give the discretion, intended that its exercise should be governed.

See Cooper's Eq. Cases, 77; 1 Railway Cases (Eng.), 135; 4 Mylne & Craig, 249; 2 Mylne & Craig, 613; 2 Blyh, N. R., 312, for the English authorities in support of this view.

By the constitution it is provided that "the general assembly shall never authorize any county, city, town or township by vote of its citizens or otherwise to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money, or to loan its credit to, or in aid of any company, corporation or association."

"The mischief which this section interdicts is a business partnership between a municipality or sub-division of the state and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein." Not that they may not do on their own account that which is forbidden as an alliance between public and private interests. *Walker v. Cincinnati*, 21 O. S., 55.

Now, it seems to me, that whenever the municipal council attempts to impose a tax for any special purpose, that the action of the council and this provision of the constitution can be brought face to face, that the courts have the right to brush away any form or cover which may be used to obscure the real purpose of the tax; and if, in fact, the tax be levied for a purpose not authorized by the grant of authority to the municipal body, or forbidden by the constitution of the state, no matter what form it takes, or under what shape it appears, it is within the power of the courts to forbid it, and by solemn injunction restrain it. Not on the ground that the council has improvidently or unwisely exercised a power granted to it or a discretion vested in it—that the courts cannot interfere with, but upon the ground that it is usurping a power not granted, or using a power granted for one purpose, for other unlawful and forbidden purposes. Having it in view all the time that the presumptions are in favor of the legality of the proceedings of the council, I cannot assent to the proposition that the presumption is conclusive, or that the declared purpose is binding so that the real purpose cannot be sought after. It has been forcibly and very truly said, that, an unlimited power in these legislative bodies to make everything lawful which they see fit to call taxation, would, when plainly stated, be an unlimited power to plunder the citizen. *Tyson v. School Directors*, 51 Penn. S., 9. In asserting the right, in any particular case, the council merely asserts its jurisdiction to the act; but questions of jurisdiction are not usually concluded by a decision in its favor, made by the party claiming it. That is as true of the courts as the legislature; jurisdiction comes from the law, and is not obtained by any tribunal through a simple assertion that it exists. When, therefore, the question of validity of taxation becomes judicial, if it shall appear that the exaction is made for a purpose not authorized by law, the right of the individual to protection is clear. See *Cooley on Taxation* 68, and cases cited or to use the words of a very able judge in 42 Pa. S., 358, 364.

"The ear of the courts should be open to well founded complaints on the part of the citizen; but where he has no irregularity, no neglect of duty, no excess of authority to complain of, nothing but an indiscreet use of clearly granted discretion, he will vex the judicial ear in vain, for the

judicial arm can redress no such wrong. The power of taxation, altogether legislative and in no decree judicial, is committed, by the legislature in the matter of schools to the directors of the school districts, (as in this case to the village council.) If they refuse to perform their duties, the court can compel them. If they transcend their power, the court can restrain them. If they misjudge their power, the court can correct them. But if they exercise their unquestionable powers unwisely, there is no judicial remedy." In this case, it seems to me clear, that the council are undertaking to appropriate property for purposes beyond the scope of their power, that they are using this power of eminent domain irregularly and oppressively, and also in levying this tax, they are by indirection and evasion, seeking to do that which it is admitted could not be done directly and openly, viz: Donate the public moneys and incur a public burden to aid this railroad company in the construction of its road.

I think also that the action is properly brought. By section 1777 it is made the duty of the solicitor to apply to a court of competent jurisdiction for an injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, etc., and by section 1778, it is provided that in case he fails, upon the request of any tax-payer, to institute such suit, the tax-payer may bring it in his own name. The request was made in writing in this case and the solicitor declined. And properly brought *now*, the citizen is not found to wait until the unlawful act is completed or the illegal tax put in the hands of the collector for enforcement against him. The action is authorized by the very terms of sections 5848 and 5849, Revised Statutes. The motion must, therefore, be denied.

LIBEL—EVIDENCE—DAMAGES.

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[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

MURAT HALSTEAD & CO. v. CHRISTIAN SCHEMP.

Under the general denial in an action for libel the defendant may prove the truth of the charge, not as a defense, but in mitigation, not only of punitive, but also of compensatory damages, and it is error to restrict such proof to the rebutting of express malice and mitigation of punitive damages only.

LONGWORTH, J.

This was a proceeding in error to review the judgment of the superior court in a suit brought by Schempp against the plaintiffs for the publication of a libel concerning him in the *Commercial*, in which suit he recovered a verdict for \$850. The defendants admitted the publication of the matter charged as libelous by the plaintiff and denied every other allegation. The plaintiff offered evidence to show express malice on the part of the defendants, and that the libelous matter was false. The defendants offered evidence to show that the libelous matter was true. The court below charged the jury that the answer admitting the publication, and the publication being libelous in its character, and the law presuming malice from its publication, the only question was the amount the plaintiff was entitled to recover; and, further, on the subject of exemplary damages, that the defendants had a right to introduce testimony to prove the truth of the charge, not as a defense to the action or as rebutting the right of the plaintiff to recover compensatory damages, but simply to mitigate such

damages as the plaintiff might be entitled to recover by way of smart money. Exception was taken by defendants to this portion of the charge.

In announcing the opinion of the district court on the petition in error, the court said it was not necessary to consider any other exceptions taken at the trial than this one. From a very early time the courts have taken a back track on the ancient doctrine of the common law that the truth constituted no defense to an action for libel, and have decided that the truth of a libel not only mitigated the damages which the plaintiff was entitled to recover, but constituted in itself a complete defense to the action. But this defense the courts required to be set up by the plea in justification, and if the general issue were taken and no such plea interposed, the truth might have been pleaded only to mitigate the damages. There seemed to be in this an anomaly, the courts saying in one breath that having made the general issue, you cannot introduce the truth as a defense, but you may introduce it to reduce the amount of recovery over anything more than one barley-corn. The legislature has seen fit to provide that in actions of slander and libel the defendant may plead or prove on the trial the truth of the matter alleged in mitigation of damages. It is true that where the defendant does not, by way of confession and avoidance, plead the truth, but contents himself with a denial, he cannot defend against the plaintiff's right of action; nevertheless, under the statute, as well as by the reasoning which has succeeded in the supreme court in the case of *Vanderveer v. Sutphin*, 5 O. S., 294 in overthrowing the common law rule he may introduce by way of mitigation of damages what would be a complete defense to the action, and, if he succeeded in his establishing his defense, the right of the plaintiff would be reduced to one cent, a thing in the eye of the law of no value whatever, the smallest coin known in this country. The court below, therefore, erred in holding that this proof in mitigation of damages could only be offered to rebut the presumption of express malice on the part of the defendants and in mitigation of punitive damages only.

Judgment reversed and cause remanded.

Sage & Hinkle, for plaintiff in error.

Wolf, for defendant in error.

MOTION FOR NEW TRIAL.

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

M. WERK v. VOSS & KOCH.

A motion for a new trial is necessary to have been filed in the court below before a reviewing court will re-examine a question of fact, although the evidence was uncontradicted and in part agreed on, for it was still a question of fact, since the court below may have disbelieved the witnesses.

LONGWORTH, J.

This was a petition in error to review a final order of the superior court. The question arises on a final order for distribution. By final decree a certain amount had been set aside to pay taxes. The master found that the property had been sold for delinquent taxes to August Voss. He tendered Voss the amount of the delinquent taxes. Voss refused to receive them, saying he was not the owner of the tax certificate, but refused to disclose to whom he had transferred it. The grantee hav-

ing been ascertained, he and Voss were made parties, and a supplemental petition was filed charging that the certificate was illegal by reason of informalities in the sale of the property by the auditor and the treasurer. Voss filed his answer, an agreed statement of facts was made up, and the case submitted to the court, who found in favor of defendant. To reverse that finding this petition in error was filed. No motion for a new trial was filed in the case below, and it was claimed that this court had no jurisdiction to review proceedings in the absence of such motion. On the other hand it was claimed that the office of a motion for a new trial is to review the finding of the court upon disputed matters of fact, and bring upon the record the evidence offered in the court below, and, where the question is one simply of law, a motion for a new trial is not necessary.

The court found that the issue in the case was one of fact. It was true there was no dispute about the evidence. The parties agreed upon the important facts, and where they did not agree, witnesses were called to prove them, and the testimony of those witnesses was not contradicted. Apparently, therefore, it was only a question of law for the court to determine whether these facts entitled the plaintiff to recover, and the court decided they did not. But that was neither here nor there. The court may have disbelieved the witnesses, for all this court knew. The issue which the court was trying was an issue of fact, and the only way of obtaining a review of that decision on the facts was by filing a motion for a new trial, as provided by law. The absence of such a motion made it beyond the power of this court to look into the bill of exceptions, and the judgment must be affirmed.

Holmes, for plaintiff in error.

Goodman, for defendant in error.

OFFICE AND OFFICER.

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[Lucas Common Pleas Court, May, 1881].

WOEHLER v. TOLEDO.

Section 20, article II, constitution of Ohio, providing that the legislature shall fix the term of office and the compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office "be abolished," contemplates a fixed term for all officers; therefore, under a statute that an officer shall hold for one year and until his successor is appointed and qualified, his holding over after the end of the year, no successor being appointed, is not a holding under the term of office, and during such holding over the salary may be changed at will, and the change cannot be made inoperative by the refusal to appoint a successor. Where, therefore, a city council, under section 1716, Revised Statutes, fixed the salary of the chief of the fire department, and after the expiration of the year, reduced it, but the mayor made no new appointment, and the prior officer held for two years thereafter, receiving the reduced salary, he cannot recover the difference between the reduction and the original salary.

DOYLE, J.

Woehler was appointed fire engineer in 1869, and reappointed after the ordinance fixed the salary at \$2,000 in 1873. He held the office under that appointment until February, 1879. In 1877 the council repealed the former ordinance and passed a new one and fixed the salary at \$1,500, and in 1878 again repealed that ordinance and fixed the salary at \$1,200. Woehler has been paid the amounts fixed by these different ordinances, and the question now is, can he recover the balance of \$2,000 annually?

†This opinion was affirmed by the district court, April 22, 1881.

Public offices, though salaried, are not generally held by contract or grant, and unless there are some special restraints in the state constitution, they are under the control of the legislative power. They may be abolished, the salary reduced, or the term shortened; new duties may be imposed or old ones withdrawn. Sedgwick on Construction of Statutes, Pomeroy's notes, page 585, and cases cited, *Butee v. Pennsylvania*, 10 Howard 415. Cooley's Constitutional Limitations, 276, 277 n.

In Ohio this general rule is modified by special restraint in the constitution and laws of the state, made in pursuance thereof.

Section 20, article 2, of the constitution provides that "the general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

It would seem from the opinion of the court in *Ohio ex rel. v. Covington et al.*, 29 O. S., 102, 115, that the office in question must be regarded as within the provisions of that section, as well as within the provisions of section 27 of the same article, upon the same subject, which provides that: "The election and appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution or the constitution of the United States, shall be made in such manner as may be directed by law."—Section 27, article 2, constitution.

"The authority of the general assembly to fix the terms of office and the compensation of officers is found in the general grant of legislative power and not in these sections, but they impose upon that body the duty of exercising the power so granted, and forbid any change in the salary of an officer during his existing term so fixed, unless the office is abolished." *State ex rel. v. Howe*, 25 O. S., 588, 598.

It is therefore in the nature of a limitation of this power that section 20 must be regarded, and for the purpose of fixing a definite time during which an officer shall not be subject to legislative action regarding his compensation. Without it the legislature might fix the term of officers for a definite period and might provide for their creation and holding during the pleasure of the legislature, and a change of salary as often as it saw fit to make it. Under this section the legislature must fix a term during which the salary of the officer shall not be changed, but it does not prevent the legislature from exercising power, under the general grant of legislative authority, of extending the right to hold beyond the term fixed, until a successor is duly qualified. *Ib.* 597.

The legislature, therefore, by the Municipal Code, section 61, provided that the officers of cities of the first class shall consist among those enumerated, of a fire engineer, who shall be appointed by the mayor, with the assent of the council, and by section 63 delegated to the city council the right to provide for such other officers as shall be deemed necessary for the good government of the corporation, etc.; by section 68, conferred upon the council the power to fix the compensation, and by section 62, provided that the person appointed to this office shall serve for one year and until his successor shall be appointed and qualified.

Section 69 provided that the emoluments of no officer shall be increased or diminished during the term for which he may have been elected or appointed, * * and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed to serve, when during the same time the emoluments have been increased.

What then is the purpose of this law, both in the constitution and the statute? Is it not to fix a definite period during which the emoluments of the office shall not be changed? The constitutional enactment, which gives the governor the power of appointment, would operate to wholly defeat the power of retrenchment vested in the legislature, if either could keep an officer in office, after the salary had been decreased by simply refusing to appoint a successor. And the senate in the one case or the council in the other would equally have the power to defeat legislation on the same subject by refusing to confirm an appointment when made. Hence, the very purpose of the constitution, which takes away from the legislature the common law right to fix the salary of officers and change it when they see fit, and to require a definite term during which the salary shall not be changed, is defeated, and the term made indefinite, to depend upon a time when the appointing power may see fit to appoint a successor or the confirming power to confirm him when appointed.

The evil sought to be remedied in the constitutional enactment was the legislation under the old constitution changing fees and compensation after a man has been elected to office, sometimes, no doubt, by political or other considerations, not depending upon the value of his services or his capacity as an officer. This

is shown by the debates on the constitution, vol. 1, pages 233, 234; vol. 2, pages 318, 561, 562, 577, 633, where it may be remarked the term is spoken of so far as it is mentioned at all as a definite time, a year or number of years. This general provision, made in the constitution itself, that certain officers therein named should hold until their successors should be qualified, did not appear to enter into the discussion of this section.

The purpose then of this section of the constitution was to require of the legislature that when they created an office not named in the constitution they should fix a term during which the salary should not be increased or diminished. Why make this provision if it was still left to the legislature to exercise its power under the general grant to make that term indefinite?

No doubt the legislature is not prohibited by it from providing that the incumbent may hold the office beyond the term fixed in compliance with it; that was expressly held in the case of the State v. Howe, 25 O. S., 588, 596, but this question is left open. It is said, however, in that case which was upon the question whether a vacancy occurred at the end of the stated term, which the governor could fill without the assent of the senate, that section 20 of the 2d article of the constitution, which enjoins upon the general assembly the duty of fixing the term of office and the compensation of all officers not provided in the constitution, imposes no restraint on the power of the general assembly to extend the tenure of an officer beyond his term, and until his successor is qualified, in a case where the duration of such tenure is not limited by the constitution."

It is proper to notice two paragraphs from the opinion of the court. On page 595: "Much stress is laid by the relator upon the word 'term,' and the claim is that the office became vacant April 16, 1875, by reason of the expiration of the defendant's term of office. Let it be conceded that the defendant's term was limited to three years from April 16, 1872; it is nevertheless true that the same statute which imposed the limitation also provided that the right of the defendant to hold the office should continue thereafter until his successor was appointed and qualified. *Qui haeret in litera, haeret in cortice.*" On page 597: "Nor is it necessary in order to maintain this construction" (that the legislature may prolong the office beyond the term), "that the time intervening between the expiration of the period fixed by the statute and the qualification of a successor should be considered as a part of the preceding term of office. Let it be conceded that the term must be fixed to a certain and definite period, so that the expiration of the period closes the term of an incumbent, if one be duly appointed and qualified. In such case there would be no vacancy in the office, and the successor must be a person appointed by the governor by and with the advice of the senate. But it is claimed if a successor be not appointed at the expiration of incumbent's term, a vacancy then occurs. Undoubtedly this would be so, if the incumbent may not lawfully hold over *pro tempore.*"

It seems to me that we must therefore look to the general grant of power for the right of the legislature to extend the office beyond a stated term, but under section 20 of article 2, it is made the duty of the legislature to fix a term to a certain and definite period, during which the salary cannot be increased or diminished, and in the act creating this office they have exercised both the power given them in the one case and the duty imposed in the other. In two cases, State v. Linn, and Thompson v. Phillipps, reported in 12 O. S., 615, 617, one Linn is said by the supreme court in the first case to have been elected for the "regular term of two years" as prosecuting attorney, while later in the opinion it is stated that Brown is entitled to hold the office until the election in 1862 and until his successor is elected and qualified. While in the other case John G. Thompson is said to be treasurer of Franklin county. "His term of office commenced on the first Monday of September, 1860, and will continue to the first Monday of September, 1862." These cases are not important except as they show the care which the court seems to have taken to avoid using as synonymous expressions the words "term" and "tenure," or mere holding over; and in the case of the Commonwealth v. Hanley, 9 Penn. St., 513, cited by the court in State v. Howe, supra, and decided under a constitutional provision that the incumbent should hold his office for three years and until his successor should be duly qualified, seems to have made the same distinction, on the failure of a successor to qualify "the incumbent, who is authorized to hold the office until his successor is qualified, holds over."—See page 601.

It is said in argument that the incumbent holds by the same right after the year as during the year. I think not. During the year no successor can be appointed unless the incumbent is first removed by the deliberate act of the council, which act generally implies cause sufficient in the judgment of the council to justify removal. After the year an appointment may be made at any time, and

when that appointment is assented to by the council, no matter how much or little time intervenes after the year, and the appointee qualifies, he is at once entitled to the office and the old incumbent ousted. There can be no such thing here as a renewal of the term from year to year in analogy to tenancy. After the year expires he holds simply at the will of the appointing power and his tenure may be terminated any day.

The case of the Commonwealth v. Drewry, 15 Grat., 1, may or may not be in conflict with this opinion, depending upon certain facts which do not appear in the reported case. The action was on a sheriff's bond. Under one section of the constitution his office was fixed at two years. Under another, it is provided that all officers, elected or appointed, "shall continue to discharge the duties of their respective offices after their terms have expired, until their successors are qualified." Under the law as it was when the sheriff was elected, his term expired July 1, 1856; the legislature in the meantime extended it to January 1, 1857, and he held until that time; between July 1 and January 1 he became a defaulter. The question was, did his bond cover that default? What the conditions of the bond were, or what the law required them to be, is not stated in the report, except in one sentence on page 9, as follows: "Their bond bound them for Drewry's official acts whilst in office." It is true the court says the term was prolonged beyond the two years, but the case could well be decided if the bond was as broad as stated upon the simple proposition that the officer held *de jure*, even though he held *pro tempore*."

The case of Steinbreck v. State, 33 Ind., 483, was decided under and in construction of the Indiana constitution, section 3, article 15, which reads as follows: "Whenever it is provided in this constitution or in any law which may be hereafter passed, that any officer other than a member of the general assembly shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." That is, the word "term" shall have that construction, but it does not appear in the case, and I have not been able to examine the constitution itself to see whether there is any similar provision to ours, section 20, article 2, or any similar reason for the adoption of such provision. I see nothing in the cases in 26 Ind., 308, and in 18 American Law Register, 365, that affects the question at all. And the cases cited are all that the counsel in the case, and the court, in what time I have been able to give it, have been able to find. I am compelled, therefore, to find that in the appointment of the plaintiff his term was fixed at one year, in obedience to the requirement of section 20, article 2, of the constitution, during which time his salary could not be changed, but that the legislature, in order to prevent a vacancy or interregnum in the office, provided for his continuance in office beyond the term, but during such continuance he held the office subject to the right of the law-making power, unrestricted by the limitations of section 20.

When the ordinance was passed fixing the salary at \$1,500, he had the option to do the work at that price or refuse to do it at all. Having elected to hold the office after that period, he is entitled to receive only such pay as by the ordinance the city agreed to give him.

It may be mentioned here, although it does not affect the merits of this particular case, that in 1877 the legislature somewhat changed the language and punctuation of section 62, and in the Revised Statutes the section is divided, so that by section 1709 the term of appointed officers is fixed at one year; and under section 1718 is found the provision that all municipal officers shall serve until their successors are qualified. The effect is the same as I have found it under section 62 of the Code.

The jury will, therefore, in accordance with this view of the law, return a verdict for the defendant.

TAX SALES.

[Superior Court of Cincinnati, Special Term, 1881].

Force, Foraker and Harmon, JJ.

J. W. SIBLEY v. J. R. CHALLEN.

Where a purchaser at delinquent tax sale by reason of irregularity in the proceedings gets no title, and thereupon brings action to establish his lien for the amount paid and subsequent payments of taxes, and obtains a decree for sale,

Superior Court of Cincinnati.

and after decree ascertains there is no such lot, but there is same number in a different subdivision, he cannot have the petition amended, but must bring a new action to another lot.

FORCE, J.

This was a motion to set aside a decree, to enable amend his petition. Plaintiff filed petition averring that in a designated sub-division, the property of the defendant delinquent taxes and bought in by plaintiff; that there in the proceedings, by reason whereof the title did not pass that he had thereby a lien on the land for the money and taxes subsequently paid, and prayed for a sale. The defendant in default, thereby admitted that the plaintiff had such judgment was entered ordering a sale. Now, at a subsequent term finds that there is no such lot as described in the petition, but of the same number in another sub-division. He therefore set aside the decree which he obtained, in order to amend his petition a lien upon another, or a differently described lot.

There is no ground for setting aside the decree. If a man brought suit for one piece of land and got a decree, he cannot come round and ask a decree for another piece of land. If he wants another lot, it must be pursued in another action. Motion

GUARANTY—HUSBAND AND WIFE—PARTY

[Superior Court of Cincinnati, Special Term, 1888]

Force, Foraker and Harmon, JJ.

BANK OF BATAVIA v. HARRIETT M. SEWELL

A guaranty of the payment of a note and costs of collection, no person, may be sued on by any subsequent indorsee of the note on the guaranty of payment, made by a husband and wife, at the death of the husband, the husband having died, the wife and the husband's proper parties defendant; but the husband's heirs are not parties.

FORCE, J.

The ground of action was what was assumed to be a payment of a negotiable note. It appeared that Mrs. Sewell and her husband were parties to a promissory note, and by a separate instrument the payment and costs of collection. The note was assigned to the plaintiff while in suit, and he was obliged to pay costs of collection. Now he sues on the guaranty for reimbursement. Whether the note is negotiable or not, there is irreconcilable conflict in the law. It was the opinion of the court that a contract of guaranty should be interpreted like other contracts, according to the meaning of the language. If it is limited to the benefit of a particular person, it will not benefit any subsequent endorsee. But if it is taken as a promise taking that the debt will be paid at all events, it should be given to whoever may become holder. Under the code of procedure the assignee of a chose in action sues in his own name, the original owner is removed and there should be no difficulty in so holding in this case a part of the consideration that the note should be paid on demand, and the parties guaranteed they would bear the cost of collection. Mrs. Sewell was a married woman; having separate estate.

murrer would be overruled. On the same ground the demurrer of the administrator of her husband would be overruled. The children and heirs of Sewell are not proper parties to the action. Granting that their father was a trustee for land, held beneficially for them, they were not parties to this contract, and the demurrer of the children and heirs of Mr. Sewell was therefore sustained.

VERIFICATION.

[Superior Court of Cincinnati, Special Term, 1881].

Force, Foraker and Harmon, JJ.

F. G. BROEMER v. CHARLES NORDHOFF et al.

An answer filed by leave will not be set aside because the verification was made before the defendant's counsel as notary.

FORCE, J.

Motion to strike answers from the files, as not properly verified. The notary who swore the defendant to his answer was one of the counsel for defendant. Judge Force, in passing upon the motion, said that under the rule in New York that could not be done—that an attorney could not administer an oath to his own client, and that rule was once followed here by the common pleas. It was not, however, an absolute rule.

The court found from the pleadings in this case that the answers were filed by leave, and there being no statutory provision in reference to the matter, there was no reason for setting aside the pleading. Motion to strike from the files overruled.

ACCOUNT—EVIDENCE.

[Pickaway District Court, April Term, 1881].

HENRY F. PAGE and JAMES BALLARD, Adm'rs, v. EPHRAIM ZEHRING.

An entry of a large sum of money as lent, viz.: \$450, by a laborer to his employer, is not the proper subject of a book account, and in an action against the employer's administrator by the lender not on the item as an account, but for money lent, he can not offer such entry in evidence under Revised Statutes, section 5242, he himself being excluded from testifying by reason of the opposite party being administrator.

PETITION IN ERROR.

The plaintiff below, Ephraim Zehring, brought an action in the court of common pleas, of Pickaway county, against said Henry F. Page and James Ballard as administrators of Charles Shoemaker, deceased, alleging that the said Shoemaker "on the 20th of September, 1878, was indebted to the plaintiff in the sum of four hundred and fifty dollars (\$450) for so much money before that time, to-wit: on the 13th day of May, 1878, by the said plaintiff lent and advanced to the said Chas. Shoemaker at his request.

Shoemaker was a farmer and Zehring a laborer on his farm. On the trial, the plaintiff, Zehring, produced a book and proposed to testify that the book was his account book of original entries and offered in evidence the following entry in said book:

"May 13, 1878, to cash lent, \$450."

To this book and the entry therein and to all the testimony of the said Zehring, the said administrators objected on several grounds, but principally on the ground that the charge of \$450 was not the subject matter of a book account. The court of common pleas overruled the objection and allowed the said book account to be offered in evidence to the jury, who found a verdict in favor of the plaintiff. The defendants below took a bill of exceptions and filed a petition in error in the district court.

Page & Abernethy and B. H. Bostwick, attorneys for plaintiffs in error, cited the following cases:

Large sums of money are not the subject matter of a book account. *Henshaw v. Davis*, 5 Cush., 146; 1 Greenleaf on Evidence, section 117, 118; 1 Phillips on Evidence, pages 303, 305, 308, 309, 311, 313, 315 and 316, 1 Wharton on Evidence, section 681. *Cram v. Spear*. 8 O., 494; *Swan Treatise*, 327-8-9. And to the point that the admission of improper evidence is a ground for a new trial, *Cowan v. Kinney*, 33 O. S., 422, 427; *Wilson v. Barkalow*, 11 O. S., 470; *Taylor v. Boggs*, 20 O. S., 516; *Sherer v. Piper*, 26 O. S., 476; *Globe Ins. Co. v. Sherlock*, 25 O. S., 50; *McNutt v. Kaufman*, 26 O. S., 127.

The action in this case was not brought upon an account or book account, but for money lent, and no copy of an account was attached to the petition. The statute, section 5,242, is applicable only "where the claim or defense is founded on a book account."

P. G. Bostwick and A. T. Walling, attorneys for Zehring.

The district court reversed the judgment of the court of common pleas on the ground that the entry offered in evidence was not the proper subject of a book account.

CONSTITUTIONAL LAW—TAXES AND TAXATION.

325

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

F. H. KLEINSCHMIDT v. W. S. CAPPELLER, Auditor, et al.

1. The act of March 5, 1881, authorizing the auditor to value and put on the duplicate omitted property since the last decennial appraisal is constitutional.
2. The legislature is authorized to select any agency they may see proper for tax purposes.

COX, J.

This was a petition in error to reverse the judgment of the court of common pleas. In the court below a petition was filed by Kleinschmidt to enjoin the treasurer from collecting taxes for the years 1879 and 1880 upon a building which had been erected, as appears by an agreed statement of facts in the case, upon the premises of the plaintiff, in Storrs township, in 1879. The building was valued at \$150.

It is claimed upon the part of the plaintiff that the district assessor had assessed the value of the real estate; that the taxes had not been paid upon it, but he had not returned the value of the building to the auditor, so that no taxes had been paid upon the building in 1879 and 1880. It was further claimed that the assessor for the decennial period had assessed the value of the property at eight thousand and some odd dollars, and that the decennial board of equalization had not yet cut down the assessment; that the auditor had no right to place this property upon the duplicate, it not having been valued by the district assessor; and that the treasurer

had no right to collect the taxes. The balance of the taxes had been tendered, but the treasurer refused to receive them unless all of the taxes were paid.

Under the law, as it formerly stood, it has been held by the courts repeatedly that these valuations must be made by the assessor of the ward or district, and that the auditor had no right to fix the value upon the property omitted from the duplicate. But the legislature, on the 5th of last March, passed an act giving the auditor the right to place such property upon the duplicate.

There is no doubt, that this act gives to the auditor the right where the property has not been returned by the assessor in any previous year to fix a valuation upon it and put it upon the duplicate. It is claimed, however, that this act is retroactive, and is unconstitutional by reason of that fact.

The constitution provides that laws shall be passed taxing by uniform rule all moneys, credits, etc., and all real and personal property according to its true value in money; but all such laws shall be subject to alteration and repeal. Now, under this constitutional provision, the legislature has undoubtedly the right, and it is their duty to cause laws to be passed putting upon the duplicate all the property of the state, and they may do it by such agencies as they see proper to adopt, and they are not restricted to any particular agency, and, if they find the law which they pass incompetent to the duty assigned to it, they have the right to repeal or alter the law. Heretofore these omissions have been returned by the assessor of the district or ward, with the valuation fixed by him, subject to be changed by the board of equalization. The legislature has seen proper to change that now, by saying, if the property is omitted from the tax duplicate, or a proper valuation has not been put upon it, it may be placed there by the auditor, or he may make such change as is proper. He is substituted in this particular case for the assessor, and we see no reason to hold that this act is unconstitutional. The power to fix the agent or the authority to make the valuation is in the legislature, and they may adopt either an assessor or the auditor, and having adopted one or the other, either is within the purview of their power. It impairs no obligation or contract. It does not change the relation of the parties. It simply puts the property where the constitution contemplates that it shall be; creates an agency by which it may be assessed at its fair valuation in money. The relation of the parties is not changed, because it is a right which the state has to have it placed upon the duplicate, and the right which every citizen is bound to submit to; and, although it may have escaped in previous years, there is no reason why it should not be put upon the duplicate, and the taxes, which the party, under the constitution, is bound to pay, collected whenever it is discovered that the property has been omitted.

We are asked to decide how far back this law reaches. The law reaches back to the last decennial appraisement. Now, the last decennial appraisement was ten years ago. The present board of appraisers have not yet terminated their duties. They had a meeting in accordance with law last fall, but by another act of the legislature their term has been extended to next November to complete the business before them, so that they have not terminated their duties, and the time to which the auditor is limited in placing upon the duplicate omitted property extends back to the decennial appraisement of 1870.

We think, therefore, that the auditor had the right to place this pro-

perty upon the duplicate and to assess its value, and that the treasurer should collect the taxes.

Judgment of the court below affirmed..

Yeatman & Hornberger, for plaintiff.

Charles Evans, for defendants.

MORTGAGE—VENDOR'S LIEN.

326

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

MARY HARDINGER v. JOHN ZIEGLER et al.

1. When the only promise to pay is the ordinary defeasance clause in a mortgage which is neither acknowledged or recorded, the plaintiff is not entitled to a personal judgment for the amount.
2. A widow has no vendor's lien for the purchase money when the right sold is a claim for dower which has not been assigned.

COX, J.

This was an appeal from common pleas. The plaintiff brought her action in the court of common pleas to recover the value of a dower estate conveyed in 1864 to defendant Ziegler, and also to assert a vendor's lien upon the estate. Her husband died a short time after the conveyance by her to Ziegler, no dower having been assigned in the property, she taking back a mortgage which was never acknowledged or recorded.

The only promise to pay the amount was based upon the defeasance clause of the unrecorded and unacknowledged mortgage; it fixing the amount to be paid, and on the payment of which the mortgage should be void. There was no contract, therefore, which could be relied upon to base a personal judgment against the defendant. Nor was she entitled to recover under a vendor's lien; for, until her dower had been assigned, she had no estate to which a vendor's lien could attach. 5 O., 522; 3 O., 5; 16 O. S., 193, 200.

Judgment affirmed.

Cutter, for plaintiff in error.

Healy & Brannan, for defendant in error.

APPEALS—COUNTERCLAIM.

327

[Hamilton District Court, April, 1881].

Cox, Johnston and Longworth, JJ.

CHATFIELD & WOODS v. D. APPLETON & CO.

In a suit before a magistrate for a sum less than \$20, when a counter-claim for \$20 is filed and the case tried before a jury, and the magistrate rules out the counter-claim, simply because no evidence was offered to sustain it, the defendant is, nevertheless, entitled to an appeal.

COX, J.

This case involved a question of practice. Appleton & Co. sued the plaintiffs before a magistrate to recover \$12 for twenty-four copies of Picturesque America, and demanded a jury. Defendants (plaintiffs in error) filed a counter-claim which was not set forth in the transcript, it having been ruled out by the magistrate, because no evidence was offered

to sustain it. On a motion for diminution of the record, an amended transcript was filed containing the counter-claim. The court below dismissed the appeal on the ground that it was not a counter-claim in the case exceeding \$20.

The court held that the counter-claim was a proper one, and should have been allowed to be filed, and the magistrate had no right to rule it out simply because no evidence was offered to support it, and that the action of the court below was erroneous.

Judgment reversed.

MORTGAGE—DURESS.

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

†HELENA HERBST v. LOUIS MANSS et al.

A mortgage made by a wife of the amount of money embezzled by the husband from the mortgagee, his employer, is not accounted as made under duress, because a warrant for the husband's arrest had been taken out, and he was threatened with arrest and prosecution, where he was actually guilty, and the arrest would have been lawful.

PETITION in error to the Superior Court.

Plaintiff in error was plaintiff below. The action was brought to set aside a mortgage executed by the plaintiff and her husband to the firm of Louis Manss & Co., he being their book-keeper. The peculations aggregated from \$10,000 to \$12,000. The ground upon which it was sought to set aside the mortgage was that it was void by reason of duress in its execution. It appeared that when the firm discovered that the plaintiff's husband had been embezzling their funds, they caused an examination of his books to be made, and finding that he had taken \$6,000 they charged him with the embezzlement in the store. He admitted it, and agreed to execute the mortgage in question. He went with an attorney and a constable to his home, where his wife, to whom he had some years before deeded the property in question, through a trustee, was made acquainted with the facts. She said, among other things, that if there was a dollar of stolen money in the property she did not want it. Thereupon the mortgage was executed. Two days afterwards, when subsequent investigation had raised the amount of the embezzlement to \$7,000, she executed a second mortgage for \$1,000.

JOHNSTON, J.

Plaintiff claims that they threatened to arrest her husband and throw him into prison if the mortgage was not given, and not being in good health and overcome with fear, she executed the mortgage for \$6,000. She denied that her husband had been guilty of any embezzlement whatever. The defendants denied any threats or duress; that while a warrant was taken out he was not arrested; that he admitted the embezzlement, and some three days after the execution of the \$6,000 mortgage she executed an additional mortgage for \$1,000. the constable not being present. The court below dismissed her petition.

The record shows clearly that the husband of plaintiff was guilty of the charge and that his embezzlements reached in fact about \$12,000, and the question is, did plaintiff execute the mortgage under duress. It was not claimed that there was any duress in the second mortgage. While

†For opinion of superior court in this case see 7 Dec. R. — (s. c. 4 B. 1038.)

a warrant for his arrest was taken out, it does not appear that he was subjected to arrest. The husband, however, clearly being guilty, a threat to arrest him or even his arrest would not amount to duress. To constitute a duress such as would avoid a contract, it must appear that the arrest threatened or made was unlawful; that the party was innocent of any crime. A mere threat of consequential imprisonment, or a threat to prosecute for perjury or any other criminal offense does not constitute duress. The law upon this question was early laid down by our supreme court, in the case of *Moore v. Adams*, 8 O., 372.

"It is not accounted duress of imprisonment, but when either the imprisonment or the duress that is offered, in prison or at large, is tortious and unlawful; for *executio juris, non habet injuriam*." 2 Bac. Ab., 156.

The wife was no doubt stricken when the announcement was made to her that her husband had been embezzling from his employers. But she conversed intelligently with the attorney, and expressed a willingness to make reparation by giving a mortgage upon the family residence into which a part of the embezzled money had gone. She perhaps was in some respects an eccentric woman. She seemed strongly attached to her church, and at times during the negotiations fittingly quoted from the scriptures, lamenting the calamity that had overtaken them. Nor does it appear from the record that there was any agreement to abandon or not prosecute the husband criminally. We are of the opinion from a careful reading of the entire record which is very voluminous, that the wife (plaintiff in error) was not induced by threats or fear of imprisonment of the husband to execute the mortgage. It is altogether improbable if she had executed it under fear, that but a day or two thereafter she should have executed another to secure defendants against her husband's same embezzlement voluntarily, for she makes no complaint against that mortgage. Upon the whole case the judgment of the court below in our opinion was correct and will therefore be affirmed.

Tilden, Buchwalter & Campbell, for plaintiff in error.

McGuffey, Morrill & Strunk, for defendants in error.

RELIGIOUS SOCIETY—PLEADINGS.

337

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

FRANK LeSAINT v. LOUIS FISLER.

In an action upon a note given by pastor, expressing on its face that it was for a loan to the church, and its property was liable for the debt, asking sale of the property, averments that the legal title was in defendant as trustee, and that pastors are agents authorized to make loans, is not sufficient to sustain judgment by default, it not being admitted that a lien on the property had been created.

ERROR to the Superior Court of Cincinnati.

The defendant in error commenced his action in the superior court to recover a personal judgment against the trustees of the Roman Catholic St. George's Church upon two causes of action. The first cause of action was upon a written obligation of the St. George's Church, dated March, 1877, and acknowledging the receipt, as a loan from Louis Fislér, the sum of \$700, which was to be paid back one year after date, with 6 per cent. interest, for which payment the church property was liable, and signed by Rev. B. Holthouse, pastor. The second cause of

action was upon a similar obligation for \$442, dated May, 1878, and signed by Rev. Eberhard. The plaintiff alleged in his petition that the defendants were the trustees of the church, that at the time these obligations were issued to him the church was an unincorporated religious society; that the trustees had the management and control of the property and effects of the said society, and that the pastors acted for and on behalf of the trustees, and as their agents in receiving this money and in causing the obligations to be issued to Fisler. No prayer was made against the church property that it might be decreed liable for the money, but simply a personal judgment against the respective defendants. The defendants denied that either one of these clergymen was authorized on their behalf to borrow the money, much less to issue the obligations; that they were not acting as their agents, and denied any liability whatever, and further that they had ever had control or management of the property or effects of the society. They asked to be dismissed.

JOHNSTON, J.

This court had occasion some time since to pass upon a case against a church of this denomination, but it was a case where a personal judgment had been rendered against certain members of the church, in addition to a decree enforcing a lien for the money against the church property. The obligation was of the same character as those forming the basis of this action. We there held that a personal judgment could not be recovered for the reason that plaintiff was himself a member of the same church with defendants, and the church being an unincorporated body or association, and for that reason the personal judgment was reversed, and the decree for the sale of the church property allowed to stand. *German Catholic Church v. Kans.* In this case, however, the plaintiff below was not a member of the St. George's Church with defendant, thus differing from the case cited very materially.

The bill of exceptions discloses that at the time these obligations were issued by the priest of this branch of the church, plaintiffs in error were trustees, or committeemen, appointed by said priest to aid him in the management of the financial affairs of that church. It further appears that this church was unincorporated. In the case of *Devoss v. Gray et al.*, 22 O. S., 159, it was held that to bind the trustees of an unincorporated religious body personally liable for the building debt of the church, it must appear that they directly participated in contracting the debt or incurring the obligation or ratified it thereafter. The question arises upon this record, did plaintiffs in error take any part in obtaining this loan or was the priest acting as their agent in obtaining the money and issuing the obligations sued upon. We have examined the evidence carefully and are unable to find any evidence of that character against them. The simple fact that they were trustees at the time is not sufficient to fasten personal liability upon them. According to the evidence the priest was not their agent in the premises, but upon the contrary the record discloses that they were in fact his appointees, or agents, to aid him in the financial and property affairs of the church. There is no evidence of ratification, if in fact he was acting for them. In the case in 22 O. S., it was held, that the fact that one of the trustees sued, paid out money on the building contract to the contractors, did not amount to a ratification on his part of the contract, or acquiescence therein. For these reasons the judgment is reversed and cause remanded for a new trial.

Louis Kramer, for plaintiffs in error.

Gustav Tafel, for defendant in error.

McGowan v. McGowan Pump Co.

APPEALS—CORPORATIONS

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

T. J. McGOWAN v. McGOWAN PUMP CO.

One stockholder cannot appeal from a decree distributing the assets of a corporation, except so far as it distributes to himself, for the interests of all stockholders in such decree are not separable, and the whole must be taken up.

This action was originally brought for the purpose of settling the affairs of the McGowan Pump Company. An order of the court of common pleas, under which the debts were paid, was passed through the hands of a receiver. It was then found that the balance in the hands of the receiver who had been appointed to settle the affairs of the corporation. Each of the stockholders was represented by an attorney, to each of whom an allowance was made out of the balance of the funds being distributed to the various stockholders. The plaintiff, T. J. McGowan, a stockholder, objected to the distribution of this balance, except so far as it distributed money to himself. He took an appeal accordingly—and a motion is made by counsel to dismiss the appeal for the reason that an appeal can be taken from a part only of a decree.

JOHNSTON, J.

There was found in the hands of the receiver, after payment of debts, the sum of \$2,000. The court below, by a decree, distributed this fund to the various stockholders, decreeing also a counsel fee to be paid their separate attorneys. All the stockholders had an interest in this fund, a joint interest. The object of the decree was the disbursement of this fund. The effect of the decree was to open up for retrial the whole merits of the cause, or at least the whole interest involved in or connected with the final decree. The distribution of the fund to McGowan, from which no appeal was taken, must necessarily be considered in a retrial of the question as to how this fund should be distributed. *Constat*, that upon a retrial it might be found that some stockholders should receive a greater, and some a less sum than in the present decree. A part of the case is to remain in the common pleas unappealed. It is to be permitted to receive the portion decreed to him, and the questions involved upon appeal as to a portion of the fund for the other parties, may not be in the appellate court to answer the interest of McGowan in the fund is not separable. The interest of the various stockholders in this fund is inseparably connected with the distribution of the fund, and cannot be separated by an adjudication of all their rights therein. 1 O. S., 201. The appeal taken in this case did not go to the whole decree, and of it, the motion to dismiss must be granted.

J. R. Sav'ler, for motion.

Judge Hagans, contra.

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State of Ohio ex rel. v. Cappeller, Auditor.

338

CONTRACT—STATUTE OF FRAUDS.

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

GEORGE W. WOLFF et al. v. WM. W. WARRINGTON.

A verbal contract for services for a year is not void under the statute of frauds, simply because by consent of parties performance under it was not begun for a few days after the time, where the time of performance was not extended beyond a year.

COX, J.

The action was brought by defendant for services rendered as a clerk under a contract for services for six months, and for another subsequent six months commencing on or about the 15th of October. One of defenses was that the contract was not in writing, and was not to be performed within a year, and therefore void. Stress was laid on the fact that the plaintiff commenced on the 17th to perform a contract which he alleged was made on the 15th of October, and that that extended the time beyond a year, rendering the contract void.

The form of the petition "on or about" the 15th of October when the contract was made was sufficient. The time of commencing the performance of the contract was a matter between the parties, and whether delayed for three or four days or longer after the contract was made, did not bring the contract within the statute of frauds, unless the completion of it was extended beyond the year. The allegation was clear that it was a contract for one year from the 15th of October. It appeared in the evidence that the contract was made at a date different than that alleged in the petition, and the court properly permitted the plaintiff to amend his petition to conform to the date of the contract before judgment rendered.

A. M. Warner, for plaintiff.

Tilden, Buchwalter & Campbell, for defendant.

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TAXES AND TAXATION.

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

STATE OF OHIO ex rel. SMITH v. W. S. CAPPELLER, Auditor.

1. A house erected on leased lands, the rent of ground only being appropriated for support of free education, is subject to taxation.
2. Laws exempting property from taxation must be strictly construed.

COX, J.

This was an application for mandamus to compel the Auditor to certify to the Commissioners that a certain house of the relator is exempt from taxation. The relator claimed that she is the owner of a lot in this city upon which she pays an annual ground-rent, which ground-rent is paid for the support of public schools of the city of Cincinnati for the free education of children; that by statute it is exempt from taxation; that upon the premises she erected a house; that the lot was valued at \$690 and the house at \$220; that the lot was not assessed for taxation, but the house has been assessed and taxes paid upon it from 1875 down to the appraisal of 1879, and she asked to have this tax refunded, and that the auditor be required to certify to the county commissioners that the property is

exempt. It was not disputed that the lot is exempt because the rent derived from it is for the support of free education. But it was claimed upon the part of the relator that the exemption of the land carries with it the exemption of any building erected upon the land; that having a perpetual leasehold upon it, she has a right to use it as she sees proper.

The provisions of the statute exempting from taxation all estates the income of which is given for the purposes of free education must be strictly construed and apply only to such property the rents of which are applied to the purposes of education. It was not claimed that the rent of the building upon these premises was given for the purposes of education. It is used by the relator for her own private purposes. Very clearly the house was subject to taxation, and the petition was dismissed.

Hicks, for plaintiff.

Evans, County Solicitor, for defendant.

PETITION IN ERROR.

339

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

†W. H. EWELL v. AMERICAN LIFE INS. CO.

The act changing the time within which petitions in error must be filed, from three years to two years, applies to all judgments before as well as thereafter rendered.

COX, J.

This was a motion to dismiss a petition in error, for the reason that it was not filed within the time limited by statute.

The judgment was rendered in the superior court in June, 1878. The petition in error was filed January 27, 1881. At the time of the rendition of the judgment the period limited by the statute for filing a petition in error was three years from the date of the judgment. An act was passed changing that law, which took effect in 1880, limiting the action to two years from date of the judgment. If the petition in error had been filed before this latter statute took effect it would have been in time, but was filed more than two years after the latter statute took effect. In a case decided by the court a short time ago it was held that the statute took effect as to all judgments which had been rendered before that as well as afterwards; that the petition in error must be filed within two years from the rendition of the judgment. The court saw no reason to change their opinion, and granted the motion.

Judge Hagans, for plaintiff.

Boyce & Boyd, for defendant.

†This was overruled by supreme court in Lafferty v. Shinn, 38 O. S., 46.

FACTORS—DAMAGES.

[Hamilton District Court, April, 1881.]

Cox, Johnston and Longworth, JJ.

L. N. BURNARD & CO. v. VOSS & CO.

When goods are consigned to be sold on arrival the consignee is not liable for damages for non-sale when he uses all reasonable diligence to do so and is unable to effect a sale. The question of diligence is for the jury, and depends on all the circumstances of the case.

ERROR to the Court of Common Pleas.

COX, J.

The case in that court was brought against Voss & Co. for damages growing out of a neglect to sell a consignment of fifty-eight tierces of hams sent them at New Orleans by plaintiffs in this city. The order was to sell on arrival. They were not sold for from twelve to twenty-six days after arrival, and then at a loss of two and one-half to three cents a pound. The defense set up was that the hams could not be sold on arrival, because there was no market for them, but were sold as soon as they could be sold, and for the best prices obtainable. The court below charged the jury that a sale on arrival does not mean that the property consigned must be sold within one minute or five minutes after its arrival, but just as soon thereafter as it could be sold without a manifest sacrifice, and that the length of time depends upon the circumstances of the case, and it was for the jury to say what would be a reasonable time. The defendants would have no right to hold them for a speculation. They were to sell them as soon as they could find a purchaser who would give anything like a market value, and, if they did not use due diligence, they would be liable.

It was claimed upon the part of the plaintiffs, that the defendants were obliged to sell at any rate at whatever price could be realized, and whether they could sell or not. Some authorities were read which held that where there was an order to sell on arrival, if the consignee did not sell on arrival, he was liable to damage whether he could sell or not. The rule laid down by the court below in its charge to the jury was a reasonable one. It was true that the order was peremptory to sell upon arrival, and it might be as said by plaintiffs' counsel that they were willing to receive almost any price for their goods if they could be sold, but the court did not think that the plaintiffs themselves intended that the goods should be sacrificed by having them sold at an extremely low price, as would appear by correspondence between the parties long before this suit was commenced. The testimony showed that the defendants used all possible exertion in the case. The hams, however, were not canvassed. They were not sugar-cured, as represented, and they were not marketable on arrival.

Judgment affirmed.

Strickland, for plaintiff in error.

Conner, for defendant in error.

JUDICIAL SALE—TAXES.

340

[Hamilton Common Pleas Court, June. 1881.]

WALKER v. McGECHIN et al.

Where, after decree of sale in foreclosure, the land becomes delinquent for taxes, the court may discharge the taxes and penalty out of the proceeds of the sale, but the penalty on the purchase will not be distributed to the purchaser.

AVERY, J.

The action was for foreclosure of a mortgage. Judgment and order of sale was entered, October, 1879, and the property twice offered and returned not sold for want of bidders. Meanwhile the taxes became delinquent and at tax sale, in January 1881, one Ray became purchaser. Afterward, under order for sale issued herein, March 1881, the property was sold and proceeds are now for distribution, the only question being as to payment to Ray, who has come and in after sale set up his claim for the amount paid upon tax purchase, with penalty. Objection is made to the payment, upon the authority of *Ketcham v. Fitches*, 13 O. S., 201. But in that case the sale for delinquent taxes was before the decree; in the present case it was afterward. There, the taxes had been satisfied at the time jurisdiction to sell attached under the decree. Here, the taxes and penalties remained outstanding, until after inquisition and two offers of the property by the sheriff, when, upon delinquent sale, the amount was paid by the tax purchaser. The two cases are therefore distinguishable. In the construction of the statute for discharging out of the proceeds of a judicial sale, taxes and penalties against the law, one case might be excluded but not the other. Taxes and penalties against the land, at the time order of sale is issued and inquisition taken, may still be "taxes and penalties against the land," for the purposes of distribution, when sale comes finally to be made, although meanwhile the lien of the state is transferred to a tax purchaser. The difference is that in such case the purchase for taxes is not completed until after the order; and jurisdiction attaching, under the order, to sell, and in case of sale, to discharge the taxes out of the proceeds, the jurisdiction remains, notwithstanding the tax purchase. But the amount to be paid is the taxes and penalties, as such, without penalties to the purchaser. Order may be taken, accordingly, for that amount with interest.

Gray & Tischbein, for purchaser.

Orin Cady, contra.

LIFE INSURANCE.

341

[Hamilton Common Pleas Court, June. 1881.]

†ALFRED TULLIDGE v. NATIONAL LIFE INSURANCE CO.

An action will lie to discover whether a life insurance policy has been forfeited by non-payment of premium, and to reinstate the policy and compel the company to issue renewal receipts, on the ground that the assured has a right to rely on the company's custom to give notice of the time when premiums fall due, and the court may enforce the issuance of a renewal receipt.

AVERY, J.

Action to compel the issue of renewal receipts upon a policy of life insurance declared forfeited by the company for non-payment of premium. The claim is that

†This case was affirmed by the supreme court. See opinion, 39 O. S., 240.

plaintiff relied on the company's giving him notice, and sending the receipts for payment, as had been the custom. The only question now is whether there is jurisdiction to entertain the action.

Upon an agreement to insure, execution of the policy may be decreed in equity. *Taylor v. Merchants' Fire Ins. Co.*, 9 Howe, 390; *Neville v. Merchants' & Manufacturers' Ins. Co.*, 17 O., 192; 19 O., 452, 457. Jurisdiction is entertained on the ground of the inadequacy of the remedy at law. Damages for breach of the agreement, before loss, at least, would be only nominal; no more, indeed, than the value of the paper and the writing of the policy. *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch., 408, 411. The same reason would seem to extend to renewal receipts upon policies of life insurance. These have been adopted, in the business of life insurance, as the customary evidence of the continuance of the policy. The obligation to issue them may fairly be held included in the agreement for insurance, and just as, in execution of that agreement, delivery of a policy might be compelled, so might the receipts. In any such proceeding to have the policy declared in force, the question of forfeiture could be determined. *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y., 610; *Day v. Conn. Gen. Life Ins. Co.*, 45 Conn., 480; *Mansbach v. Metropolitan Life Ins. Co.*, 17 Hun., 340.

Demurrer overruled.

Sayler & Sayler, for plaintiff.

C. D. Robertson, for defendant.

377 COUNTY COMMISSIONERS—EMINENT DOMAIN.

[Hamilton District Court, May, 1881.]

Cox, Johnston and Longworth, JJ.

COMMISSIONERS OF HAMILTON COUNTY v. WARREN WILDER.

The provision in the law that county commissioners may condemn property for public improvements, where they are unable to agree with its property-owner as to its value, impliably confers authority on them to agree that in condemnation the jury may find a certain value as by consent, and further to agree that instead of paying damages for injury to the remainder of the land not taken, the land shall be perpetually protected from damage which would be caused by the improvement changing a water course.

LONGWORTH, J.

Wilder was plaintiff in the superior court. He alleged in his petition that in 1870 the county commissioners, under the act of April, 1879, proceeded to appropriate his property to straighten Mill Creek, near the foot of Gest street. That statute authorized the commissioners to appropriate such land as should be necessary to cut a new channel for Mill Creek through the land of plaintiff. The general act of 1852 provides, among other things, that when the county commissioners are unable to agree with the property-owners, certain proceedings in condemnation should be taken. The petition alleges that the county commissioners and Wilder did agree, and although proceedings were instituted to condemn the land in the probate court, yet by agreement of all parties no evidence was offered and the jury returned a verdict, by consent, of \$10,500 as the value of the land. It is further alleged that the county commissioners agreed, instead of paying the damage which the remainder of plaintiff's land suffered, to perpetually protect that land from damage from the waters of Mill Creek. The petition further alleges that the county commissioners failed to keep this agreement, and that Wilder was put to large expense in repairing damage done, and he asks judgment against the county commissioners for the damages he has sustained, and also for a mandatory injunction requiring them to perform their agreement. A demurrer to the petition was overruled.

The question was, first, as to the power of the county commissioners to enter into such a contract. They have no powers whatever except such as are given them by statute. It is contended that they had no authority to do anything more than appropriate this land. But we think that the general term properly decided that, inasmuch as the act of 1852, under which the condemnation was to be made, was expressly referred to, and inasmuch as that act made it essential to any condemnation at all that the parties should be unable to agree, that there was an implied authority on the part of the commissioners to make an agreement, and having made an agreement which was not extraordinary, but was proper under the circumstances, that agreement is binding.

After the demurrer was overruled, however, the defendants filed an answer denying that any such contract was ever made. The bill of exceptions shows that plaintiff below introduced in evidence an alleged copy of the agreement. The law is explicit as to the manner in which the county commissioners shall contract. The law says it shall be essential to the validity of every contract entered into by the commissioners, that the same shall have been assented to at a meeting of the board, and entered upon the minutes of the auditor; otherwise it is not binding upon the county. In the present case it appears that if such a contract was made it was never entered upon the journal. Therefore it was never a contract of any legal or binding force upon the county. It was also sought to invoke the principle of estoppel against the county, by showing admissions made by the commissioners since. The doctrine of estoppel can have no application to a public officer who acts beyond the powers given him. Otherwise the powers of a public officer would be practically unlimited. The court below should have arrested the case from the jury at the termination of the evidence for plaintiff.

Judgment reversed.

Asa Waters, for county.

H. C. Whitman, contra.

PARTNERS AND PARTNERSHIP.

378

[Hamilton District Court, May, 1881.]

Cox, Johnston and Longworth, JJ.

DAVID S. NYE v. JOHN W. RUTHERFORD et al.

An action to subject the interest of one partner in the partnership property, to the payment of a judgment against him, the other partners being non-residents, is a proper case for service by publication or by personal service out of the state.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

The plaintiff brought his action below, alleging that he had recovere a judgment against John W. Rutherford by the consideration of the court of common pleas of Wyandot county, for a sum of money exceeding \$2,000; that he caused execution to be issued, and the sheriff returned *nullum bonum*; that the Cincinnati and Portsmouth R. R. Co., which was made a party to this action, was indebted to John W. Rutherford in a sum of money far exceeding the amount of his judgment. He asked relief in equity that the indebtedness to Rutherford might be appropriated to the payment of the judgment of the plaintiff. Rutherford filed his answer

alleging that the money due from the railroad company was not due to him individually, but to the firm of John W. Rutherford & Co., consisting of himself, one Cochran and Brown; that the accounts of this partnership were unsettled; it was not ascertained what the share of each individual partner in the concern would amount to, and he prayed to be dismissed. To this answer a demurrer was filed. The demurrer was sustained, but the court gave leave to the plaintiff to make Cochran & Brown parties defendant to his action and to bring them in court within ninety days: otherwise the cause was to be dismissed. Thereupon plaintiff filed his amended petition, making Cochran & Brown parties, alleging that this was a partnership liability, and caused a copy of the petition to be served on Cochran & Brown outside of the state. Motion was made to dismiss the action for non-compliance with the order of the court, and the court, granted the motion to dismiss the action, and gave judgment for costs against the plaintiff. It is this judgment which is now sought to be reversed.

The court said that although it did not appear from the record, he presumed that the reason for dismissing the action was that Cochran & Brown were not properly brought into court as ordered. There was no difficulty in subjecting to the payment of his debts such property as the defendant was really possessed of, either in law or in equity. While the property of one partner could not be appropriated at law for payment of his debts, yet a court of equity could do it. This was a case in which service by publication could properly be made, and that being so, personal service of a copy of the summons and petition might be made out of the state. To hold that this was not a proper case for service by publication would lead to manifest absurdity and injustice. It would result in this: that, where two or more partners are residents of different states, their partnership could not be appropriated to the payment of the debt of either partner until they have chosen to wind up the partnership affairs and divide their funds, for, whichever partner was sued might plead the interest of the other in the fund, and that other could not be brought into court because service by publication was not to be had upon him.

LANDLORD AND TENANT.

[Hamilton District Court, May, 1881.]

Cox, Johnston and Longworth, JJ.

ALBERT RIVETT v. LOUIS A. BROWN.

Where defendants bought out the business of one holding under a five years' lease, at a monthly rent, and were to remain on the property if they paid the back rent of their predecessor, but no definite time was agreed upon, they are tenants from month to month, and the landlord is entitled to a month's notice of their intention to leave, required under the Illinois law, and if they leave in the middle of the month without giving such notice, he is entitled to rent for the following month.

LONGWORTH, J.

The suit came up on a petition in error to the court of common pleas. The petition alleged that Brown, in 1876, rented two stores in Chicago to the defendant below at a monthly rent of \$186, and that the rent for the month of January, 1877, was due and unpaid, for which he asked judg-

ment. The defendant alleged that the contract was verbal, made in Illinois, and that a contract in that state not in writing and not to be performed in one year is void. The plaintiff, in reply, claimed that possession of the premises under the lease having been given, it was taken out of the operation of the statute. The plaintiff also claimed that under the Illinois statute he was entitled to one month's notice of his tenant's intention to leave, and that Rivett having left in December, 1876, without giving that notice, he was entitled to recover of him the rent of January, 1877, which was the object of this suit. The real question of issue was whether Rivett was a tenant at will or from month to month.

It appeared that the property had been leased for the term of five years to one Jones, two years prior to July, 1876, at a monthly rental of \$186. Jones sold out his business to Rivett & Partridge. Brown, in July, 1876, found them in possession. Brown agreed with them if they would pay Jones' back rents and continue to pay the amount of rent received in Jones' case, they might remain there; and no definite time being agreed upon. This they did until December, 1876, when they left without notifying Brown of their intention to quit. An attempt had been made to secure a three years' lease, but it was never delivered.

Under this state of facts Judge Longworth held that the possession of Rivett & Partridge was under the contract which they had made when Brown found them in possession, to remain during their pleasure, paying rent from month to month. The landlord was therefore entitled to notice of their intention to leave. They having abandoned the premises without giving that notice, they were liable for the month of January, 1877, the month following the month in which they abandoned the premises. Judgment of the court below affirmed.

ERROR.

379

[Hamilton District Court, May, 1881.]

Cox, Johnston and Longworth, JJ.

LEO A. BRIGEL v. WESLEY M. CAMERON.

No petition in error lies to an order sustaining a demurrer to a petition, and holding that unless it is amended within ten days the action will be dismissed, until the action is dismissed.

LONGWORTH, J.

The suits were filed in the courts below to restrain the defendants from prosecuting claims against the estate of George Weber, the brewer. The demurrers were filed to the petitions, which were sustained, the court holding that unless within ten days amended petitions were filed, the suits should be dismissed. To this order petitions in error were filed.

Held, that the order of the court below was *in terrorem*, and until the action was dismissed there was no final order upon which a petition in error would lie. As mere obiter, however, he expressed the opinion that the demurrer ought to be sustained. Petitions dismissed at plaintiff's cost.

[Hamilton District Court, May, 1881.]

389

CITY BUILDING ASSOCIATION No. 2 v. ROBERT ZAHNER.

For opinion in this case, see 6 Dec. R., 1068: (s. c. 10 Am. Law Rec., 181.)

397 **Messinger et al. v. Wardens of Trinity Church et al.**

389 [Hamilton District Court, May, 1881.]

W. P. HULBERT v. JAMES S. WISE, Treasurer.

For opinion in this case, see 6 Dec. R., 1069; (s. c. 10 Am. Law Rec., 182.)

390 [Hamilton District Court, May, 1881.]

C. H. WOOLUMS v. E. SCHOTT.

For opinion in this case, see 6 Dec. R., 1070; (s. c. 10 Am. Law Rec., 183.)

390 **TRUSTS—EVIDENCE.**

[Hamilton District Court, May, 1881.]

†ELMA JANE ORR v. ALFRED ORR et al.

The clearest proof is required to prove a trust by parol evidence.

LONGWORTH, J.

Elijah Orr, the husband of the plaintiff, was owner of a lot of land, which he conveyed to his father, Alfred Orr. It is claimed by plaintiff that the property was conveyed to Alfred Orr with the understanding that he was to immediately convey the same to the plaintiff for her own use; that he acted simply as a trustee through whom the property was conveyed from husband to wife. This is denied by Alfred Orr, the father. He says his son insisted he should take this property in satisfaction of a debt which his son owed him, and he says he paid to his son the difference between the amount of the value of the property and of the debt. There was a considerable conflict of testimony. In 5 O. S., the supreme court has decided that although a trust of this nature might be proven by parol it required evidence of the strongest character. The evidence must be clear, satisfactory and conclusive. We think the plaintiff has not made out his case by that character of evidence.

Petition dismissed.

J. T. Crapsey, for plaintiff in error.

J. A. White, for defendant in error.

390 [Hamilton District Court, May, 1881.]

WILLIAM PULLAN v. COCHRAN & FEARING.

For opinion in this case, see 6 Dec. R., 1070; (s. c. 10 Am. Law Rec., 184.)

397 **RELIGIOUS SOCIETY—EQUITY.**

[Lucas Common Pleas Court, June, 1881.]

CHARLES R. MESSINGER et al v. WARDENS OF TRINITY CHURCH et al.

1. A court of equity has no jurisdiction to inquire into the validity of an election of corporate officers, or to try their title or eligibility, where the case is not between two sets of officers, each claiming, or where it is necessary for the protection of property, or to the granting of other equitable relief, for if the

†For decision of this case by the common pleas court, see 6 Dec. R., 968; (s. c. 9 Am. Law Rec., 304.)

officers were not such de jure they would be de facto officers, and if ousted by the court there would be no officers at all. In the absence of other grounds for equity jurisdiction, the only remedy is at law by proceedings in the nature of quo warranto.

2. A petition by members of a religious corporation against the wardens and vestry, asking equitable relief on the grounds: 1. That they have assumed to take and manage the property of the church, is bad, because non constat, but that they have the right so to do. 2. The charge that they have, in an arbitrary and unwarranted manner, interfered with the rector in the performance of his duties, is bad, for the words "arbitrary" and "unwarranted" are a mere conclusion of law, and leaving them out, the interference is not shown not to be legal. 3. The charge that they have endeavored to compel the rector to resign, whereas a large majority of the members desire his retention, is bad, for it is not shown but that they have the right so to do. 4. The charge that they prevent the practice of any ceremony or inculcation of any doctrine, except as they may dictate, is bad, or it is not shown that they dictate anything contrary to the canons and rubrics of the church.
3. Nor can an appeal to the civil court be had on the ground that the conduct of the church officers is resulting in dividing the church into factions, depreciating its property, reducing its revenues, and emptying its pews, unless it is shown that their acts are illegal. Whether the civil courts ever have jurisdiction merely because irreconcilable dissensions have grown up, they have none if no violation of trust or division of property is involved.

DOYLE, J.

The petition alleges that the church was incorporated February 28, 1842, under the name of the Wardens and Vestry of Trinity Church, and has continued as an organization since with officers chosen under the laws of the state of Ohio and the constitution and canons of the Protestant Episcopal Church of the Diocese of Ohio and the Protestant Episcopal Church of America, with which it is in canonical union.

The petition then proceeds to allege that the plaintiffs are members and contributors of the church, that property has been acquired devoted to education and worship according to the rites and ceremonies of the Episcopal Church. That an election was held on the 18th of April, 1881, for wardens and vestrymen, and it then proceeds to allege certain facts, by which it is claimed the election of defendants as wardens and vestrymen was illegal, that they have assumed to act and are acting as such, and are exercising the functions of such offices, and using the corporate name of the wardens and vestry of Trinity Church.

It then alleges certain acts of the defendants which are alleged to be unlawful, and which will be noticed hereafter, and prays that the defendants may be restrained from interfering with the management of the property and temporalities of the church; from interfering with the rector; from using the corporate name, and from exercising the powers and duties of wardens and vestrymen.

A preliminary injunction was allowed upon the filing of this petition, which expires with the decision now to be rendered, and the question is whether we shall continue it in force or whether a demurrer which has been filed to this petition should be sustained.

The petition may be divided into two parts. First, that relating to the election, and, second, that which it is claimed constitutes ground for relief against the defendants to restrain certain acts therein, which are said to be unlawful and in violation of the trust reposed in the officers or trustees of the corporation.

First, as to the legality of election. Upon this branch of the case the points of difference between the parties arise upon the following propositions:

1. Can a court of equity, in a case like the present one, enquire into the validity of the election by which the defendants claim to hold their offices, or try their title to the offices, and if the election be found to be illegal, or the defendants otherwise ineligible, enjoin them from exercising the duties or enjoying the franchises of the office, and thus effectually oust them therefrom?

2. If the court can thus enquire and adjudge, what should its answer be to this question: "Does it lie within the power of this church, under the laws of the state of Ohio, to elect wardens and vestrymen, unless at the meeting called for that purpose there is present a majority of members of the church entitled to vote, and hence is an election valid where it appears that but 90 votes were cast out of a membership of 240?" The answer to this question depends upon the construction of the statutes of Ohio on this subject.

3. Where the canons of the Episcopal Church, with which Trinity Church is in canonical union, provide that "in electing a vestry no person shall be entitled to vote unless at the time of voting they are adherents of the Protestant Episcopal Church, and be at least 21 years of age, and have for at least six months preceding rented a pew or a portion of a pew, or by subscription or otherwise have contributed regularly for the same space of time to the support of the parish; nor shall any person vote in a parish of which they are not bona fide members." And if there is no other provision of the canon expressly conferring the right to vote on these classes, is it in the power of Trinity Church, or is it in conflict with the above canon to pass the following rule:

"The right to vote at an election of Wardens and Vestry of Trinity Church shall be limited to persons, without regard to sex, who are adherents to the Protestant Episcopal Church, at least 21 years of age, bona fide members of the parish, and who have for at least six months prior to the election been pew-holders, and if non-communicants at a rental of not less than \$5 per annum."

There are other questions in the case incidentally connected with these, but whose importance would only be seen after determining these one way.

If the first matter in dispute should be decided in favor of the defendants, that is, if the answer should be a negative, it would render it wholly unnecessary to investigate either of the others.

Invoking here the very familiar rule that equity will not interfere at the suit of any one who has for the grievance complained of an adequate remedy at law, we are led to first inquire whether there is such remedy.

Section 6760 provides that a civil action may be brought in the name of the state. First, Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise within this State, or an office in a corporation created by the authority of this State.

The statute then proceeds to regulate the mode of proceeding, who may bring the action, the enforcement of the judgment of the court, the allowance of an injunction pending the proceedings, and section 6791 provides that nothing in this chapter contained is intended to restrain any court from enforcing the performance of trusts for charitable purposes, at the relation of the prosecuting attorney of the proper county, or from enforcing trusts, or restraining abuses in other corporations at the suit of a person injured.

The proceedings in quo warranto are intended to try the title of persons claiming the office. Neither the law nor anything we have seen in the government of this church, contemplates that there shall be no officers entrusted with the management of its affairs, and certainly it is not contemplated that the court through any of its officers or agencies, shall attempt to run or manage a church organization, except where and to the extent that it is necessary to enforce or preserve a trust. It may be remarked here that these plaintiffs, while alleging that the defendants are not legally elected, do allege that the defendants are in fact in office, exercising the control as officers, and wholly fail to allege or show that any other persons claim the offices or have any right whatever to them.

Hence a judgment of ouster in this case would leave the corporation without a legal control until a legal election could be held, unless, indeed, the allegation that there was not a legal election, or such a finding by the court would amount in law to establishing the right of the old officers to hold over, and in that case such old officers would have a clear right to remedy by quo warranto, or if entitled to equitable relief to sue for it in their own names.

I find the general rule of law to be stated in High on Injunctions, section 1235, and other text books, about as follows:

Courts of equity do not entertain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable only in courts of law, the appropriate remedy being by proceedings at law, in the nature of a quo warranto. Nor is the fact that relief is claimed upon the ground of fraud sufficient to warrant a departure from the rule, or to justify a court of equity, in such case in granting relief by injunction.

Indeed, the only ground upon which the jurisdiction of equity in regard to corporate elections can be properly based, is the protection of the property rights of the shareholders, and it is believed that the limit to the exercise of the jurisdiction is found in such measure of preventive relief, as will prevent injury to those property rights, without extending it to questions of title to corporate offices, the determination of which is to be sought in a legal rather than an equitable forum.

In *Hullman v. Honcomp et al.*, 5 O. S., 242, our supreme court, Bartley, J., decide that "the legality of the election of the complainants as trustees of the German Catholic St. Peter's Cemetery Association of Cincinnati, at the election held by the Association in February, 1850, and the right of the defendants to exercise the powers and conduct the affairs of the Association, cannot be judicially tested by bill in chancery, but such cause falls appropriately within the jurisdiction of proceedings at law by quo warranto.

And I find it asserted pretty uniformly that even pending the litigation at law to try the title to the office, equity will not practically oust the incumbents by an injunction restraining them from performing the duties. In such cases the court is governed by the principle that it is better that an officer *de facto* should discharge the duties of an office than that they should not be discharged at all. Equity contents itself in such cases with preventing any unlawful or improper acts on the part of the incumbent.

State v. Jarrett, 17 M., 309. 2 Abb. N. S. S., 289; 74 N. C. 103 cited. *Watts' Actions v. 3*, p. 772. High on Injunctions, section 1315.

Upon the other hand, and upon this principle, officers *de facto* and in possession are frequently entitled to protection in the performance of their

official duties, from forcible interference pending an action by parties claiming to be officers de jure to try the title, and such protection in no manner determines the question of title, but merely goes to the protection of the incumbents against the interference of claimants out of possession, whose title is not yet established. See High on Injunctions, section 1315.

This general rule being established, and, indeed, not seriously disputed, we are asked to examine what is claimed, upon the principle of certain authorities cited, some exceptions to this rule, within which exceptions it is claimed this case comes.

The case of the First Presbyterian Society of Gallipolis v. Smithers, 12 O. S., 248, is but another affirmation of the rule. The plaintiffs alleged they were trustees of the society, and as such were entitled to the possession of certain real estate which the defendants unlawfully kept out of their possession, and the action was under the code for the recovery of real property. The answers deny that the plaintiffs are such trustees, and this makes a clear issue between the parties, which the court say was triable, but in the trial of this issue the proof would have to be confined to the question as to who were and who were not de facto trustees, for it seems to be settled that the title of persons claiming to be, not de facto, but de jure members, or officers of a corporation, cannot be thus tried and determined in a collateral proceeding and this can be done only in a direct proceeding by information in the nature of a quo warranto.

The case of the First Presbyterian Society of Galipolis (in connection with the Hocking Presbytery) v. the First Presbyterian Society of Gallipolis (in connection with the Athens Presbytery) and William H. Langley, Executor, establishes this proposition: "Where a trust is created for the benefit of an incorporated religious society, and there are two bodies, each claiming to be such a society, a court of equity may require the claimants to interplead and may proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law."

In this case a person died leaving a will appointing Langley her executor and directing that \$2,000 be set apart as a permanent investment for the use of "The First Presbyterian Society of Gallipolis." At the date of the will there was but one society of that name, but about the time of the death of the testator the society had divided, and a "new school" and "old school" society existed under the same name; and the court without determining any question of the legality of any election, for no such question was raised, simply decide that the society which showed a continuous succession from the date of the will, was the society entitled to the fund as against the seceders who organized the new society.

None of the trustees of either society were parties of the action, and hence so far as their individual right to the office of trustees were concerned, they could in no wise be affected by the decree, but in fact there was no controversy of that kind.

The case most strongly relied upon by the plaintiff is Bartholomew v. Lutheran Congregation, 35 O. S., 567. Without attempting to recite the facts of that case, the proposition decided is contained in the third paragraph of the syllabi.

"Where persons assuming to be trustees of a religious corporation take possession of a church building, exclude the persons theretofore in possession, file a petition under section 557 of the code to quiet their title and obtain an injunction to prevent the persons so excluded from retaking possession, and on final hearing upon petition, cross-petition and evidence, it

is decided that the persons so excluded are legally the trustees, they may be restored to such possession and an injunction may be granted in their favor restraining the plaintiffs from interfering with them in the possession and control of this property." And the court in its opinion, says, that this is not in conflict with the case in the 5 O. S., already cited.

Two things are to be noticed in connection with this case. First, it was an action relating to real property, brought by parties alleged to be in possession, to quiet their title—an action expressly authorized by the code, and one of well established cognizance in a court of equity. Second, the contest was between two sets of trustees, each claiming to be the legal trustees of the corporation, not under the same election or any election held in pursuance of the same laws of the church, but it was conceded that the defendants were the lawful trustees, unless certain action of the synod was taken after the church had dissolved its connection with the synod in declaring the minister and the defendants in a position of schism and rebellion, and declaring their office vacant and ordering a new election should be held to be valid.

The case may be said to establish this doctrine, that the court having obtained jurisdiction of the parties and the subject matter in the action *qu a timet*, and having determined that the plaintiffs were not entitled to the relief demanded, because they claimed under proceedings that, as against the trustees of the corporation were wholly void, they might, to end litigation and to prevent the multiplicity of suits, grant the defendants full relief on their cross-petition. The case in 13 Wis., 348, is an action by trustees of the church against persons who, it is charged, have associated themselves under the same name to enjoin them from committing a threatened trespass upon the property of the church and apart from a statement of the judge as to what might be a necessary part of the judicial enquiry on the trial, has no bearing on this question, as the court merely holds that it was one of those peculiar cases where equity might interfere to prevent a trespass.

The case in 34 Wis., 332, is said by the judge deciding the case to be almost identical with the one last noticed, and is strictly ruled by that one. "It is insisted," says the court, as the complaint shows the defendants to be mere wrong doers that it is but the ordinary case of an application to restrain trespassers against whom there exists an adequate remedy at law, and so equity is without jurisdiction. And in this case as in the preceding one the action was by the Church Society, through its legally elected trustees, against outsiders, the fact that they were such being admitted in the first case by a demurrer. And in this case the objection is made, says the court, in the nature of a demurrer *ore tenus*, and the facts alleged in the petition are admitted to be true; that is, the action is the same as if Trinity Church through its legally elected trustees, brought an action to restrain a trespass upon its church property, by alleged outsiders.

The doctrine is asserted in the text books upon which these cases are decided to be, that an "injunction will be allowed in behalf of an incorporated church, to restrain persons professing to act as church officers, but without authority from withholding possession of the church property and temporalities which they have secretly and illegally usurped, and to restrain them from interfering with the property and records of the church, such acts being distinguishable from mere trespasses which may be remedied by an action at law. But in such cases the trustees of the church are the proper parties complainant to the suit for an injunction against

the pretended trustees, and the action need not be brought in the name of the state." High on Injunction, section 314. And the case in 13 Wal., 131, is also decided upon this ground and but affirms this principle.

Another class of cases to which my attention has been called, and notably the case in 23 N. J., Eq., 216, affirm what may be said to be a well established rule in equity, viz:

"A court of equity has no jurisdiction to remove an officer from an office of which he is in possession or to declare such office forfeited. But when, in a suit of which equity has jurisdiction, the question of the right to an office, or as to the regularity of an election arises, and must be decided to obtain the equitable relief, that court is competent to inquire into and decide these matters for the purpose of the suit."

But, as decided by Chancellor Jabriski, in that case, while the question of the legality of the election arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into and decide it, as it would any other question of law or fact that arises in the cause. Yet the decision is only for the purpose of that suit; it does not settle the right to the office or vacate it, if the party is in actual possession.

The jurisdiction of the court in that particular case rested upon three distinct grounds—to enforce a trust, to suppress fraud and to compel the performance of a contract—three objects peculiarly within the province of equity. And if the petition in this case gives this court jurisdiction upon any of the grounds claimed for it, the demurrer would have to be overruled, and if, having jurisdiction, the validity of the title to these offices of the defendant be incidentally involved, we could no doubt try and determine it.

Indeed the case of *Hullman v. Honcomp*, 5 O. S., 242, as well states the law as any other I have seen. In that case the court entertained bill because there were matters alleged, connected with the trust property, which gave it jurisdiction; but having determined that the plaintiffs were not upon final hearing, entitled to the equitable relief prayed for, independently of the question of the validity of the election, they refused to retain the bill for the purpose, but dismissed it altogether. And, so here, if the matters alleged, independently of the question of the title to the office, be sufficient, to give this court jurisdiction we will not retain the petition for the purpose of determining that question, but would dismiss it.

It is undoubtedly true as a branch of this jurisdiction that where property is conveyed to trustees for the use of a religious association upon the condition of its being forever used as a place of worship in accordance with the forms and doctrines of a particular church, such doctrinal points may be proper subjects of investigation by the court in determining whether such a perversion of the trust exists as to warrant an injunction.

But where such investigation is not necessary for the protection and enforcement of the trust, the court will not institute any inquiries into doctrinal or polemical questions.

Let us examine the petition then and see whether it contains facts, independent of this title to the office, which gives us jurisdiction; and, if so, whether this question is incidentally connected with it, so that we can investigate and determine that also.

The allegations of this petition which are independent of, and do not relate to the election of the defendants or the legality of their claim to the offices which they hold, are after reciting the incorporation of the church

and the accumulation by it of property for use in education and religious purposes, as follows:

1. That the defendants, since they have undertaken to act as wardens and vestrymen of the church, have taken into their custody all the property, real and personal and the temporalities of the church and assumed to manage and control them.

2. They have in an arbitrary and unwarranted manner interfered with the rector of the parish in the performance of his clerical duties.

3. They have endeavored to compel the rector to resign, who is desired to be retained in the rectorship by a large majority of the members of the church.

4. And to prevent the practice of any right or ceremony, or the inculcation of any doctrine except as the defendant might dictate.

These four constitute all the charges against the defendants after their election as wardens and vestrymen, and which charges, it is claimed, give a court of equity jurisdiction to restrain the defendants, and jurisdiction of the whole matter so that as auxiliary to the relief which these matters entitle plaintiffs to, the court may in this proceeding try the title of the defendants to, and finally oust them from their offices.

It is further alleged in the petition that by reason of this unlawful conduct of the defendants Trinity Church is divided into factions, the value of its property is depreciated, a division of the congregation is threatened, the revenues of the church have been diminished, a large number of the pews upon which the church depends for the payment of its current expenses remain unrented, whereby danger is imminent of the sale and sacrifice of the church property to pay outstanding debts, secured by a mortgage thereon, and irreparable injury is likely to be done to the plaintiffs and their interests in said church property.

These latter allegations are not of distinctive acts of the defendants, but of the damage which has resulted or is likely to result from the acts already charged, and independently of the question of the legality of the election, is all that there is to entitle the plaintiffs to relief from a court of equity.

We cannot take judicial notice of the canons or constitutions of the Episcopal Church, nor of the rules or by-laws of this church, except as they are set out in the petition, with sufficient definiteness to understand them. The only canon set forth in the petition relates solely to the qualification of voters, and is unimportant, except in connection with that subject.

Take the first charge made in the petition that the defendants have, as wardens and vestrymen, taken into their custody the church property. What is there any where in the petition, outside of the legality of the election, to show that they are not entitled to such control? I do not find anything. It seems to be admitted in argument that a legally elected board would be entitled to such control; and, as the petition alleges that the wardens and vestrymen are the trustees of the church, it would probably follow as matter of law that they would be the legal custodians of the church property.

Take the second charge, that the defendants have in an arbitrary and unwarranted manner interfered with the rector of the parish in the performance of his clerical duties. Leave out of view for the present the words "arbitrary and unwarranted" and what is there in the petition to show this court, affirmatively, that the wardens and vestry of this church

have not the right under the constitution or canons of the Episcopal Church of the Diocese, or under the rules or by-laws of this particular church organization, to interfere with the Rector in his clerical duties; or that he is not, in the performance of those duties, subject to the warden and vestry. I do not find anything alleged, and I can not know whether anything exists unless it is alleged.

The charge that they have in an arbitrary and unwarranted manner so interfered, adds nothing whatever, in my judgment to the charge. It is the conclusion of law of the plaintiffs; the facts, the specific acts, which are claimed to be arbitrary and unwarranted are not alleged. These plaintiffs might well deem those acts wholly arbitrary which, viewed by the court, in the light of law, would appear entirely legal and warranted.

So with the third charge, that they have endeavored to compel the rector to resign. For aught that appears they have the right to compel him to resign. There is no legal inference arising from the fact that a majority of the members of a corporate body desire to keep a particular person in its employment, that the trustees, legally elected, may not compel such employee to resign, or may not discharge him. If there is any law of the church on this subject it is not arrived here. The only other affirmative allegation, the fourth, alleges that the defendants seek to prevent the practice of any rite or ceremony, or the inculcation of any doctrine except as the defendants might dictate. If the wardens and vestry should attempt to dictate doctrines or rites or ceremonies which, according to the creed or belief of this church, were schismatic or heretical, complaint might well be made of such by those adhering to the faith of the church who were interested in this corporation because here might be involved a perversion of the trust property from the purposes of the trust. Whether here in the civil courts or to the church authorities in the first instance, it is not necessary now to determine, although, under the allegation of the petition, I think they might come here; but there is no such charge here. What rights, ceremonies or doctrines the defendants have dictated, we are not informed. For aught that appears, they may have been in strict accord with the canons and rubrics of the church, and the faith professed and taught by the church. If they do so accord, then no member of the church can complain. If they do not, before this court can advise or control, they must at least be distinctly averred and the variation be clearly made to appear.

Upon none of these charges can we get any aid from the law of the state creating the corporation.

The act incorporating the wardens and vestry of the church, passed February 28, 1842, (40 O. L., 62) provided that they should be entitled to all the rights, privileges and immunities granted by and shall be subject to all the restrictions of, the act of March 5, 1836, in relation to incorporated religious societies. And that act (Curwen Statutes, page 235) provides that such society, when incorporated, may elect such officers and make such rules as may be necessary and expedient for its own government and the management of its own affairs.

So that whatever power, control or jurisdiction the wardens and vestry have, depends upon the rules and regulations made for the government of the church, either by the church or by itself or by the church with which it may be in canonical union. None of these are here set forth,

except the one relating to the qualification of voters at the corporate elections.

Now, I take it that unless these acts of the officers of the church are shown to be illegal, and in violation of the trust reposed in the officers or *ultra vires*, so as to give a court of equity jurisdiction upon the general ground of the case of equity over all classes of trusts, the court can not interfere at the suit of a small number of the members, even though it appears that the result of such acts is to divide the church into factions, to depreciate the value of its property, to divide its congregation, to reduce its revenues or empty a portion of its pews, any more than, at the suit of **any member of any other corporation**, can it restrain the control and management of its trustees or directors, which are not shown to be illegal or *ultra vires*, for the manifest reason that every one of these misfortunes may follow from the legal acts of the trustees and from their refusal at the will of a minority, or even a majority, of the members to act in violation of their trust, or in an unlawful and unwarranted manner. Of course I will not be misunderstood here. I am expressing no opinion as to the legality or propriety of any of their acts. I have no opinion on the subject, but am unable, simply from the allegations in the petition, to which I alone can look, to say they are illegal or improper, so as to give me, sitting as a chancellor, the right to interfere with or restrain them. In the view I take of this case I agree, in the main, with the propositions of law argued by counsel for these plaintiffs, but am unable to see that the facts alleged bring the case at bar within those principles which he contends for. It is urged, however, that another ground of equitable jurisdiction over this class of property and trusts, is that where dissensions have grown up, which are irreconcilable, and which divide the congregation or membership, equity will interfere to preserve the property and temporalities of the church. Just what remedy equity will apply I am not quite able to discover from any thing which has been urged on argument. I know of no case which so holds, and of no principle which is as broad as that claimed, but if there were there is no allegation here to bring the case within it. It is said Trinity Church is divided into factions, but we are not told what are the factions, how extensive, upon what question they are at difference, whether of doctrine, church government, who shall hold the offices, or whether anything more exists than is very common in church organizations, a difference of opinion upon matters, as to which they have legal right to strive within themselves for the mastery, or which are properly cognizable in the ecclesiastical body of which the church is a member by whatever form of judicatory it may establish.

In this class of cases where the matter complained of involves no violation of trust, no division of trust property, the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws and supported by a preponderating weight of authority, is to leave questions of discipline, or of faith, or ecclesiastical rule, custom or law to the properly constituted church judicatories, whether of the individual church where it is an independent organization, or of the general organization with which it is in connection in the matter of ecclesiastical government, and that the legal tribunals should accept such decisions, when made as binding upon them. 13 Wal., 679. 1 Speers Eq., 87, 45 Mo., 183, High on Injunction, section 310.

I am firm in the conviction that it would be a calamity to this, or any other, church to have the precedent established for it, that an appeal to the civil courts could be made whenever differences should arise between its members, and that we ought not to establish such precedent, unless the law clearly demands it of us. We think it does not.

It seems to me, therefore, that we have no power to grant the relief demanded here. That the only real question involved in this petition is the validity of this election. That question I can not examine. It was very ably argued, and is a very interesting one. I do not express any opinion upon it, but in accordance with the views already expressed I must sustain the demurrer.

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TURNPIKES—ASSESSMENTS.

[Hamilton District Court, May, 1881.]

Cox, Johnston and Longworth, JJ.

†THOMAS BOWLER et al. v. BIDDINGER FREE TURNPIKE CO., et al.

Where a statute (93 O. L., 96, sec. 8.) provides that special taxes for the construction of a free turnpike road shall be levied on lands on each side of the road, except that when there is another road on either side, within two miles, only property half the distance to such road shall be taxed. If on a demurrer in an action to enjoin such tax it appears that there is a road less than two miles distant, so that the property on one side of the free turnpike shall be liable to assessment to the full distance of a mile, and on the other side only to half the distance to such other road, the levy of the tax is unconstitutional, because the uniform operation of the law is broken.

JOHNSTON, J.

This action was instituted for the purpose of obtaining an injunction against defendants, restraining them from levying and collecting extra taxes assessed upon the lands of these plaintiffs, for the construction of the Biddinger Free Turnpike. The plaintiffs allege that the preliminary steps were not properly taken; that the requisite majority of property-holders' names were not signed to the application, and, further, although their lands lie within one mile of said road, yet, that within two miles of the turnpike there is an unimproved county-road not connected. They further allege that the turnpike is of no benefit to them nor to their lands. The defendants allege that all the proceedings for the construction of this road were regular; that the lands of the plaintiffs, which are assessed, lie within one mile thereof, and are within half the distance of any unimproved county-road, and are liable to said extra tax levied upon their land. To this answer a demurrer was interposed by plaintiffs, and the court below found the demurrer well taken, and the defendants not desiring to amend a judgment that they be perpetually enjoined from collecting said tax was entered, from which they appealed to this court.

This case is submitted here on the same pleadings, on the demurrer to the answer of the defendants.

It is argued by counsel for plaintiffs, that the act under which the turnpike was constructed is unconstitutional in that a tax is imposed upon their property, when no benefit is conferred. That the act should have been so framed, as to provide for taxing only such land as might be bene-

†A decision contrary to the above on some of the points was rendered by the supreme court in *Bowles v. State*, 37 O. S., 35.

fited by the road, whereas it provided for taxing all land to the distance of one mile on either side of said pike without regard to benefits. This view seems to have been entertained of the act by the court below. The case is not here for review upon petition in error and it is unnecessary for this court to say whether the court below took a proper view of the act under which this turnpike was constructed or not. Another view may be taken quite satisfactory to this court, that properly arises under the demurrer touching the constitutionality of the act. It is a well settled rule of practice that a demurrer, no matter by whom filed, searches the entire record and that leads us to an examination of the petition as well as the answer. It is averred in the petition among other things "that there runs parallel with this free turnpike, a county-road unimproved, called the "Biddinger road," that it is unconnected with this free turnpike, and within two miles of it. In the answer there is a substantial admission of this averment of the petition, for the defendants among other things aver "that the lands of the plaintiffs are within one-half of the distance of any unimproved county-road and within one mile of said free turnpike road." Now the section of the act under which this extra tax was levied, reads as follows, 73 O. L., 96, section 8): "Extra taxes, when levied as hereinbefore provided, shall be on all real and personal property within one mile on each side of the free turnpike road, except * * * where any of such roads, or any toll road, or *unimproved state or county road*, being unconnected with the same, (free turnpike) shall lie, be or run on upon either side of such proposed road within less than two miles, then the taxes shall only be levied upon such lands and personal property, as lie one-half the distance of such roads."

Thus it will be observed that if no unimproved, unconnected county-road run or be within two miles of the free turnpike built, or proposed to be built, then all lands and personal property to the distance of one mile upon either side thereof shall be taxed to pay for the same. If, however, such unimproved, unconnected county-road does exist within two miles then there is a discrimination in favor of all property lying beyond one-half the distance of such county-road, and yet within one mile of the free turnpike, that is to say that only such real and personal property situate and being within half the distance between such county and free turnpike is subject to the extra tax. Thus property upon one side of the turnpike may be liable to the tax for a distance back of only a few hundred feet, while at other points where no such county-road exists, it is liable to the full distance of one mile, the uniform operation of the law and of the extra tax thus being broken.

The supreme court has recently passed upon this same act in the case of *Bowles v. State*, 37 O. S., 35. *Bowles*, as is well known, was convicted in this county of forging bonds directed to be issued to pay for this same free turnpike road. What the record in that showed further than appears in the decision we do not know whether if there was any evidence showing that there was an unimproved unconnected county-road within two miles of this free turnpike road at any point thereon, the report of that case does not show. It would seem that the unconstitutionality of the act was claimed, for the reason that this free turnpike was crossed by another free turnpike, and that therefore, only such land within a mile of such crossing benefited by the proposed turnpike road should be taxed, or rather should be taxed only in proportion to the benefit derived therefrom. This discrimination it was claimed, rendered the act unconstitutional.

The court after deciding that the legislature in the exercise of the general taxing power as distinguished from the power of local assessment, may create a special taxing district without regard to municipal or political sub-divisions of the state, for defraying the expenses of constructing and maintaining public roads then proceed to say inferentially that if the record did show the existence of such other free turnpike, and that it crossed the turnpike in question, the act and its operation would be in that respect unconstitutional. We quote from the opinion: "All property within the taxing district must be taxed by a uniform rule, according to its true value in money." Under the statute it is plain, that property within the taxing district and within a mile of the crossing of another free turnpike road, is not taxable by the same rule that applies to other property within the district. * * * Under the statute now being considered, the record does not show whether or not the taxes levied for the construction of the Biddinger road improvement would be uniform upon all the real and personal property within the taxing district, viz: within one mile on each side of the Biddinger road. Clearly if the Biddinger road improvement did not cross any other free turnpike road, the rule of uniformity required by the constitution is not violated. We do not know, and cannot assume that there is such a crossing." And the court then proceed to say that an act will not be declared absolutely void, if under certain circumstances which may or may not exist, the operation of the statute would not violate the principle of uniformity required by the constitution. Cooley's Constitutional Limitations, section 178.

Now, if for the reason suggested, this act would have been unconstitutional, unquestionably had the record shown the existence of such a county road as is admitted by the answer in this case, for that reason must it also have been declared unconstitutional, the uniformity required by section 2, of article 12, of the constitution being disregarded in both cases. The record in the Bowles case *supra*, not showing that another turnpike crossed the one in question, the court had the right to and did presume that the Commissioners had proceeded according to law; that the extra tax was properly levied for a distance of one mile upon either side, *upon all real and personal property* and that another free turnpike did not cross the road in question; thus the act having a constitutional operation—no discrimination being made in favor of any property within the mile upon either side.

It appearing therefore upon a fair reading of the petition and answer in this case that an unimproved and unconnected county-road lies within two miles of this free turnpike road, all property, real and personal, is not liable to be and we presume has not been taxed according to a uniform rule within the taxing district, and for that reason the operation of the statute is in contravention of the uniform rule provided by section 2, of article 12, of the constitution, and so far as this case is concerned, void. The demurrer is sustained and unless defendants desire leave to amend, denying that such a county-road does in fact exist, a decree will be entered perpetually enjoining the collection of the extra tax against the plaintiff.

Von Seggern, Phares & Dewald, for plaintiff.

I. J. Miller, and County Solicitor, for defendants.

COURTS—MORTGAGE.

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[Superior Court of Cincinnati, General Term, July, 1881.]

†SARAH K. MILLER v. W. P. HULBERT et al.

1. Where the district court reverses the finding of the superior court in special term, this court in general term will regard the controversy as no longer open.
2. The action being to enforce payment of rent under a lease, and the district court having decided the transaction to be a mortgage, the plaintiff being a devisee of real estate, has no right of action, but the claim must be enforced by the executors.

HARMON, J.

The plaintiff, as devisee of the late Griffin Taylor, claims to be the owner of a lot on Main and Court streets, upon which the defendants, as representatives of J. W. Coleman, deceased, had a perpetual lease. The plaintiff seeks to enforce the payment of rent, under the covenants of a lease. The property was deeded to Griffin Taylor by J. W. Coleman in 1841, and this perpetual lease was given back. The defendants, by answer, say that the transaction was in fact a mortgage by Coleman to Taylor, which making the proper credits for usurious interest in the shape of rents, had been paid off, and ask a reconveyance of the property. The court, at the special term, found that it was not a mortgage, but a conditional sale, and gave a decree for the plaintiff, (*ante* 44), which the district court reversed, (*ante* 179), finding the transaction to be a mortgage. The case was remanded, and now comes before the general term on reservation on the mandate, the pleadings and the same evidence.

A majority of the court were of opinion that the question whether the transaction was a mortgage or a conditional sale is no longer open to enquiry; not because the decision of the district court is binding, in the ordinary sense, on the general term of this court, but because it is a decision of this question in this very case by a court of co-ordinate jurisdiction, and the case is reserved to general term in the shape it stood at special term, after it was remanded from the district court. The question should, then, be considered settled, subject only to review by the supreme court. The transaction being a mortgage, the plaintiff has no right of action, being only a devisee of real estate, and though, by an amended answer and cross-petition, the defendants have made the representatives of Griffin Taylor parties, and they have answered they ask no foreclosure, but simply deny and ask to be dismissed with their costs; nor do the defendants, the representatives of Coleman, ask any affirmative relief against the executors. They present neither allegation, prayer nor proof to make out a case entitling them to redeem the property from the lien of the mortgage. They do not aver the executors of Taylor have refused to receive the balance due. They do not make any tender of balance due or ask the court to what is due, considering it as a mortgage offering to pay into court the amount when found. They simply say they have paid the whole debt, and ask a reconveyance of the property.

The court is unable to find by any mode of figuring that the debt has been paid. Payments of rents which, according to the district court, are for interest made prior to 1848, cannot be credited on the principal, because there was no law in 1848 authorizing that to be done, and certainly the payments made since have not been sufficient to pay off the payments

†A motion to file a petition in error in this case was refused by the supreme court, May 9, 1882.

remaining due. The only conclusion the court could reach, therefore, was that both the petition and cross-petition must be dismissed, leaving the executors of Taylor to enforce this mortgage, if they are content to rest on the decision of the district court that it be a mortgage, or leaving the representatives of Coleman, by proper tender, to lay the ground for an action to compel a redemption or to an action of account.

Judge Foraker dissented from the opinion of the majority, in holding that the court should not go behind the decision of the district court that this was a mortgage. The judge was of opinion that the whole case was before this court, and they were bound to decide the question for themselves, the decision of the district court being simply that of a court of equal authority, and as such entitled to proper respect and consideration. He adhered to the view he had announced at special term, (*ante* 44,) after careful consideration, that the transaction was a contract of sale, and not a mortgage.

M. B. Hagans and W. M. Ramsey for the plaintiff.

General Durbin Ward, for defendant.

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RELEASE OF DOWER.

[Hamilton District Court, June, 1881.]

Cox, Johnston and Longworth, JJ.

†J. J. WAGNER, Executor, et al. v. SARAH A. COX.

Where, in consideration of a mother releasing dower in property sold by heirs, her children, each child agrees to pay her \$800, and gives a note for that amount, with a provision in it that if he pay her \$20 every January and July of her life, it shall discharge the note, and an heir pays until nearly half the amount is paid and then becomes in default, the widow is entitled to recover the full amount of the note. The amount is the value of the dower interest, and the failure to pay did not result in a penalty, but was a failure to exercise an option.

ERROR to the Court of Common Pleas.

LONGWORTH, J.

In 1866 Jacob Cox died intestate, owning 100 acres of land on Montgomery pike about eight miles from the city. He left a widow and eight children. These children partitioned the land between them, the widow releasing her dower, and each of the children agreeing to pay her the sum of \$800 in consideration of the release of the dower. Notes for this amount secured by mortgage on the property were given by each of the children. This suit is brought on one of these notes. The note reads as follows:

"For value received I promise to pay to Sarah Cox \$800, provided that if I pay on the first day of January and the first day of July of each year \$20 during the life of Sarah Cox, it shall discharge this note and mortgage."

These semi-annual payments were made until they amounted to \$393. Then there was a default. Suit was then brought, and the defendant then tendered the amount in default in court.

The only question in the case is, whether under a proper construction of this instrument, the \$800 is to be regarded as a penalty or not. If it is a penalty, it is void. The evidence is clear and uncontradicted that the agreement between the parties was to pay \$800 as the fair value of this dower interest. They gave, it is true, an option to pay a sum semi-annually during life, which would release them from payment of the whole debt. Their failure to pay it did not result in a penalty; but it was simply a failure to exercise an option, which had been given. Judgment in favor of mother affirmed.

†This case was affirmed by the supreme court. See opinion, 40 O. S., 539.

BUILDING ASSOCIATIONS—USURY.

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[Superior Court of Cincinnati, General Term, July, 1881.]

JUNGKUNTZ v. WEST LIBERTY BUILDING ASS'N No. 1.

1. An agreement that retiring members of a building association may take out the money they had paid in, and interest thereon at a rate above eight per cent., is not usurious.
2. Where a retiring member is entitled to receive back the money paid in, and to secure him against insolvency, he takes part in cash, and part in a note paying at the winding up of the association, his taking the cash and note is not an accord and satisfaction.
3. The association cannot withhold part of the money as retiring member is entitled to receive, until its winding up, for apprehension of ultimate insolvency, to relieve which the member would be obliged to contribute. It is a liability only to be enforced in an action directly between creditors and the stock holder, and a counterclaim will not lie in favor of the association.

FORCE, J.

This suit was brought by a retiring member of the building association to recover money he had paid in. One article of the constitution provided that non-borrowing members could withdraw at any time, taking out the money they had paid in, and, in addition, interest at the rate of 6, 7, 8, or 9 per cent., according to the time they had remained in. The plaintiff had become a member and gave notice that he intended to withdraw, at that time being entitled to 8 per cent., on the money he had taken out. Some apprehension arose as to the ultimate solvency of the association, so that before he actually received the money the association passed a resolution declaring that withdrawing members should be paid only 6 per cent., in any case on the amount they paid in—75 per cent. down, and a note for the remaining 25 per cent., which note was not to be paid until the winding up of the association. The plaintiff was tendered 75 per cent. in cash and a note for the balance, and so much of the note was only to be paid as could be distributed to the member in a due proportion after paying all creditors. He took the cash and the note, and now sues for the balance claimed to be due, according to the provisions of the constitution at that time.

It was claimed on behalf of the association, first, that the allowance of more than six per cent. would be usury; second, that the parties had come to an agreement and had finally settled the matter; third, that if it was not settled by agreement of parties, yet, as the plaintiff was a member of the corporation, which was in debt, he is subject to contribution, under his liability as a stockholder.

Judge Force remarked, in disposing of the case, that this is not a case where usury can be pleaded. The money paid in by members of the association is not a loan to be returned, at all events. If the association is prosperous, it may be returned; if the adventure is disastrous, it may be lost. If the association prospers, the money may be returned with an addition. A member going into a building association takes all these chances. The money advanced is put at risk. The increase, if any, which he receives, is not interest. It is profit on the adventures, and where a member withdraws, in anticipation of the winding up, and receives an addition, such as this plaintiff received, it is not interest on money loaned. It is an adjusted profit of money put into the enterprise, and, hence, whether it be one per cent. or ten per cent. it is not interest, and can not be usury. As to the next defense, accord and satisfaction,

the evidence does not show that the plaintiff assented to the settlement proposed by the defendant, but shows the contrary. As to the third defense, in which it is claimed the association can set up a counter-claim against the plaintiff on his liability as a stockholder, the court held that where a stockholder of a corporation is held liable to the amount of his stock, it is a liability not to the parties to the suit who were not held to be corporation but to the creditors, and one which must be enforced directly by the creditor against the member, and although formerly corporations were correct practice. Hence, it is a matter directly between the creditors and stockholders.

Judgment for plaintiff.

S. T. Crawford and John Benzinger, for plaintiff.

John S. Conner, for defense.

PARTITION.

[Hamilton Common Pleas Court, July, 1881.]

ROBERT LANG, Guardian, etc., v. LEROY S. BARNARD et al.

The provision that a guardian may do any act in reference to the partition of an estate that the ward could do if of age (Rev. Stat., sections 5756, 5772,) authorizes the guardian to bring the action. A contrary legislative intent cannot be inferred from the fact that the express authority to bring such action was contained in the act of 1820, and was omitted in the act of 1831; like the act now in force, the act of 1820 not being limited to guardians of minors, and as partition effects possession, and not title, such inference would be unreasonable.

EVERY, J.

Petition by the guardian of a minor for partition. Demurrer on ground that the action is not maintainable by a guardian.

Held:—The statute provides that any person entitled to partition may file his petition therefor, and that the guardian of a minor idiot or insane person may, on behalf of his ward, do or perform any act, matter or thing, respecting the partition of an estate which such minor or insane person could do under the provisions of the statute if he were of age and of sound mind. Sections 5756, 5772, Revised Statutes.

Certainly, if of age, the minor could file this partition, and therefore taking the words of the statute, the guardian may now do so.

But it is said the act of 1820 which also declared that the guardian of a minor might, on behalf of his ward, do any act or thing respecting the partition, contained in addition an express provision for bringing the action by the guardian; and that the act of 1831, like the statute now in force, omitted this provision. The provision of the act of 1820 was not, however, limited to the guardianship of minors. The words were, "Any person being joint tenant, tenant in common, or co-parcener, and the executor, administrator, guardian, or agent of such person may file a petition." Although this was omitted in the act of 1831, that act still contained the provision for the doing of any matter or thing by the guardian respecting the partition. The inference then of legislative intention to exclude demand of partition by the guardian is not at all plain. Considering that a partition proceeding does not affect title, but only possession, and that the duty of a guardian to manage the estate for the best interest

of the ward may often require that he should hold it in severality, any such inference would be against reason.

Demurrer overruled.

Wulsin & Worthington, for defendants.

C. K. Browne, for plaintiff.

HOMESTEAD.

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[Hamilton Common Pleas Court, July, 1881.]

CHARLES EVANS, Admr., v. JOSEPHINE STAGGAMAN et al.

On decree for sale by the probate court on administrator's petition to pay debts, there being no liens to preclude the allowance of a homestead, the omission of the widow to ask assignment of a homestead by metes and bounds, Revised Statutes, section 5437, before sale, does not give the entire proceeds to creditors, but the court may grant an allowance out of the proceeds. If it is erroneous to suppose that \$500 is intended by the statute to be given in lieu of homestead, yet such error is not to the prejudice of any creditor unless it amounted to more than, estimating the probabilities from the ages of the minor unmarried children, the annual commutation would amount to.

ERROR to the Probate Court.

AVERY, J.

In that court, upon petition of administrator to pay debts, there being no liens to preclude the allowance of a homestead, the homestead of the deceased, upon which his widow and four unmarried minor children continued to reside after his death, was sold for some \$5,000, and \$500 in lieu of a homestead allowed to the widow out of the proceeds.

Held:—That in this there was no error to the prejudice of the administrator and creditors. It would have been the duty of the appraisers, upon application, before the sale, to set off by metes and bounds a homestead of \$1,000 for so long as any unmarried minor child continued to reside thereon. Section 5437, Taylor v. Thorn, 29 O. S., 569, Revised Statutes. But not having done this, by reason that no application was made, it did not follow, therefore, that the entire proceeds were to go to the creditors. The court still had control of the fund. Creditors, it has been held, are paid out of the proceeds of land according as their rights relate to the land; when land is converted into money, rights are the same as before the conversion. Jackson v. Reid, 32 O. S., 443, 446. As a homestead of \$1,000, or if the premises were incapable of division, \$100, annually, might have been set off against the creditors for as long as any unmarried minor child resided on the property, it would have been no prejudice to them to take the estimated value thereof out of the proceeds. It was in the discretion of the court, in the absence of any circumstances of estoppel, to relieve against the default of the widow. There may have been error in assuming that the statute gave her \$500 in lieu of a homestead, but it was not to the prejudice of the plaintiff in error, unless more than, according to the probabilities derived from the ages of the children, was to be estimated as the value of the homestead. Considering that one of them was not more than ten, and that there were four in all, between nineteen and ten, \$500 would appear to be rather beneath than beyond the value of a homestead of \$1,000 or \$100 annually for so long as any might continue a minor unmarried.

Affirmed

Forrest & Mayer and Wilby & Wald, for plaintiff in error.

D. Thew Wright, for defendant in error.

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Hof v. Bank.

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GAMBLING.

[Hamilton Common Pleas Court, July, 1881.]

LENA BOBB v. J. J. HETSCH et al.

1. Owners of separate buildings in which separate sums were lost at gambling cannot be joined as defendants.
2. The liability of the owners of the property wherein gambling is carried on, to one who has lost money therein is created only after judgment obtained.

AVERY, J.

Petition to recover money lost at lottery playing. The defendants were ten in number. Against the first five, the plaintiff alleged they were indebted to her in \$2,000 paid and lost to them in purchasing lottery tickets, and playing the game called "policy." Against the other five she alleged they were owners of the buildings wherein the money was lost, and that they permitted the same to be used and occupied for the purpose, whereby such property became liable. The owners severally demurred for misjoinder, and for that the petition stated no cause against them.

Held:—That, while it did not appear but that the first five were jointly engaged, the other five were charged each with owning a separate piece of property. If a cause of action against them was stated by the petition it could only be against each for the money lost in the building owned by him. To join other owners, was misjoinder.

As to the cause of action, the statute is that the owner of a building, who knowingly permits it to be used and occupied for gaming or a lottery, and does not immediately, in good faith prosecute an action for recovery of the possession thereof, shall be considered a principal in the business, section 4276, Revised Statutes. But the exact meaning of this need not be determined for it is not the cause of action stated. Against the first five the cause of action is that they are indebted; against the other five that their property is liable. These causes are stated separately, the one alleging a debt, the other a liability of the property. Whether the owners might be joined as principals, is a question not raised upon a petition not joining them as principals. As to liability of their property, while the statute creates such liability, it is only after judgment obtained, section 4275, Revised Statutes, *Binder v. Finkbonk*, 25 O. S., 103.

Hildebrandt for plaintiff.

Wilby & Wald, M. F. Wilson & J. Meyers, for defendant.

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CORPORATIONS.

[Hamilton District Court, June, 1881.]

Cox, Johnston and Longworth, JJ.

ADOLPH HOF v. WESTERN GERMAN BANK.

The owner of stock in a corporation from whom the certificate has been stolen undorsed, is entitled on proof of loss and offer of indemnity to the issuance of a new certificate for which mandamus will lie.

COX, J.

The plaintiff says that he and his brothers were the owners of two shares of stock in the Western German Bank, and that upon a dissolution of partnership between himself and brother he became the owner; that

his safe was broken open by burglars and robbed; that he made application to defendant to issue new shares of stock, he giving bond to indemnify them against loss, but they refused to do so. In answer they set up that the stock was owned by the brother, and that he made an assignment for the benefit of creditors, and they were not advised whether that assignment was finally closed. They deny the larceny of the stock. The testimony shows the ownership of the stock; the preponderance of testimony is that it was never indorsed. The testimony of the president of the bank is that the plaintiff made a request for a duplicate certificate; that he expressed himself satisfied with the bond, but insisted that he should call at the bank before the duplicate certificate was issued.

The court found that the plaintiff was entitled, upon proof of loss of the stock and upon giving a bond to indemnify the bank against loss by the original stock turning up in the hands of an innocent holder, to a peremptory writ of mandamus, and granted the same.

Hildebrandt, for relator.

Forrest & Mayer, for defendant.

BILL OF EXCEPTIONS.

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[Hamilton District Court, July, 1881.]

Cox, Johnston and Longworth, JJ.

PHILIP KLUGMAN v. PHILIP MAUK.

Allowance of exceptions should appear of record.

COX, J.

The bill of exceptions in this case was duly signed, sealed, and allowed, but the transcript of the journal does not show its allowance. It is necessary that the allowance of the exceptions should appear upon the journal. *Burke v. Railway Co.*, 26 O. S., 643; *Baldwin v. State*, 6 O., 15; *Acheson v. Bank*, 8 O., 117; *Hill v. Bassett*: 27 O. S., 597.

Judgment affirmed.

Simrall & Simrall, for plaintiff.

Butterworth, for defendant.

BILL OF EXCEPTIONS.

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[Hamilton District Court, June, 1881.]

Cox, Johnston and Longworth, JJ.

HENRY BUCK v. JOSEPH MILLS.

Where it is necessary to review all of the alleged errors, to have all the testimony, the bill of exceptions must state affirmatively that it contains all the evidence.

COX, J.

This is a petition in error to reverse the judgment of the court of common pleas. In that court the case was tried before a jury. Numerous errors are assigned in regard to receiving and ruling out testimony as to particular questions set out in certain depositions. But the depositions are not attached to the bill of exceptions nor filed in the case. There is endorsed on the bill of exceptions what purports to be an agreement that the depositions need not be attached to it, but may be filed with the papers,

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Low v. Insurance Co.

but it is only signed by the attorneys on one side. The bill of exceptions does not state affirmatively that all the testimony is set forth, nor is such the fact. We are unable, therefore, to look into the question attempted to be raised by the petition in error, and the judgment of the court below must be affirmed.

O. M. & A. J. Smith, for plaintiffs in error.

Cowan & Ferris, for defendant in error.

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FRAUDULENT CONVEYANCE—PARTIES.

[Hamilton District Court, July, 1881.]

Cox, Johnston and Longworth, JJ.

†A. CONSTABLE v. JOHN WESER et al.

¶A motion to make a person interested in property alleged to be fraudulently conveyed, a party to a suit, must allege that he has an interest in the property, or relief must be prayed against him.

COX, J.

The case was originally brought to set aside a conveyance, the plaintiff alleging in the court below that he had recovered a judgment on a promissory note against Weser and one Pfeiffer and wife; that after judgment was recovered Pfeiffer and wife conveyed the property in question to defraud creditors. The case was submitted in the district court on a motion to make Weser a party in the case as being an interested party, without whom the case could not be determined. There was no allegation in the petition whatever that Weser had any interest in the property alleged to have been fraudulently conveyed, nor is any relief prayed against him, and the motion was denied.

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[Hamilton District Court, July 1881.]

MARY HARRISON et al. v. COUNTY COMMISSIONERS.

For opinion in this case see, *post*, 256.

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LIFE INSURANCE.

[Hamilton District Court, July, 1881.]

Cox, Johnston and Longworth, JJ.

†WILLIAM LOW v. UNION CENTRAL LIFE INSURANCE CO.

1. Though on a policy void *ab initio*, the assured can recover back premiums paid yet where the policy is merely voidable, as where it is provided that "it shall be void for misrepresentation as to age," which being for the benefit of the company, can only be taken advantage of by it, and the assured cannot claim that his own misrepresentation must avoid the policy, the premiums already paid cannot be recovered back.
2. A misrepresentation in applying for life insurance, as to the age of a person making it, nine years out of the way, is material, although not willfully made.

ON ERROR to the Superior Court.

LONGWORTH, J.

Low filed a petition against the defendant in the superior court alleging that in 1876 Michael Low was insured by the defendant in \$3,000 for his benefit; that he continued for four years to pay premiums upon the policy regularly, and in June, 1880, came to the office of the insurance company to pay the premium on the day it

†A motion for a rehearing of this case was overruled by the district court. See opinion, *post*—(s. c. 7 Bull 113.)

‡ This case was affirmed by the supreme court. See opinion, 41 O. S., 273.

was due, but the officers of the company refused to receive it or to recognize the policy; that he thereupon brought suit to recover the premiums already paid. The defendant's answer admits all the facts, but alleges that the policy contained a condition that, if any representation made in the application for insurance should be false, the policy would be void; that it was alleged in the application that Low was fifty-eight years of age, while he was in fact several years older, and having found out that fact they refused to recognize the existence of the policy. To this answer no reply was filed. The plaintiff introduced the policy of insurance and rested. The defendants declined to offer evidence. The court was requested by the plaintiff to instruct the jury that the fact, that the representation was false, was not a sufficient defense to the plaintiffs' claim, unless it was alleged and proved that it was willfully false and fraudulent, which instruction the court refused to give; judgment was rendered upon the verdict, and this proceeding in error is instituted to reverse it.

The court, in disposing of the case, said that the question to be determined arose in precisely the same way as though a demurrer had been filed to the petition; the answer admitted the facts alleged in the petition and the reply, the facts alleged in the answer, and the introduction of the policy in evidence was merely surplusage. The petition alleged that the statements in the application for the policy were averred to be in all respects true by the insured, they being treated as warranties, and, further, that one of the conditions of the policy was, that should the policy become void by reason of a violation of any of the conditions, the payments made thereon should be forfeited to the company. The contention of the plaintiff was twofold. First, he insisted that the mere fact that the representation was false would not release the company from its obligation under the policy unless it appeared that the representations were willful or fraudulent upon his part; and, second, that if he was not right in this assumption, the policy became null and void *ab initio* by reason of this breach, and, having become void, all premiums, paid under it were wrongfully paid, and he has a right to recover them back.

As to the first claim, the plaintiff based it upon the authority of several cases cited, but by a consideration of those cases, it distinctly appeared that the policies upon which they were brought expressly stated that they should be void if it should appear that any statement was willfully false or fraudulent. Such a condition was not in the policy in this suit. The representation was that the insured was fifty-eight years of age, when, in reality, he was several years older. He was, in fact, sixty-seven years old, as appeared by a deposition, not, however, in evidence. Such a misrepresentation was clearly a material one.

As to the second question, if the company wrongfully declared the policy forfeited, relief could be granted the plaintiff; *Ins. Co. v. Pottker*, 33 O. S., 459. If, on the other hand, the policy was void *ab initio*, such relief would be granted; for money paid by way of premiums on a void policy may be recovered back. But, if the policy is simply voidable on the election of the company, then the express contract that all premiums theretofore paid should be forfeited would apply. The representation in the policy as to age is simply for the benefit of the company, and can only be taken advantage of by it. The insured was not in the position to say that his own misrepresentations should void the policy. The defendant in this case had the right to forfeit the policy.

Judgment affirmed.

[Hamilton District Court, October, 1881.]

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ROBERT F. CARVER v. THOMAS WILLIAMS et al.

For opinion in this case, see 6 Dec. R., 1084 (s. c. 10 Am. Law Rec. 310.)

[Hamilton District Court, October, 1881.]

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MARY J. PERIN, Exrx. v. COMMISSIONERS.

For opinion in this case, see 6 Dec. R., 1085; (s. c. 10 Am. Law Rec., 311.)

[Hamilton District Court, October, 1881.]

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SCHOTT v. HUNT.

For opinion in this case, see 6 Dec. R., 1087; (s. c. 10 Am. Law Rec., 313.)

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Gerke et al. v. Gerke et al.

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[Hamilton District Court, October, 1881.]

SCHULTZ v. MEYER.

For opinion in this case, see 6 Dec. R., 1086; (s. c. 10 Am. Law Rec., 312.)

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DEEDS.

[Superior Court of Cincinnati, General Term, October, 1881.]

Foraker, Force and Harmon, JJ.

GEORGE GERKE et al. v. MAGDALENA GERKE et al.

A voluntary conveyance made by a man in his last sickness, at a time when his mind was very weak, and it appears that he did not exercise what little capacity he had, will be set aside when it appears that he did not know the significance of his acts, and the nature of the act justifies the conclusion that he has been overcome by undue influence, and the deed was not read to him before signing, although there had been times when he was willing and desirous of making a similar disposition of his property, and he had given instructions as to the drawing of the conveyance he signed.

FORAKER, J.

This cause was reserved from special term upon the evidence.

It is a suit in equity to set aside certain conveyances of certain real estate. The ground upon which this is asked is mental incompetency and undue influence.

The conveyances in question are: 1st. A deed from John Gerke to Christian Ziegler, in trust to be conveyed by him to said John and Magdalena Gerke for life; with remainder over to the survivor, with remainder over again on the death of the survivor, to George Gerke; and in case he do not so long survive, with remainder over to George E. Gobrecht; and in case he do not so long survive, remainder over to William Kessler; and in case he do not so long survive, remainder over to Peter Kessler; and in case he do not so long survive, remainder over to John Gerke, Jr., for the following uses and trusts, viz:

To have and to hold said premises during the joint lives of said George Gerke, John Gerke, Jr., Elizabeth Kuerze (formerly Gerke), Magdalena Karhoff, Elizabeth Gobrecht, Catharine Pfeffer, Peter Kessler and William Kessler, or the survivor of them; and to lease or rent the same in whole or in part, as may seem best to him and collect and divide the income thereof semi-annually, one-half to George Gerke, John Gerke, Jr., and Elizabeth Kuerze, or their respective heirs, the other half to the others named or their respective heirs, with remainder over, after the death of the last survivor of the beneficiaries named in fee simple to the respective heirs of the several beneficiaries; the heirs of each taking in fee the share their ancestor had enjoyed for life.

This deed was executed on the 21st day of February, 1876, and the property conveyed was a lot situate on the south west corner of Eighth and Depot streets, in the city of Cincinnati, on which the grantor had then recently erected at a cost of about \$65,000 a handsome building, containing a large hall, designed by him to be dedicated to, and used for musical purposes and which, in consonance with this idea, he christened "Beethoven Hall."

The second deed is one made by the said Christian Ziegler, on the 23rd day of February, 1876, conveying said property in accordance with the provisions as above recited of his trust.

The plaintiffs in this suit are George Gerke, John Gerke, Jr., and Elizabeth Kuerze. The defendants are Magdalena Gerke, Christian Ziegler, George E. Gobrecht, William Kessler, Peter Kessler, Magdalena Karhoff, Elizabeth Gobrecht and Catharine Pfeffer.

The plaintiffs are the children of John Gerke by his first marriage.

The defendant Magdalena Gerke was his second wife, and is his widow. The defendants William Kessler, Peter Kessler, Magdalena Karhoff, Catharine Pfeffer and Elizabeth Gobrecht are her children by a former marriage. Geo. E. Gobrecht is a son-in-law of Magdalena Gerke. Christian Ziegler is made a party only because as the trustee named he is connected with the title.

The controversy is therefore between the children of Gerke and his second wife, and her children.

John Gerke made no will, hence, but for these deeds the property in question, subject only to Mrs. Gerke's dower interest, would have descended in fee to the complainants, at his death in 1876. By these deeds they take nothing until after the death of Mrs. Gerke, and from and after that time, until the death of the last survivor of them, they and their heirs, take but one-half of the net income and at the expiration of that time their heirs take one-half in fee simple.

The question is, whether or not the evidence shows Gerke to have been mentally incompetent, or unduly influenced thereunto, when he made the deed of February 21, 1876, to Christian Ziegler. If so, both it and Ziegler's deed made in pursuance of it, must of course be set aside.

From a great mass of testimony taken at the trial, it appears that Gerke commenced life poor, and died in 1876, at the age of only 54 years, the possessor of a large fortune. He carried on the business of brewing and distilling, and acquired his wealth by industry, and by the exercise of sound business judgment. He appears to have been a man, when in good health, of more than ordinary mental endowments. In 1872 he lost his first wife, the mother of the plaintiffs. Within about seven months thereafter he married for his second wife, Magdalena Gerke, then Magdalena Kessler, one of these defendants. For a long time prior to this marriage she had kept a saloon diagonally across the street from Gerke's residence, and he had spent much of his time there since a period prior to the death of his first wife. From the date of this marriage in January, 1873, until Gerke's death in April, 1876, he seems to have taken less interest in his business and to have given himself up to a great deal of extravagance, drinking, and dissipation of one kind and another. He made a trip to Europe with his wife, and spent large sums of money for various presents, almost all of which were distributed among the different members of his wife's family.

He aided his wife's sons and sons-in-law in business, by the use of money, and otherwise, and it would seem from the evidence that he was almost continually surrounded by the children and friends of his wife.

During this period he manifested in various ways, considerable vanity. Among other things he conceived the idea of having some kind of a monument to perpetuate his name. His mind finally evolved the hall here in controversy. He built it to stand for the honor and the glory of the name of John Gerke. He wanted it to stand for one hundred years.

The question arose as to how he should vest the title to secure what he desired. Upon this he consulted Mr. Tischbein, as his attorney.

They had several conferences. It was finally determined that the title should be put in trust according to the form of the deeds that were afterward executed—for the benefit of his children only. Thereupon Mrs. Gerke, who was present, requested that her children too be made beneficiaries of the trust. After manifesting some reluctance, Gerke finally consented to do so, and, thereupon, accordingly directed Mr. Tischbein to draw up the deed in accordance with what they had agreed upon, including his wife's children as beneficiaries.

This was in the latter part of the year of 1875, shortly before the building was completed. A few days later, Gerke told Mr. Tischbein he need not go on with the matter of preparing the papers, as he wished to see him again and talk with him further about them before he executed them. In consequence of this, Mr. Tischbein did not draw up the papers until after Mr. Gerke's last illness came upon him. Why he should ever have drawn them at all, after being told this, does not appear.

Mr. Tischbein's testimony is uncontradicted as to this part of it, and from it we learn that he never received any additional instruction from Gerke, and never talked with him from the time he told him not to go on with the preparation of the papers until he called upon him to have them execute it. He also testifies, and his testimony is uncontradicted here too, that Mr. Gerke never saw the deeds, or either of them, or any draft thereof, until the day he signed the one he executed. His language being, in substance, that Gerke never saw the deeds as written, that they were never explained to him in detail, and that he never knew anything of the form in which the deeds were drawn.

During the year 1875 Gerke had a severe illness. He recovered and was able to go about and attend to business, when he desired to do so. He was informed by his physicians, however, that his sickness had been occasioned by excessive drinking, and that there was no safety for him except in carefully abstaining therefrom. He appears to have observed this admonition until the night of January 5, 1875, at which time he had a formal or dedicatory opening of his hall. On this occasion he indulged too freely, and in consequence he was taken violently ill the next day. He continued ill until the —day of April, 1876, when he died.

On the 21st day of February, during this illness, he executed two instruments. The first was a lease of the property in question to George E. Gobrecht and the other was the deed to Ziegler.

There is a great mass of testimony as to his condition at this time. We are satisfied, from a careful examination of this, that many of the witnesses, who testified about seeing him during his illness, and as to the mental condition in which they found him, confused his first, with his second illness, and therefore, are of the opinion that much that is contained in the record must be disregarded in an effort to arrive at his true condition on the 21st day of February, 1876. There is, however, an abundance of testimony directly in point, and although there is much contradiction in it, yet we have been able to reach a conclusion. Mrs. Gerke and George E. Gobrecht were present when he signed the deed. A Mr. Schick testifies, that he also was present. All these testify for the defendants as to his condition at the time.

Frederick Tischbein, the lawyer who drew the deed, and who, as Notary, took Gerke's acknowledgment, Charles H. Davis, an attesting

witness, and Dr. Thornton, the family physician, were also present and they testify for the plaintiffs.

From this testimony, it appears that Mr. Gobrecht sent for Mr. Tischbein to come to Mr. Gerke's and to bring with him the lease from Gerke to Gobrecht for Gerke to sign it. Mr. Tischbein came and in the presence of himself, Mr. Gobrecht, Mrs. Gerke and Dr. Thornton, the lease was signed by Gerke, and witnessed by Tischbein and Dr. Thornton. After this was done and after Tischbein, Mrs. Gerke and Gobrecht had stepped into another room, Gobrecht asked Tischbein if he had with him also the deed, Tischbein answered "No," whereupon Gobrecht directed him to go back to his office and get it and bring it there, and have it signed also. Tischbein did so. During his absence Dr. Thornton left. In consequence, Gobrecht went out to get some one to sign the deed with Mr. Tischbein as a witness. He found Mr. Chas. H. Davis, then a government gauger, and requested him to come and witness Mr. Gerke's signature. Mr. Davis came, and in his presence, the presence of Mrs. Gerke, and Mr. Tischbein, Gerke signed the deed. Davis and Tischbein signed as witnesses. The deed was then handed to Mr. Tischbein by Mr. Gobrecht, and Mr. Tischbein afterward left it for record. As to all the facts so far stated, there is either no disagreement or such a preponderance of the evidence that we so find.

We are of the opinion that Gerke was perfectly competent to have executed these instruments at any time prior to his last illness. We are also of the opinion that he *desired* to make a trust disposition of this property for the benefit of his own children, and further, that he at one time *consented* to include among the beneficiaries the children of his wife, and that if he had done so then, the testimony is not sufficient to show that he was unduly influenced thereunto by anything his wife is shown to have said or done in that behalf. What she said and did is, in our opinion, nothing more than that fair persuasion she was entitled to exert. While both his physical and mental condition were in our judgment, seriously impaired from the first moment of his last illness, yet we are of the opinion that there were times during that illness when voluntary acts of this character could not have been questioned for incompetency.

But the question is, whether or not under all the circumstances attending it, the execution of this deed on the morning of February 21st, 1876, can be sustained against the claim of mental incapacity and undue influence. What is the evidence as to that? We have already seen that the deed was no ordinary conveyance of property. It created, in possible contingencies, a long line of trustees and devolved upon them complicated duties. It required more capacity to comprehend such a deed, than it would to understand a simple conveyance from A. to B. Still a very sick man with a very feeble mind, might have readily comprehended it and sufficiently have understood it when presented to him for execution if he had previously, when in health, examined it and familiarized himself with it. But this Gerke had not done. He and Tischbein had talked about what he wanted done, and Tischbein drew up this deed as the expression of what he understood was wanted. It had not been submitted to Gerke. He had not read it; he had not had its details explained to him. He had not seen anything in writing. He had not said "this is what I want." And not only that, but he had said to Tischbein the last time they talked with each other: "Don't go on with the preparation of the deed until I see you and talk further about the matter." This must be ac-

cepted as conclusive, that his mind was at least in doubt as to what he should do. He was evidently contemplating some change; what, doesn't matter. We have no evidence that his mind ever, again, prior to the execution of the deed, settled upon anything, much less upon this identical instrument.

Now with this state of facts existing what was his condition of mind on the 21st of February? Was it such that he was capable of settling whatever doubts he might have, and of comprehending the character and effect of the transaction in which he was engaged? Upon this question the testimony of Mrs. Gerke is, that her husband's mind was clear and active all the while during his illness. That every morning he asked to have the papers read to him, and particularly the market report. That the night of the 20th of February he told her to send for George Gobrecht, to come and bring the papers, (referring to the lease and the deed) so that he could sign them and fix up his business matters. That the next morning he was in "right good" condition as she expresses it, and again spoke of having Gobrecht sent for. That thereupon she sent for Gobrecht, and when he came Gerke told him to get the papers and let him sign them and fix matters up. That thereupon Tischbein was sent for, and when he came Gerke spoke to him, and asked him if he had the papers. That Tischbein answered: "I have the lease but not the deed." That thereupon, in the presence of herself, Gobrecht and Dr. Thornton, Tischbein read the lease, the whole of it, for Mr. Gerke, who sat up in bed and listened. That after the reading of it Gerke signed it, and then asked Tischbein if he also had the deed. That she then sent Tischbein for the deed; that he was gone some time but came with it. And Mr. Gerke sat up by himself, and Tischbein read the whole deed, and Mr. Gerke signed it in the presence of herself, Gobrecht, her brother, Mr. Schick, Tischbein and Mr. Davis, whom Gobrecht went for to sign as a witness.

George E. Gobrecht testifies that Gerke sent for him about eight o'clock on the morning of the 21st of February; that he went over to see what was wanted; that Gerke told him he thought Tischbein ought to have the papers done by that time, and for him to send and get them, and he would sign them; that he wanted to fix those matters up; that he (Gobrecht) then sent for Tischbein, who came with only the lease; that he read over the lease carefully to Gerke, particularly some special provisions that had been written in it; that Gerke expressed himself satisfied with it, and thereupon signed and acknowledged it; that he then called for the deed and Tischbein said he did not have it; Gerke asked if it was not done yet; Tischbein then said he guessed he had it about as near as he could get to what was wanted. Gerke said, go and get it—I want to sign it; that Tischbein went to get it and when he came he read certain provisions out of the deed to Mr. Gerke: he did not read the whole deed over to him, but certain provisions, such as especially referred to the trustee matters of the different parties, "all that provision relating to that matter was read over to Mr. Gerke, right there in the room; after that he acknowledged to it, and said that that was just exactly as he wanted it, and that was just the way he had told him that he did want it." Then he goes on to say Mr. Gerke instructed Mr. Tischbein to take the lease and deed and have them placed on record.

All this transpired, he says, in the presence of himself, Mrs. Gerke, her brother, Mr. Schick, Mr. Tischbein, and Mr. Davis, whom he called in from a neighboring distillery to witness Mr. Gerke's signature.

Martin Schick testifies that he resides at Bellaire, Ohio, but that he came down here and stayed with Gerke and helped nurse him during three weeks of his illness, and that he was here at the time and was present at the execution of the lease and deed, on the 21st of February.

According to his account, Gerke did not talk so freely as appears from Mr. Gobrecht's statement, but as regards his mental and physical condition, and as to what transpired in other respects, he substantially confirms Mr. Gobrecht and Mrs. Gerke.

Opposed to the testimony of these witnesses is first the evidence of Dr. Thornton, the attending physician, and one of the witnesses to the signing of the lease.

He testifies that he was called to see Gerke on the 6th of January, and found him in bed, and pretty sick from the effects of excessive drinking, the night before, at the opening of the hall; that he remained a very sick man all the while until his death the following April; that he was afflicted with a tumor on the liver, finally resulting in an abscess of the liver, from the immediate effects of which he died; that he suffered great pain almost constantly, unless under the influence of opiates, that his sufferings were so great when not thus relieved, that he could not sleep, and that his pain would cause him to cry out so loud that he could be heard a square away; that consequently they kept him nearly all the time under the influence of hypodermic injections of morphia; that the effect of these injections was to ease his pain, produce a kind of stupor, and enable him to sleep and rest; that he visited him always once and sometimes twice a day, ordinarily, and when he was especially bad he visited him three times a day; that he visited him three times on the 22nd of January, and that on the night of the 20th of February he was called there in the night, and on the following day he visited him three times; this he knows from seeing visits so entered in his books—and this, he says indicates to him that he was on that day worse than usual. Further than this he cannot testify as to his condition at that time. It is his recollection, however, that when he witnessed Mr. Gerke's signature, Mr. Gerke was set up in bed to sign. The doctor has no distinct recollection as to date, and his condition, but says his signature as a witness does not indicate that he thought him competent to validly execute the lease. That all he understood that to mean was that he saw him sign. He says, however, that while he thinks Gerke was competent at times during his illness, to have understood such a deed, yet he was hardly able to have done so on his worst days, and that at such times, he seemed anxious to be let alone, and wanted to be disturbed as little as possible.

Charles H. Davis testifies that at the time of the execution of the deed he was called in by Mr. Gobrecht to witness Mr. Gerke's signature; that after he came into the room they propped Mr. Gerke up in bed with pillows, gave him pen and ink, and he signed his name to the deed. But that the deed was not read; nor was it explained to Gerke; that neither the notary, nor any one else said a word about the character of the paper, or in any way explained it, and that from the beginning to the ending of the matter Gerke did not say a word to any one about anything; that he seemed to be very weak and sick, and anxious to get through with the matter, and be let alone; he seemed to act in a merely mechanical way, and "I

don't think he could comprehend what he was doing further than that he was signing his name." After Gerke had signed his name he was laid back in bed.

Mr. Tischbein testifies that he first went to Mr. Gerke's residence with only the lease; that he explained to Gerke in as short a way as possible that he had there the lease in question, and what it was; that thereupon they propped Gerke up in bed and he signed his name; that Gerke was apparently very sick, and very weak, and that he talked but very little.

That after the lease was signed he and Mrs. Gerke and Mr. Gobrecht stepped into the adjoining room, and there Mr. Gobrecht and Mrs. Gerke instructed him to go at once to his office and get the deed to Ziegler, and have that signed too; that he did as directed; that when he returned Gerke was lying in bed asleep; that they awakened him; raised him up in bed, supported him with pillows, and gave him a pen and ink; that while they were doing so Gerke cried out with pain, and requested to be let alone; that he, Mr. Tischbein, said to him that he had there for him to sign, the deed to Ziegler that he had told him to prepare; that Gerke nodded his head and signed his name; that they at once laid him back in bed; and he at once dozed off into sleep again; that he did not read the deed, or in any way explain it to him, except only to say, as stated, that it was the deed to Ziegler that he was to prepare, that no one said anything to Gerke about the matter, and that Gerke did not say anything whatever on the subject.

This is the substance of all the testimony given as to the manner and circumstances of the execution of this deed.

There is such a decided conflict that it is impossible to harmonize this evidence. According to the one account Mr. Gerke could hardly have had a better day during all his illness than the 21st day of February, 1876. His mind was clear and active; he fully comprehended and intelligently discussed the most complicated features of the transaction in which he engaged. He does not seem to have been suffering any pain worthy of mention.

On the other hand the 21st of February seems to have been one of the worst days of all that severe and fatal illness.

According to this account Gerke had practically no mind at all—certainly not enough to intelligently comprehend such an instrument as he signed.

He did not talk any, to any body about anything, nor did he in any way indicate an understanding of what he was doing, further than that he was signing his name.

We have already said that these contradictory statements cannot be reconciled, we must therefore see who the witnesses are, and consider the circumstances and unquestioned facts with a view to weighing the evidence and determining the preponderance.

The testimony raises considerable doubt in the mind of the court as to whether Mr. Schick was present at the signing of the deed, but conceding that he was, his testimony is open to the objection that he was the brother of Mrs. Gerke, and therefore naturally biased by all the prejudice that such a relation would inspire, while Mr. Gobrecht and Mrs. Gerke were directly interested, as parties to the controversy, in sustaining the transaction.

On the other side we have first the book of Dr. Thornton, showing his visit at midnight on the 20th, and his three visits on the 21st, unmis-

takable evidence that the 21st was one of the worst days Gerke had. Knowing this, we know from the Doctor's evidence what his condition must have been. But the Doctor and his book are supplemented by the testimony of Mr. Davis and Mr. Tischbein, showing him to be as from the Doctor's evidence we would expect to find him.

These are credible, intelligent and wholly disinterested witnesses, free, so far as we can observe, from all bias of prejudice whatever.

By all the rules of evidence we are bound to accept their statement. Doing so, we find that upon the day, and at the time when John Gerke executed this deed he was critically ill. His mind already weakened and enfeebled by disease and suffering was so blunted and stupified by the influence of opiates, that had been administered to relieve pain, that he was unable to intelligently comprehend and understand the nature and character of such a deed as that which he signed.

That what little mental capacity he did have, he did not exercise. That his signing of the deed was only a passive acquiescence in what was demanded of him at a time when he had neither capacity nor disposition to withstand importunities and exactions; that it was not therefore in any just or proper sense voluntary, but as one of the witnesses expressed it, "only a mechanical performance."

Upon such a finding of facts the law of the case becomes quite simple. We content ourselves with the statement that we are satisfied to adopt and follow what is said by Mr. Justice Story in section 238 of his work on Equity Jurisprudence, viz:

That the acts and contracts of persons who are of weak understandings and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion, that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence."

The prayer of the petition will be granted and the decree of the court will be entered accordingly.

Thomas B. Paxton & John W. Warrington, for plaintiff.

Judge M. B. Hagans, for defendants.

REFUNDER OF TAXES.

696

[Hamilton District Court, October, 1881.]

Cox, Johnston and Longworth, JJ.

†MARY HARRISON et al. v. COUNTY COMMISSIONERS.

Where the assessor of real estate values a lot at so much per front foot and returns the lot as having more feet front than it really has, whereby the valuation is excessive, the error is a clerical and not fundamental one, and should be corrected by the auditor on the duplicate, and it is the duty of the county commissioners, being notified thereof, under section 1038, Revised Statutes, to direct a remitter of the overpayments for the five years next preceding.

JOHNSTON, J.

This action was for a refunder of taxes paid on property situated on the north side of Fourth street, 165 feet west of Walnut. It is claimed that by error of the district assessor, in 1870, said property was returned

†See also 6 Dec. R., 1085; (s. c. 10 Am. Law Rec., 311.)

as fronting $34\frac{1}{2}$ feet on Fourth street, instead of $32\frac{1}{2}$ feet, and was valued at \$945 per front foot, and that by reason of this excessive valuation, \$1,890 were added in excess of its true value. The court below sustained a demurrer to this petition and judgment was entered for defendants, to which plaintiffs excepted.

It clearly appears upon the face of the petition that the assessor did erroneously list the property as containing a frontage of thirty-four and one half feet, and that this error was carried into the valuation as $34\frac{1}{2}$ feet were valued at \$945.00 per foot, thus the owners being required to pay on \$1,890.00 that had no basis whatever upon which to stand. The act which induced this error was declared clerical and not fundamental, and very properly it became the duty of the auditor to correct the duplicate, and notify the Treasurer to deduct the unpaid portion of taxes levied upon this erroneously listed and valued two feet, which it appears from the petition was done. The commissioners having had their attention called to this error by the auditor, in conformity with section 1038, Revised Statutes, and to the taxes that had been erroneously charged and collected, it became their duty to direct a remitter thereof to the owners to the extent of the taxes paid for the five years next preceding the discovery of the error—to-wit, March, 1880. All these facts appearing upon the face of the petition, the demurrer in the opinion of the court should have been overruled, and the defendants required to answer. The court erred in sustaining the demurrer.

Judgment reversed and case remanded.

Storer & Harrison, for plaintiffs.

Chas. Evans, for commissioners.

697

[Hamilton District Court, October, 1881.]

GEORGE M. IVES v. COMMISSIONERS OF HAMILTON COUNTY.

For opinion in this case, see 6 Dec. R., 1079; (s. c. 10 Am. Law Rec., 306.)

697

[Hamilton District Court, June, 1881.]

ADOLPH HOF v. WESTERN GERMAN BANK.

For opinion in this case, see *ante*, 245.

698

[Hamilton District Court, October, 1881.]

NICHOLAS MEYER v. B. SHROEDER.

For opinion in this case, see 6 Dec. R., 1083; (s. c. 10 Am. Law Rec., 309.)

698

[Hamilton District Court, June, 1881.]

HENRY RUCK v. JOSEPH MILLS.

For opinion in this case, see *ante*, 246.

Hamilton District Court.

722

[Hamilton District Court, July, 1881.]

698

PHILIP KLUGMAN v. PHILIP MANK.

For opinion in this case, see *ante*, 246.

[Hamilton District Court, July, 1881.]

698

A. CONSTABLE v. JOHN WESER et al.

For opinion in this case, see *ante*, 347. See note also.

APPEALS.

722

[Hamilton District Court, October, 1881.]

Cox, Johnston and Longworth, JJ.

BROERMAN v. TOWNSEND.

An appeal to the district court will not be dismissed because of the neglect of the clerk of the court of common pleas to file the transcript within the time fixed by law.

MOTION to dismiss an appeal.

COX, J.

The decree from which the appeal was taken was rendered at the October term of the common pleas court, 1879. Notice of appeal was given and bond filed at the same term. The transcript was filed in the district court in March, 1880. It was claimed that the appellant, having given his bond during the judgment term of the court, it was the duty of the clerk to have delivered the papers into the district court on or before the first day of the January term, 1880, as prescribed by section 3235, Revised Statutes.

The appellant, having given his bond for appeal within the statutory time, had done all the law enjoined upon him to do, and he could not be precluded from his right of appeal by any omission of the clerk to file the papers in the district court within the proper time, if there had been such omission. Revised Statutes, sections 5228, 5255; *Hubble v. Renick*, 1 O. S., 171; *Hoff v. Fisher*, 26 O. S., 7; *Pugh v. Corwine*, 1 Dec. R., 451; (s. c. 10 Western Law Journal, 79.)

Appeal sustained.

WILLS—EVIDENCE.

722

[Hamilton District Court, October, 1881.]

Cox, Johnston and Longworth, JJ.

GEORGE S. WILLIAMS v. JOSEPHINE SWIFT et al.

In construing a will, parol evidence is admissible to prove how the testatrix designated her interest in an estate.

COX, J.

This is a case involving the construction of the will of Josephine Williams. The question arose under a distribution of a fund in court derived from the sale of certain property in which Eureka Gilpin had a life estate.

Mrs. Gilpin was the daughter of Thomas Williams, who devised his real estate to his eight children for life, with remainder over to their children. Under a construction of that will the supreme court has held that, as to property devised to Thomas Williams' children who die without issue, such estate becomes undevised and passes into the general fund of his estate. Mrs. Gilpin is beyond the possibility of issue. Josephine Swift and others claim a one-thirtieth interest in the fund as coming to their mother, who was the niece of Josephine Williams, the words of the will being, "I devise any interest that I may have in the estate of my aunt, Mrs. Euretta Gilpin," etc. On the other hand, it was claimed by Mary W. Devault and others that they were entitled to this fund on the ground that Mrs. Williams had failed to devise this part of the fund, and it, therefore, fell into the general fund of her estate, to be divided among her heirs, and, therefore, the devisees could not take. On the trial of the case, parol evidence was admitted as to what Mrs. Williams designated as her interest in Euretta Gilpin's estate, to explain what she meant by her interest in the estate of Mrs. Gilpin, namely, the remainder after Mrs. Gilpin's death. To the admission of this testimony exception was taken.

The will of Mrs. Williams was ambiguous in regard to what the testatrix meant by her estate, and the parties were entitled to go outside of it, and by parol evidence explain its meaning. Mrs. Williams had no interest whatever in the estate of Mrs. Gilpin, for Mrs. Gilpin had nothing but a life estate; but upon the death of Mrs. Gilpin, as one of the heirs of Thomas Williams, Mrs. Williams would have an interest in that remainder, and this Mrs. Williams denominated her interest in the estate of Mrs. Gilpin. Without this explanation it would be almost impossible to determine the intention of the testatrix. The evidence was properly admitted. *Boggs v. Taylor et al.*, 26 O. S., 604.

Judgment affirmed.

741

[Hamilton District Court, December, 1881.]

WEBER et al. v. GAMBRINUS STOCK CO.

For opinion in this case, see 6 Dec. R., 1102; (s. c. 10 Am. Law Rec., 482.) It was reversed by the supreme court. See opinion, 41 O. S., 689.

752

INFANT—LANDLORD AND TENANT—NEW TRIAL.

[Hamilton District Court, December, 1881.]

Cox, Johnston and Longworth, JJ.

†MEYER ROTHSCHILD v. CATHARINE HUDSON.

1. Where a lessee is a minor and assigns the remainder of the term, the assignee is liable to pay rent to the lessor during his occupancy, until the minor disaffirms the assignment by him, for the assignee has enjoyed the premises, and his occupation has been legal, the assignment being voidable and not void, and it does not relate back to invalidate everything before.
2. Where a lessee assigns the remainder of his term nominally to one person, but the one who really enjoys possession is another, such equitable assignee is in privity of estate with the lessor, and is liable for rent during his occupancy.

[†]This case was affirmed, without report, by the supreme court, November 11, 1884

3. A claim by defendant's counsel, who is examining an expert in handwriting, as to whether a whole series of receipts had been written by the same hand, that a remark by the opposite counsel, of "we don't claim that they were," was misconduct, as depriving him of getting before the jury the value of the witness as an expert, is unfounded.

ERROR to the Superior Court.

The plaintiff in error was the defendant in the court below. The action was commenced by Mrs. Hudson to recover \$650 rental for premises on Central avenue, this city, claimed by her to have been leased by her testator in his life-time to one Biercroft and Wiederich, and by them transferred to Rothschild who took possession and enjoyed the rents and profits thereof and agreed to pay the same. The defense of Rothschild was various; that Hudson's interest was only a leasehold estate; that he had become the assignee of a portion only of the entire estate; that the portion for which rent was claimed was but a portion of the original estate, and that Rothschild never became liable to pay the rent to Hudson, for the reason that he was never in possession during the time for which this rent was claimed; that there was no privity of estate between him and Hudson, but that the person who was in possession was Philip Warner, and that Rothschild only acted as agent for Warner. There was another defense that for the time rent is claimed neither Rothschild nor Warner was in possession, or liable for the reason that one of the assignors, of Warner, or of Rothschild, as the case may be, was one Wiederich, and that he at the time was a minor and had disaffirmed his act on becoming of age. At the trial below judgment was rendered for the executrix, not for the amount claimed, but for the amount found to be due before the date of disaffirmance on the part of Wiederich, and this proceeding was to reverse that judgment.

JOHNSTON, J.

The assignments of error chiefly relied upon, and presented in argument and by brief, are that the court erred in instructing the jury that if they found that Rothschild was the real, the beneficial party, to whom Biercroft and Wiederich assigned their lease, and not Philip Warner, whose name appeared in the assignment, that they might return a verdict against Rothschild, if they found that he was in possession during the time the rent accrued for which suit was brought—claiming that there was no privity of estate between Hudson and Rothschild. That the court erred in charging the jury that defendant was liable for any rent that accrued during the minority of Wiederich, but before his disaffirmance—and further, that one of the counsel for defendant in error was guilty of misconduct during the trial, and erred in overruling motion for a new trial.

Of these in their order. It does appear from the pleadings and evidence that the assignee of the lease from Biercroft and Wiederich was Philip Warner. The plaintiff charged in his petition that that name was inserted at the request of Rothschild, but that Rothschild paid the consideration, immediately took possession of the premises, enjoyed the rents, paid the taxes, and was the real beneficiary. Although this was denied by defendant Rothschild, the evidence fairly considered, showed Warner to be a mythe or a fictitious person. It was a fair question under the evidence in the case, in our opinion, for the jury to determine if in fact the assignment was not made to Rothschild and not to Warner; that in reality Rothschild and Warner meant one and the same person. The evidence

disclosed that defendant had once before had a lease of the premises and had suffered it to be used as a house of prostitution and was indicted therefor, and he said he did not want to be caught that way again, and hence the name of Warner was, upon his suggestion, inserted. It does not appear that any witness in the case ever knew of such a man except affiant himself. His account of him must have been very unsatisfactory to the jury, as appears from an examination of the evidence. The jury were, we think, properly charged in that respect; even if Warner was, in fact, another person than defendant, the verdict was right, for at best he had possession, receiving the rents, managing and enjoying the property from the beginning. Defendant was the beneficial party, the real party in interest, the equitable owner. Our supreme court in the case of *Hall v. Plaine*, 14 O. S., 4223, substantially recognizes the right of a beneficiary under such circumstances to be sued. Defendant, according to that decision, could have maintained an action for rent due from under-tenants while he was in possession, although the naked legal title was outstanding. But the case of *Astor v. L'Amoureux*, in 4 Sand., 524, is exactly in point. Duer, J., twice announced the opinion of the court, holding the equitable assignee of a lease in possession to be liable, and not the holder of the naked legal title as trustee. And to the same effect is *Taylor's Landlord and Tenant*, section 456. Besides there was nothing in the assignment forbidding an immediate transfer of the term to the defendant by Warner and defendants' immediate, continuous and exclusive possession might have justified the jury in inferring that the lease had been assigned over in fact to him by Warner. *Kinsman v. Loomis*, 11 O., 477; 13 Johns, 516. "Possession, however, by the defendant is sufficient evidence *prima facie* to charge him as assignee for the payment of subsequently accruing rent." *Taylor's Landlord and Tenant*, section 450.

The jury having found that Rothschild was the real assignee, it followed as matter of law upon the evidence that he was liable to Hudson or his executrix, the plaintiff below. There was privity of estate between Hudson and Rothschild. The question whether Hudson was the owner of the whole of the original leasehold estate, whether he assigned the whole or only a part of it, or retained a portion is quite immaterial. It was not claimed by plaintiff that Rothschild was the assignee of Hudson, but of Biercroft and Wiederich. They were the lessees of Hudson for a term of 15 years from December, 1874. The evidence is uncontradicted that they assigned their whole interest in that term. They went out of possession and as the jury found Rothschild immediately entered into possession, and privity of estate at once arose between him and Hudson, and while he retained the possession there arose an implied duty on his part to pay the rent as covenanted by his assignors, *Sutliff v. Atwood*, 15 O. S., 186. As to the minority of Wiederich. The court charged that until he disaffirmed his assignment to Rothschild that Rothschild had the right to retain possession of the premises and collect the rents of his tenants. In this we see no error. The assignment by Wiederich was not void, but only voidable at his election on becoming of age. It appears that he did not disaffirm for more than a year after reaching his majority, hence, until that time Rothschild had full right to retain possession and collect rent, and there was a corresponding obligation on his part during this possession to pay the rent secured by the lease to the lessor Hudson. The disaffirmance did not reach back and invalidate everything as claimed up to the time of the assignment of the lease by the minor. The objection

as to the misconduct of one of the counsel was not, in our opinion, good ground for error. When an expert in handwriting was being examined by defendants' counsel as to whether the whole of a series of receipts had all been written by the same hand, one of the plaintiff's counsel, it seems, remarked, "we don't claim that they were," or words to that effect, thus claiming that they were deprived of getting before the jury the value of the witness as an expert. The action of the court in this matter to which objection was made, was, the refusal of the court on account of such misconduct, to withdraw the case from the jury and dismiss the action. Such an order would have been unwarrantable, if the court had granted it. We have examined the evidence and all the proceedings very carefully—the charges refused, and the portions of the general charge excepted to, to ascertain if any error to the prejudice of plaintiff in error occurred and in the opinion of a majority of the court, he has not in anywise been prejudiced and the judgment below is affirmed.

Yaple, Moos & Pattison, for Rothschild.

Hildebrandt & Hildebrandt and Judge Pruden, for executrix.

APPEALS.

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[Hamilton District Court, December, 1881.]

Cox, Johnston and Longworth, JJ.

LEONARD BAUER v. CATHARINE LOHR et al.

A case appealed from the probate court to the common pleas cannot be appealed from that court to the district court.

COX, J.

This case came up for hearing on a motion to dismiss an appeal on the ground that the case was not appealable to this court. The original cause of action was in the probate court, growing out of the settlement and distribution of the effects of an estate. From the judgment of that court an appeal was taken to the common pleas court. A judgment was there rendered and an appeal taken from that court to this court. It is claimed on behalf of defendant that no appeal will lie in this action. It is claimed, on the other hand, that under section 6203, Revised Statutes, the case is appealable. Our statute gives to the probate court very plenary powers to distribute estates subject to the right of a party affected by the judgment to appeal to the court of common pleas. The statute also provides that upon motion of either party the probate court may reserve a case to the court of common pleas, and when so reserved it shall be heard and decided in the court of common pleas in the same manner as if that court had original jurisdiction. Section 6200, Revised Statutes, provides that the court of common pleas shall have original and concurrent jurisdiction with the probate court, to enforce orders of distribution. Section 6203, provides that appeals shall be allowed from the probate court to the court of common pleas, in the same manner as is provided for appeals from the probate court to the common pleas in other cases. Appeals shall also be allowed from any judgment or order of the court of common pleas to the district court in proceedings relating to the enforcement of orders of distribution, by any person against whom such judgment or order may be rendered to the same extent and in the same manner as is provided for appeals from the common pleas in other cases.

Now, it will be seen by these sections, that appeals may be allowed from the probate court to the court of common pleas, and appeals may also be allowed from the court of common pleas to the district court in cases where the distribution of assets is concerned, subject to this qualification however, "to the same extent and in the same manner as is provided for appeals from the common pleas in other cases."

In what other cases are appeals allowed? The policy of the law in this state is to allow but one appeal, for instance, as in the appeal from the magistrate to the court of common pleas, or from the county commissioners to the common pleas. The general rule has been to have but one appeal. Formerly an appeal was allowed from the court of common pleas to the district court in all cases; but that has been restricted by statute to such cases, in which the court of common pleas had original jurisdiction, and in which the party was not entitled to trial by jury. There are two cases, we think, in which appeal would clearly lie, notwithstanding this policy. One is where the probate court reserves the case to the court of common pleas, and being in the nature of a chancery case, it would be appealable to the district court. The other is, where it is originally brought in the court of common pleas, that court having concurrent jurisdiction with the probate court in the distribution of estates. But we do not think, where a case comes originally from the probate court to the court of common pleas by appeal, that any further right of appeal lies to the district court.

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NEW TRIAL.

[Hamilton District Court, December, 1881.]

†JACOB BROCK v. AUGUST BECKER.

1. Where in a suit for foreclosure of a mortgage, an excessive amount is found due by reason of an erroneous method of calculating interest, and this is not discovered until after the term, a petition for a new trial lies under section 5305, as for error in the assessment of the amount when the action is on contract, though for foreclosure.
2. Such petition must affirmatively show that it is filed not later than the second term after the discovery of the error.
3. A mere allegation that the error was not discovered until after the term at which the judgment was rendered, where two terms have passed since then, is bad on demurrer.

BURNET, J.

This petition was filed for a new trial of a case that was tried in this court at the April term, 1880; or, to modify the judgment that was rendered at that trial. The plaintiff, in the present petition—who was defendant in the original case—averts that the defendant, Becker, held a note for \$5,000, dated October 5, 1870, and payable six years after date to his, Becker's order, executed by plaintiff, Brock, with six per cent. interest from date until paid, which was secured by a mortgage; that Becker filed his petition in the court of common pleas to foreclose the

†See also opinions in 6 Dec. R., 1009 (s. c. 9 Am. Law Rec., 482), also 5 Dec. R. 510 (s. c. 6 Am. Law Rec., 380.)

mortgage upon this note which was the last note recited in the mortgage, and the only one that remained unpaid, and obtained a judgment of foreclosure from which an appeal was taken to this court; that the case was tried at the April term of 1880, in this court, and a judgment of foreclosure was rendered in his favor; that a suit had also been brought upon the note in the superior court, upon which a judgment had been rendered in favor of Becker, and a petition in error was filed in this court to reverse that judgment and this court affirmed the judgment, but in deciding both cases this court refused to allow any penalty to the plaintiff, Becker; that afterwards the counsel for Becker prepared a decree of foreclosure in which he made the amount due upon the note \$8,228, to the first day of the term, April 5, 1880, which amount included a penalty upon the amount of the judgment; that he handed up a decree having thus prepared it to the court with the statement, in answer to the interrogatory of the court, that it was all right, and that thereupon, without examination of the court it was entered upon the journal, to all of which defendant Brock, by his counsel excepted. It is charged in the petition which was filed within less than one year after the rendition of the decree of foreclosure that this decree was procured by the fraud of the counsel for plaintiff in the other action in including in the amount of the decree a penalty which the court had refused to allow and not informing the court that it was so included.

Upon an examination of the figures we find that the five per cent. penalty was not included, but that the amount of the decree was made up by adding to the principal of the note the interest that would be due at its maturity which was six years after its date, and then calculating interest upon the sum thus produced to the first day of the term in which the judgment was rendered. This calculation gives the precise amount for which the decree was taken. The addition of five per cent. to the proper calculation of principal and interest would make more though not very much more than the amount for which the decree was taken. It appears, therefore, from the face of this petition that there was not included in the judgment the five per cent. penalty which it is alleged was included in contravention to the express order of the court. There was, therefore, no such imposition such as is charged by counsel when the decree was handed up. It was not, in other words, obtained by fraud of counsel. There is error, however, in the amount. This method of computing interest is not allowed. The note simply called for a certain amount to be paid with interest, from date. It is not allowable, therefore, to treat it as separate from the principal, and a sum to bear interest of itself; but it is simply incident to the principal, to be calculated from date to the time of payment or to the term of the judgment. If it were payable annually or at any other stated periods, then it might be added to the principal and thus capitalized and itself bear interest. But where the note is made simply to draw interest from date, the interest itself cannot become a principal and bear interest, except by some subsequent act of the parties making it so. There is this error, therefore, in fixing the amount due upon the decree. It is alleged in the petition for a new trial that it was obtained by mistake, and it is alleged that the error was not discovered until after the term of the court was past at which the decree was entered. Under the section to which the party has referred us there would be no remedy. There is a preceding section, however, section 5305, the fifth clause of which provides for a new trial where there has been error in the assessment of the amount

of the recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property. The action it is true was for foreclosure, but it was upon contract. Section 5309 provides that when the grounds for a new trial could not with reasonable diligence have been discovered before but are discovered after the term at which the verdict, report or decision was rendered or made, the application may be made by petition not later than the second term after the discovery. This petition was filed on the 17th day of June, 1881. The entry was made at the April term, 1880, in the month of July, of that year. There intervened between that term and the time of the filing of the petition two terms, which had passed. The petition was not, therefore, filed at the second term after the rendition of the judgment but was filed later than the second term after the rendition of the judgment. The petition for a new trial must be filed not later than the second term after the discovery. Now, this allegation is exceedingly indefinite, that the error was not discovered until after the term at which the judgment was rendered. How long after does not appear, and it must affirmatively appear upon the petition that the plaintiff has a good cause of action. It does not appear that the petition was filed not later than the second term after the discovery of the error. The defendant demurs generally to this petition. On either ground the petition is bad.

Demurrer sustained.

Jordan, J. & Williams, and J. B. Gibbons, attorneys for Brock:
William Disney, *contra*.

THOMAS HARTZELL v. JOHN SHANNON, Admr.

For opinion in this case, see 6 Dec. R., 1093; (s. c. 10 Am. Law Rec., 444.)

TAXES AND TAXATION.

[Superior Court of Cincinnati, December 8, 1881.]

AUGUST DRAUDE v. L. A. STALEY, Treasurer.

Where, by an error in the action of a decennial board of equalization, a piece of property is valued, during ten years, for less than it should have been, the auditor has no authority to add on the duplicate the accumulated taxes on the omitted value for the past ten years, sections 1038 and 2800, Revised Statutes, which are substantially the same, do not authorize it, for they refer only to the pending duplicate. Section 1040 refers to the omission of a class of tax, and section 2803, amended 78 O. L., 47, refers to property which has wholly escaped taxation, of which the owner must be presumed to be aware, but no authority to make additions is given to the auditor, and this is not unreasonable, for the owner is not presumed to be aware of it, and it is too late for him to appeal to

the annual boards of equalization for a hearing, and if such owner cannot pay his taxes without paying such accumulation, he may pay and bring suit to recover back the unauthorized part.

HARMON, J.

Defendant demurs to the petition, wherein the plaintiff seeks to recover certain money paid by him upon demand of the defendant for taxes charged against him on the duplicate.

He avers that his property was appraised at the decennial appraisal in 1870, and he has paid taxes upon it every year since; that last July the auditor claimed that there was an error against the county in the figuring of the auditor in 1870, in making the deductions authorized by the state board of equalization, to the extent of \$1,500, in the total value of his property and proceeded to add to the tax of the current year, the tax on \$1,500 since 1870. Being upon the duplicate and the treasurer refusing to receive any of the taxes unless he also paid that, he was compelled to pay. Under the statute authorizing the recovery of taxes, illegally collected, the question of voluntary payment cannot arise here, because the tax was upon the duplicate, and the treasurer was armed with the powers of the law against this defendant to collect it. The only question is, was the tax illegally collected.

The powers of the auditor with respect to taxation are only such as are conferred upon him by statute; and it has been the policy of the courts to give those powers a strict construction. Certainly a free state cannot complain of a strict construction of the powers it confers upon its own officers, for the summary collection of taxes from its citizens.

There are three sections which the county solicitor contends authorize this action of the auditor, sections 1038, 2800 and 2803, Revised Statutes. The two former are substantially the same, one coming under the title of "County Auditor," the other under that of "Assessing Real Estate." They simply provide that the auditor may correct any errors he may from time to time discover in the duplicate. It is manifest, however, that the powers conferred by these two sections relate only to the pending duplicate. One of the provisions relates to the manner of noting or making corrections after the delivery of the duplicate to the treasurer; another provides for the refunding of overcharges upon duplicates of former years, with a limitation of five years and requirement of investigation by an authority from the county commissioners. The legislature has here recognized the manifest difference between correcting an error in a pending duplicate and undoing the consequences of errors in former duplicates; and by so expressly providing for the refunding of past over-payments, makes its silence upon the subject of subsequent collections in cases of mere under-payment significant. Surely, it cannot be that it was intended to so limit the power of the auditor over errors of one sort and give him power without limitation as to time or action by the commissioners over errors of the other sort.

An examination of the other section referred to, 2803, and of section 1040, makes the case still clearer for the application of the maxim "*expressio unius exclusio est alterius*." The latter authorizes the auditor to charge upon the present duplicate any class of tax—county, township, etc., which may have been omitted from any former duplicate, with a limitation as to time. The former as amended (78, O. L., 47), gives him like power with like limitation in cases where any land, lot, or improvement

thereon, shall not have been returned by the assessor or shall have escaped taxation by error of the auditor. The powers above mentioned being the only ones expressly or by implication conferred upon the auditor, it follows that a mere error of calculation of the kind in question is beyond his power after the duplicate for the year is closed. As to the current year the action of the auditor is a correction, and the plaintiff cannot recover. As to former years the action of the auditor is an addition which he had no authority to make, and to that extent plaintiff can recover.

There is nothing unreasonable in this view and nothing inconsistent with what may be supposed to be the policy of the framers of the law. Everyone must be supposed to know when his property escapes taxation, but he cannot be supposed to know of error of this kind, and it would be a great hardship for a citizen, after paying his taxes for many years and regulating his affairs accordingly, to be called upon to pay, in a single sum, not only the taxes of the current year, but an accumulation of back taxes, as to which it is too late for him to appeal to the annual boards of equalization.

J. R. McGarry, attorney for plaintiff.

Chas. Evans, for defendant.

APPEALS.

[Hamilton District Court, December, 1881.]

Cox, Johnston and Longworth, JJ.

JOSEPH H. ANDREW v. RACHEL CONNELLY.

The right of appeal from a justice's court is barred by a refusal to make counter-claim more definite and certain.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

The case was originally commenced before a justice of the peace. The amount involved is not very considerable, and perhaps these parties are litigating more for the purpose of vindicating their right and defending a principle, than for the dollars and cents involved in it. It appears that Rachel Connelly was employed by plaintiff in error as domestic in his family, at the sum of \$2.00 per week. She alleged in her bill of particulars filed before the justice that such was the employment and the price agreed upon. It seems that the length of time of the services was not very protracted nor very agreeable; for, she alleges she was employed on the 24th of the month; she went to the residence of the plaintiff in error upon the 25th, and entered upon her services as domestic, and that upon the 26th he drove her from the house, and that she was obliged to resort to an action of replevin to recover her clothing. She asked damages in the sum of \$18 in this action and at once demanded a jury. The record shows, that when the cause came on to be heard, the plaintiff in error offered to file a counter-claim, asking \$25 damages against the plaintiff. The record shows, that objection was made by counsel for plaintiff to the filing of this for the reason that it was not sufficiently definite and certain. Thereupon the justice ordered the defendant, Andrew, to make his "set-off" more definite and certain, which Andrew then and there refused to do. The record shows that the case then proceeded to trial and there was a verdict for plaintiff below for \$8.

Thereupon Andrew gave notice of appeal, to which plaintiff below objected; but notwithstanding the protest of plaintiff below, the justice accepted the bond on the part of appellant and the case was appealed to the court of common pleas. Upon reaching that court, Rachel Connelly filed a motion to dismiss the appeal, alleging it was a case not appealable, on the ground that all she demanded was \$18, and that he, Andrew, in point of fact, never filed any claim as a counter-claim or set-off, and on the ground that the statute provides, where the amount in controversy is less than \$20, and a jury-trial is demanded, no appeal lies. The court below refused to grant the right of appeal, to which ruling Andrew excepted. The bill of exceptions presents the original counter-claim or demand, which the record says, was offered by plaintiff in error to be filed, but, according to the record was not filed. In fact, all the original papers are attached to the bill of exceptions and there is no oral testimony offered. The transcript of the justice is also attached, and upon this record we are asked to review it and to reverse the judgment of the court below. The statute relating to the proceedings of justices of the peace requires, that the plaintiff must file a bill of particulars setting forth his claim against defendant, and that if defendant asks to recover against plaintiff by way of set-off or counter-claim he must upon request of the plaintiff set out the particulars of the set-off or counter-claim. The plaintiff is entitled to this. It appears from the record that such request was made before this justice of the peace, or rather, that an objection was made that it was not definite and certain and that the justice ordered him to make it definite and certain. The code of practice governing courts of record which is applicable to practice before justices of the peace requires that the set-off or counter-claim of defendant must be presented in an intelligible manner so that not only the court, but also the plaintiff may understand exactly what he or she is to meet. Now in this case in which Mr. Andrew sought to file what the justice calls a set-off—which is in fact a counter-claim—the counter-claim was in fact indefinite and uncertain in this that it did not appear that the damages of \$25 accrued out of breach of the contract described in the plaintiff's bill of particulars or that it was in any way connected with that transaction. The counter-claim simply reads as follows: "Rachel Connelly, to Joseph Andrew, Dr. To damages sustained by reason of failure and insufficiency of plaintiff's contract, \$25." The motion of Mrs. Connelly was, therefore, well taken and the justice did not err in ordering him to make his counter-claim definite, and having failed to make such amendment the record does not show that he filed any counter-claim at all, and the case, therefore, we are bound to hold, proceeded to trial without any bill of particulars setting forth a counter-claim or set-off being filed in the case at all. The statute provides in substance, that appeals shall not be allowed in any case before a justice of the peace where the case was tried to a jury, and where neither party in his bill of particulars demands more than \$20. Therefore, there being no bill of particulars on the part of defendant, there is no ground of appeal to the court of common pleas, and that court did not in our opinion err in dismissing the appeal. Andrew's remedy, it seems to this court, was by petition in error to reverse the order of the justice requiring him to make his counter-claim more definite and certain.

Judgment of the common pleas dismissing the appeal affirmed.

Mallon & Coffey, for plaintiff in error.

Davis & Marsh, for defendant in error.

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Markley v. Michael.

815

[Hamilton District Court, 1881.]

WESLEY M. CAMERON v. WM. CAPPELLAR, Auditor.

For opinion in this case, see 6 Dec. R., 1089 (10 Am. Law Rec., 443.) This case was reversed by the Supreme Court, with report. See opinion, 41 O. S., 533.

819

[Hamilton District Court, December 14, 1882.]

JAMES W. O'CONNOR v. MARY J. RYAN, Exrx., et al.

For opinion in this case, see 6 Dec. R., 1095 (10 Am. Law Rec. 477.) This case was affirmed by the Supreme Court, with report. See opinion, 41 O. S., 368.

823

[Hamilton District Court, 1881.]

VICTORIA BUILDING ASSOCIATION v. ARBEITER BUND.

For opinion in this case, see 6 Dec. R., 1108 (s. c. 10 Am. Law Rec. 485.)

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[Hamilton District Court, December 2, 1881.]

J. C. A. SACK v. LOUIS A. HEMANN et al.

For opinion in this case, see 6 Dec. R., 1104 (s. c. 10 Am. Law Rec. 483.)

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LIEN ACQUIRED PENDENTE LITE.

[Hamilton District Court, December, 1881.]

Burnet, Johnston and Longworth, JJ.

GEORGE C. MARKLEY v. AUGUST MICHAEL.

1. Where a suit to subject property was begun, and a lienholder was made defendant, but, before service upon him the property owner mortgaged it, the mortgagee cannot claim against such lienholder, that in purchasing at the sale under the decree the lienholder bought subject to the mortgage, and the mortgagee not being a party to the suit cannot claim that had he been he would have received the share of the proceeds distributed to the mortgagor. Although the provisions of sec. 5055 Rev. Stat., as to *lis pendens*, protect a plaintiff only from liens acquired after service of summons, yet the setting up by a defendant lienholder of his rights, relates back to the beginning of the action, and is as much protected by its pendency as the plaintiff would be.
2. Where, in an action to foreclose a mortgage, the holder of a mechanic's lien is made a party defendant, the statute of limitations ceases to run against his lien, and although he does not file a pleading setting it up, until the two years he is given has run out, it is not barred. From the filing of the petition he became entitled to be regarded as one of the litigants, and his interest was presented for adjudication by the filing of the petition.

PETITION in ERROR to reverse the judgment of the Court of Common Pleas.

BURNET, J.

The petition in the court of common pleas, in which court the plaintiff in error was plaintiff and defendant in error was defendant, alleges that on the 12th day of December, 1874, one Arnold Suer and Genevia Suer, his wife, executed to plaintiff a mortgage on certain real estate described in the petition to secure payment of their note which is set out in the petition, and that the mortgage was, on the 15th day of December, put upon record; that in the month of October, about two months previous, one Schultz, a judgment creditor of Arnold Suer, had filed his petition in the court of common pleas against Suer and wife, the mort-

gagors, to set aside a deed which it was alleged was given by Suer to a third person and by him conveyed to the wife of Suer, for the purpose of defrauding his creditors; that to this petition the defendant, August Michael, was made a party defendant; that a building association was also made defendant; Michael and the other party defendant having mortgages upon this property which were liens upon the property before the month of October, 1874; that the defendant, Michael was not served with summons in the case until the month of January, 1875, a day later than the time when the mortgage which the plaintiff held from Suer and wife was put upon record, and that after his service in January he filed his answer and cross-petition in the cause setting up his mortgage; that such proceedings were had in the cause that a decree was rendered finding the equities of all the parties, finding that the deed made by Suer, and the subsequent deed made by his grantee to the wife of Suer were in fact made for the purpose of defrauding creditors and providing that the deed should be set aside as fraudulent, finding the mortgage of the building association was a lien upon the property; that the mortgage of August Michael was also a lien upon the property and that Schultz, the plaintiff in that action, by reason of the judgment against Suer and wife had a lien upon the property, and directing the property to be sold; that the property was sold and purchased by August Michael, the defendant in this action, and thereupon a decree of distribution was made; that the mortgage of August Michael was paid in full; that after the satisfaction of the other mortgages set up in the action there remained the sum of \$75.00 which was ordered to be paid, not to Schultz, the plaintiff in the action, but to Suer's wife, on the ground that she had furnished the money wherewith, in part, her husband had bought the property, and was to that extent his creditor, and being clothed with the legal title, we may infer, although this is not stated, she had a preferable lien upon the property for the payment of that amount, and the plaintiff asks that the property may by sold to pay his mortgage.

There is a demurrer to the petition on two grounds, one that there was a defect of parties defendant; and secondly, that there were not sufficient facts stated in the petition to constitute a cause of action. The demurrer was sustained. Leave was given plaintiff to file an amended petition, of which leave he availed himself. The structure of the amended petition was different from the original petition, but it did not contain any material facts necessary to make out the cause of action not set out in the original petition, a motion was therefore made to strike the petition off the files on the ground that it did not substantially change the original petition. This motion was granted, and judgment rendered for defendant. Plaintiff in error claims that the court erred in sustaining the demurrer in striking from the files his amended petition. The contention is that inasmuch as the mortgage from Suer and wife to plaintiff, was recorded before the services of summons upon Michael in the original action, and before he entered appearance, which entry was made by filing an answer and cross-petition, that Michael was bound to take notice of his mortgage which was upon record, although that mortgage had been taken by him during the pendency of the suit, and that as to Michael there was *nolis pendens* which protected him from the obligation to take notice of the rights of the plaintiff, and that, inasmuch as after the payment of the anterior mortgages upon the property there remained a sum of money which by the decree, in the absence of the plaintiff from that action was awarded to Mrs. Suer who was one of the mortgagors of the

plaintiff, and which, therefore, if he had been defendant in that action setting up his rights, would have been awarded to him, that he is now entitled to have the property sold, for the purpose of paying off his mortgage.

The provision of the section of the Code of the Rev. Stat. specifying what shall be *lis pendens* does say, in substance, that when a petition has been filed by a plaintiff, after a service of the summons upon the defendant, a third party may not acquire adversely to the plaintiff from the defendant any interest in the property sought by the plaintiff to be subjected. The counsel for the plaintiff in error, claims that this would protect Schultz, who as judgment creditor, had filed his petition in the court below to set aside the deed of Suer and wife; but as Michael, the mortgagee, had not been served with process until after the plaintiff, Markley had acquired his rights by a mortgage subsequent to the commencement of the suit, that he, Michael, is not protected against the rights of Markley, and, that Markley, as against him might acquire an interest in the property sought to be subjected in the action.

We have not been cited to any authorities bearing upon this precise question. The language of the Code, it is true, does provide that an interest in the subject matter of the action cannot be acquired as against the plaintiff during the pendency of the action, but the petition, the averments of which are substantially recited in this petition of the plaintiff, did set out that the defendant, August Michael, had a mortgage lien upon the property which it was sought to be sold and require him to come in and set up his mortgage lien.

It has been held by this court, in a case which came before the court some years ago, that where a party, in seeking to foreclose a lien upon real estate made defendant to his action another, who held a mechanic's lien upon the property, and required that he should appear in the action and set up his claim, but the holder of the mechanic's lien did not appear in this action until after the two years within which he might foreclose his lien as against the owner of the property, that nevertheless his right of action remained, and the statute of limitations ceased to run when the action was begun, although begun by another party. He became entitled, from the filing of that petition to be regarded as one of the litigants in that action, and his interest was directly presented for the adjudication of the courts by the filing of that petition.

The Supreme Court, in case of *McEwing v. James*, 86 O. S., 152, has held that the statute of limitations ceases to run against a set-off from the time of the commencement of the action in which it is pleaded, and that although the petition filed does not at all suggest the existence of the set-off. Now applying the analogies; when the petition was filed by Schultz to set aside the conveyance made by Suer to his wife and to subject the property to the payment of his judgment, inasmuch as he made August Michael a party defendant as having a mortgage lien upon the property, if Michael afterwards came in and set up his mortgage lien, it will avail him against parties obtaining an interest from Suer and wife in the subject matter of the action after the action was begun as much as the plaintiff would be protected by the pendency of the action. We think, therefore, that the court below did not err in sustaining the demurrer, nor, as there was no substantial change made by an amendment to the petition, do we think the court erred in ordering the amended petition to be stricken from the files.

Judgment affirmed.

[Hamilton District Court, 1882].

834

ADOLPHUS H. SMITH v. WM. C. MINCHELL.

For opinion in this case, see 6 Dec. R., 1106 (s. c. 10 Am. Law Rec., 484.)

[Hamilton District Court, 1881].

835

R. S. HAMILTON, Trustee, et al. v. CLARK JACOBS.

For opinion in this case see 6 Dec. R., 1094 (s. c. 10 Am. Law Rec., 445.) Also see note to that case.

DECEIT—EVIDENCE.

8

[Hamilton District Court, 1881].

†UNITED STATES HOME AND DOWER ASSN. v. JACOB REAMS et al.

To prove that fraudulent representations were used to induce the signing of a contract, all that took place between the parties may be introduced in evidence to explain what transpired.

ERROR to Common Pleas Court.

JOHNSTON, J.

Plaintiff in error was defendant in the common pleas, and prosecuted this petition in error to reverse the judgment entered there for some \$200 in favor of Reams and wife. The action was commenced originally before a justice of the peace by Reams and wife. It was taken to the court of common pleas by appeal. Reams and wife first filed a petition on appeal and then an amended petition in which they substantially state, that this defendant is a corporation organized under the laws of Pennsylvania, but having an office in this state; that its agent at Tippecanoe, Miami county, in this state, through fraudulent representations, induced the plaintiffs to pay to the association \$200, the false and fraudulent representation being, that the defendant was engaged in the business of loaning money, the agent, as they claim, representing at the time, before plaintiffs signed any papers, that this association had a large intact fund of \$40,000; that, in addition to that, they owned property and assets of a large amount, and were ready at all times to accommodate all parties with loans who might ask it, upon giving sufficient real estate security, and to give them loans of money in any reasonable sum. They further allege that the promise was made by this agent that they should have the amount of money they desired, to-wit: \$4,000, upon their farm, within ninety days; that in default thereof the money they advance would be returned to them with 8 per cent. interest. They allege that these allegations were false; that this association never did have the sum of \$40,000, nor any other reserve fund to loan to persons who might become members of the association; that after having paid the money and waited ninety days for the loan of \$4,000, and the loan not being then forthcoming, they demanded the money back, and they allege that the defendant agreed to pay back the money advanced, but never did so, wherefore they bring this suit.

†This decision was affirmed by the supreme court commission, without report, November 11, 1884.

The association answers, admitting it is a corporation for the purpose named in plaintiff's petition; but this association denies that it ever agreed to loan these plaintiffs, or either of them, any sum of money whatever. It goes on to allege that it operated upon the endowment plan or system; that where a person would subscribe for a certain number of certificates of deposit in trust for accumulation, by paying \$22.50 every year for twenty-one years, there would be ready for each certificate \$1,000, the amount of the endowment, at the expiration of that time. They allege that the husband and wife knew of this plan, that they signed a declaration and an agreement in which it was agreed that upon these payments annually they would become entitled to this endowment, and they say that the installments were paid for two years, but that plaintiffs are in default for the third year; and they ask by way of cross-petition, a judgment against plaintiffs for the sum of \$90, the amount claimed to be due for the third year; of installments on the four certificates issued to them, all the installments for the first two years having been paid, and all fraud is denied. To this a reply is filed by plaintiff, denying all allegations of the answer. Upon these issues the case was submitted to the court, without the intervention of a jury. Judgment was rendered below for \$180 in favor of plaintiffs, together with interest and costs.

Various exceptions were taken during the trial as to the admission of evidence on the part of plaintiffs, and error is claimed also in that the court excluded certain evidence of the defendant. Motion for a new trial was also filed, and it is alleged that the court erred in overruling the motion for a new trial.

We have had occasion to pass upon a case somewhat similar to this, between a party who had purchased certain certificates of this corporation and this association; and we have, as in the former case, examined the bill of exceptions with care for the purpose of ascertaining the rights of the parties. The question in the case is really as to whether the court below had before it sufficient evidence upon which to base its judgment. There was quite an amount of evidence heard by the court under the objection of counsel for the association, it being a case in which the court very properly ought to have heard all the evidence offered by either side. In such cases it is a rule of law to open the doors wide in order that the court may ascertain, if possible, whether either of the parties have been in fact defrauded. A motion was made at the close of the evidence in the case to exclude all the incompetent and irrelevant evidence introduced on behalf of plaintiff, and the record shows that the court granted the motion. It was for the court to determine what was competent and what was incompetent, and the court having ruled out all incompetent evidence, it is proper to presume that the court acted only upon the competent evidence in the case. Fraud, of course, cannot be presumed, it must be proven. It need not be proven beyond a reasonable doubt, but the court is to be governed by all the facts and circumstances of the case, and if, in the opinion of the court, fraud has been practiced by either party, it is the duty of the court so to decide. It appears from the testimony in this case clearly, that Reams and wife were not capitalists seeking to buy four certificates of this association, and after paying \$22.50 per year for twenty-one years, at that time to receive the net sum of \$1,000. The evidence of Reams entirely disproves any idea like that; but, on the contrary, his testimony and the correspondence of the

agency disclose the fact that he was from the first a borrower, and that he was not a capitalist seeking to invest money in this way; that he was a borrower of money to relieve himself from the embarrassments into which he was gradually drifting; that he was induced by the representations of the agents to take these certificates of stock; that through these representations he was induced to part with \$180, fully believing that, according to the representations of the agent, within ninety days he would obtain for him \$4,000 less 20 per cent; that upon this he was induced to sign the papers. Where a party is sought to be held by a paper writing and he sets up that it was procured through fraud, the rule of law is that oral testimony will be admitted to prove the fraud. That has been the settled law in England and has always been the law in this country. The party upon discovering the fraud must, of course, act promptly. Now, in this case, it seems, that this man Reams was a person living in Tippecanoe City, Miami county, this state. He seems to have been a confiding man. He seems to have placed implicit confidence in the agent who obtained the \$180 from him. He made application to become a member on February 8, 1879. He made application for a loan at that time or the next day thereafter. In three months from that time he says he was to receive \$4,000, less 20 per cent; and the money not coming he then commenced to write to the agent here, to Scranton, Pennsylvania, the headquarters, and to Washington City. It seems to have been an association with many departments. It had a middle department; it had a western department; it had a central department; and it had departments in Kentucky, Ohio, Indiana, and Missouri. And it seemed from the evidence to have a great number of agents; an agent called a superintendent of finances, a superintendent of loans, a general manager, and a great number of other important agents. It seems to have had every class of agent but that of paymaster. The evidence seems to disclose that through all these agencies not more money was taken in, than sufficient to pay the agents so employed; and some of the agents testified that in fact all the money this association had wherewith they might pay these members was received from the dues of members who might be induced to go into the association. As a last resort, after baffling this man for almost a year, he writing to them and they replying by letter and postal cards, they finally sheltered themselves behind the fact that the money they expected to loan him was dependent upon a private bill pending before congress; that they expected to make out of this bill about \$1,000,000; that the time of congress was just then largely taken up with public business, and when the proper time arrived they would obtain one-quarter of a million dollars, and they go on to say when that bill passes they will make all these certificate holders feel good. A year passed by and the agency having been removed from Troy to here—its only business now being to defend certain suits brought against it—this party being satisfied a fraud had been practiced upon him, brings this suit to recover back this money obtained from him, as he claims, through fraudulent representations. There is a blank in evidence which the plaintiff testifies reached his hands from the agent located at Troy. The association denies that they ever agreed to loan him any money, but that he was in only on the twenty-one year plan. There is a blank paper attached to the evidence in which it is stipulated that he, the borrower, did bind himself and would bind himself to accept the money within ninety days from the time when it should be offered to him. Of course, he would

have been very glad to accept it; but, why insert such a stipulation that he was to receive money within ninety days? We are satisfied from this evidence that this unsophisticated countryman was induced by fraudulent representations to enter into this agreement, expecting to receive this money from defendants. We think, therefore, there was no error in the court allowing evidence to be introduced to explain just what transpired between these parties before the paper was signed.

Judgment of the court below affirmed.

S. F. Crawford, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

15 ACKNOWLEDGMENT—LANDLORD AND TENANT.

[Superior Court of Cincinnati, General Term, January, 1882].

MARGARET R. POOR v. SARAH S. and MAURICE J. SCANLAN.

1. The qualifying clause "where the amendment does not change substantially the claim of defense," of section 5114, Revised Statutes of Ohio, authorizing amendments to conform pleadings to the facts proven, does not refer to the form of the remedy, but only to the claim of defense.
2. Where the acknowledgment of a lease is written on a separate sheet of paper, the lease is invalid to pass the term.
3. While one occupying the premises as assignee, is liable to pay rent according to the provisions of the lease, yet this liability is not upon the covenant therefor, but upon an implied contract.
4. Where a woman is married while occupying property under such a lease, by virtue of a devise of the lease to her for life, and continues after marriage to occupy jointly with her husband, and there is nothing to show the contrary, her interest in the property, under the devise, will continue her separate estate by virtue of section 3108, Revised Statutes of Ohio, and the occupation will accordingly continue to be her occupation, referable after marriage as well as before to the original entering.
5. Rents accruing during continuance upon such occupation are liabilities arising on a contract of the wife subsisting at the time of marriage.
6. In such case an action at law will lie against her during coverture, but under section 4996, Revised Statutes of Ohio, the husband must be joined. For the satisfaction of the judgment recovered in such action, the separate estate of the wife is primarily liable.

FORAKER, J.

This case was reserved upon the evidence. It is an action for rent.

From the pleadings and the evidence it appears, that March 1, 1857, the plaintiff, being then the owner thereof, leased a certain lot on the north side of Third street in the city of Cincinnati, to George Selves, for ninety-nine years, renewable forever.

The certificate of acknowledgment of the lease was not written on the same sheet of paper that the lease was written upon, but on a separate sheet attached to the paper the lease was written upon, by a common paper fastener. All parties seem, however, to have been ignorant of this fact until after this suit was brought. Selves held possession of the premises under the lease, paying the rents reserved therein, \$250 every quarter, until his death in 1862. When he died he left a will by which he devised to his widow Sarah Selves, now Sarah S. Scanlan, the defendant herein, all his real estate for life. She elected to take under his will, and at once took possession of this leasehold estate. She remained in possession continuously until after this action was commenced, paying the rents reserved according to the covenants of the lease, until June 1, 1878, when she refused to pay the quarter's rent then falling due, and offered to sur-

render the premises, which offer was not accepted. She has not paid anything since. In 1869 she married her co-defendant, Maurice J. Scanlan, who, jointly with her, has occupied and used the premises since, until they quit possession in 1881.

This action was commenced in 1879, to recover four installments of rent that had become due, amounting to \$1,000. The petition simply alleged that there was due the plaintiff, from Sarah S. Scanlan and Maurice J. Scanlan, for rent of the said premises, \$1,000, and prayed for judgment against the defendants. Nothing was said, either in the style of the case or the body of the petition, about the defendants being husband and wife. No reference was made to the lease, and there was no allegation that the wife had a separate estate. The case stood upon this petition and a general denial by the defendants, when it came on for trial. The facts above mentioned appearing, the plaintiff was allowed to re-file an amended petition which she had previously filed and withdrawn, in which the facts above stated, except as to the defective acknowledgment of the lease, were fully set out, together with allegations that the wife had a separate estate, followed by a prayer for judgment and appropriate relief. The defendants excepted to the re-filing of this amended petition, and thereupon answered, denying all the allegations of the amended petition, except that George Selves occupied the premises at his death; that Mrs. Scanlan was the devisee of all his real estate for life, and that she entered into, and held possession of the premises in question until 1881, and that she married Scanlan in 1869; also that she held for life, under the will of Selves, the real estate described in the petition as her separate estate. Defendants claim that the amended petition ought not to have been allowed, because a departure.

It is not pretended that defendants were surprised or placed at any disadvantage by it. The provision of our code on this subject is that such amendments may be made when in furtherance of justice, and when they do not substantially change the claim or defense. Section 5114. In the case of *Spice v. Steinruck*, 14 O. S., 213, it was held that this did not refer to the form of the remedy, but only to the general identity of the claim, and consequently, that it was permissible, as was done in that case, to so amend the petition as to change the action, which was to recover damages for a malicious prosecution, to support which malice and want of probable cause had to be shown, to an action for damages for an illegal arrest, to sustain which it was not necessary to show malice or want of probable cause, but only a void process. The amendment in this case certainly does not change the claim that is made in the petition. At most it but changes the form. It can scarcely be said to fairly do even that. It is really nothing more than a statement of the facts of which we have the naked legal effect set forth in the petition, with some allegations about a separate estate, which according to our view of the case, are only so much surplusage.

Considering the case upon its merits there are two general propositions relied upon by the defendants. In the first place it is claimed that, because Mrs. Scanlan was the devisee of this leasehold only for life, she took less than the whole term, and that she was consequently a sub-lessee, and not an assignee, and if but a sub-lessee, not liable to the lessor, for want of privity of estate.

For a second defense it is insisted that the defendant, Mrs. Scanlan, has done no act to authorize her separate estate to be charged.

Either of these propositions would be sufficient for the defendants if it could be applied to this case. But in our opinion neither one has application.

The first has not, because the instrument intended for a lease to Selves was invalid, as such, by reason of the acknowledgment being written on a separate sheet of paper. *Winkler v. Higgins*, 9 O. S., 599. It did not pass the term to Selves. It was, consequently, at most but an equitable lease, giving him a right to occupy and enjoy the premises upon the terms and conditions named in it, and binding him, as upon personal covenant, to comply with its terms and conditions so long as he remained in possession. *Bridgmans v. Wells*, 13 O., 43. The equitable right was all that passed by the devise. And this right the defendant took without assuming his personal covenant. Her undertaking was by an implied contract to pay for her use and occupation, so long as she enjoyed the same, according to the terms of the lease. This contract was between her and the lessor; hence there was privity of contract at least.

The second proposition would be unanswerable, if the plaintiff's right to recover a judgment depended upon a right to charge Mrs. Scanlan's separate estate upon such a contract entered into during coverture. For we fully agree with the claim of her counsel, that in such a case it must be shown that she *intended* to charge her separate estate, and that such intention was relied upon. But, in our judgment this is not such a case. This is merely an action to recover a personal judgment, and whether or not such a judgment shall be rendered, does not depend upon, and is not affected by the question whether or not she at all has a separate estate.

Mrs. Scanlan was a *feme sole* when she took possession of these premises. She was therefore competent to contract, and as we have seen, did, by implication, contract to pay, according to the terms of the lease, so long as she remained in possession. Her continued possession, after marriage, as well as before, must be referable to her original entering, and must have been therefore in pursuance of the contract to which we have alluded as thereby made for her by operation of law. Especially do we think so in view of the fact that she took possession for life, and hence did not have occasion to periodically consider, whether or not she would continue there. This being true, she held the premises at the time the rents accrued, for which she is now sued, under a contract which the law made for her when she took possession and which was in force when she married her co-defendant, whereby she was obliged to pay the same. It is upon that contract that this action is based; a contract therefore subsisting at the time of the marriage; not made during coverture, but before.

This view is not affected by the fact that her occupation, after marriage, was jointly with her husband, since her interest and rights in the property, under our statute, section 3108, remained her separate estate.

The case is therefore, properly stated, an action against husband and wife, to recover rents that have become due, during coverture, upon a contract made by the wife before marriage, and existing at the time of marriage. At common law marriage made the husband liable for the existing obligations of his wife. But in all actions against him to enforce them, she must be joined as a co-defendant without regard to whether she had a separate estate or not. *Drew v. Thorne*, Aleyn, 72 7 Term, Rep. 384. If, therefore, we had no statute on the subject this action would lie against the defendants for a money judgment. In such a case, however, *i. e.* if there were no statute, the separate property of the wife

could not be taken to satisfy the judgment. But in such actions we have instead of the common law rule that the *wife* must be joined with the husband, section 4996, of our Revised Statutes, which requires the *husband* to be joined with the wife. And instead of the wife's separate estate being exempt from liability to be taken to satisfy the judgment, we have it expressly made liable by section 3110, which provides that "the separate property of the wife shall be liable to be taken for any judgment rendered in an action against husband and wife, upon a cause existing against her at their marriage, etc."

-The language of this section has been changed somewhat since the case of *Westerman v. Westerman*, 25 O. S., 500, where it was construed to mean that the wife's separate property was not only liable to be taken in such case, but that as between her and her husband's property, it was primarily liable; but the change has only made it more apparent that the legislative intent agreed with the construction of the court.

Our conclusion is that this is an action against Mrs. Scanlan and her husband on a contract obligation of hers, existing at their marriage; that it is immaterial whether she intended to charge her separate estate or not, and that judgment should be rendered for the plaintiff which is accordingly done.

J. W. Herron, for plaintiff.

J. H. Perkins and D. H. J. Holmes, for defendants.

BAILMENT—CONVERSION.

17

[Hamilton District Court, December 14, 1881].

ROBERT L. CRIGLER v. J. W. GAFF & CO.

1. A bailee, after conversion of the property of his bailor, or unjustifiable refusal to deliver the same, cannot recover for the care and keeping thereof thereafter.
2. If, after the conversion of property by a bailee, in an action by the bailor to recover damages for such conversion, the money representing the sale of such converted property is, upon the motion of the bailor, paid into court; and upon the motion of bailor, a portion thereof is afterwards paid over to him, and by agreement of bailor and bailee they agreed to litigate as to who is entitled to recover the balance left in the hands of the court, the bailor will be deemed to have waived any damages sustained by such conversion beyond the sum remaining in the hands of the court.

JOHNSTON, J.

This case comes here on error to the court of common pleas. It is a controversy about 432 head of hogs, delivered by Crigler to the firm of Gaff & Co., on the 3d of January, 1876, to be fed by them at their distillery in this county, at an agreed price of three cents per day per head.

Briefly to state the facts, while these hogs were in the possession of Gaff & Co., Grotenkemper & Co., of this city, instituted a suit against Headley & Peck, to recover a debt against them. They caused an attachment to issue, suit having been brought in the common pleas court, and they desired the sheriff to levy upon these hogs as the property of Headley & Peck. The officer declined to do so without some indemnity being

†This case was affirmed by the supreme court commission, without report, June 24, 1884.

given, which, not being given, they served process of garnishment upon Gaff & Co. To that proceeding R. L. Crigler never was a party in any sense. There was judgment in the case against Headley & Peck; Gaff & Co. answered the garnishee process, and after the answer was filed, Crigler appeared and wanted his hogs. They refused to deliver them. Thereupon he commenced an action in the superior court against Gaff & Co., for \$10,000 damages, for the unlawful conversion of these hogs. Grotenkemper & Co., on the ground that Gaff & Co. had not made a satisfactory answer, threatened suit against them as garnishees. Thus Gaff & Co., being threatened upon this side and upon that, instituted this action in the common pleas, to enjoin both, Crigler and Grotenkemper, from proceeding to bring an action against them, on the part of Crigler, alleging his pending action in the superior court against them for the conversion of these hogs, and to enjoin Grotenkemper & Co. from commencing an action against them as garnishees for the amount of their judgment, and asking that they be required to interplead to settle who was entitled to the fund. A restraining order was granted in the common pleas court, and an answer was filed by Crigler, in which he alleged that he was not a party to the suit of Grotenkemper & Co., wherein these hogs had been attached; that they had been unlawfully levied upon, and that the sale that had taken place in the Grotenkemper case, although by order of the common pleas court, was of no effect as against him, inasmuch as he was not a party to that suit, and that the property ordered to be sold was not the property of Headley & Peck, but his property. He claimed, therefore, in his answer or cross-petition in the court of common pleas, the same as claimed in his petition in the superior court—a case of unlawful conversion of his property, and without making any reference to the proceeds of the sale of the property, that were then in the hands of Gaff & Co., he asked that he might recover as against Gaff & Co., \$10,000 for the conversion of these hogs. He set up no claim to the proceeds of sale.

Grotenkemper & Co. filed an answer in the nature of an interpleader, setting out their judgment in the court of common pleas, and asked that it might be paid out of the funds in the hands of Gaff & Co.

When the case came on to be heard for an injunction, or rather a further restraining order, an entry was made by the court, against the objection of Crigler, in which the rights of the party were very correctly defined. This entry was made on the 11th of March, 1878, in which Grotenkemper and Crigler were both restrained from prosecuting suits against Gaff & Co., until the title to the fund should be determined, the right being specially reserved to Crigler to prosecute in this action in the common pleas as against Gaff & Co., his claim of damages for the conversion of the hogs. He excepted to the whole entry.

Then, upon the 13th of March, 1878, Crigler appears in this injunction suit, and moves that Gaff & Co. be required to pay the funds arising from the sale of the hogs, \$7,151.63, into the hands of the clerk of the court. On the 23d of March, 1878, that motion was granted, and Gaff & Co. were ordered to and did pay in the \$7,151.63 arising out of the sale of the hogs, and \$682.98 interest from the 19th of August, 1876, until the 22d of March, 1878, making altogether \$7,834.61. And it was further ordered that the disposition of said sum shall not be considered a judgment against the plaintiff as to their liability to pay interest, nor conclude their right to recover for the feeding of the hogs after the alleged conversion—up to their sale in August.

Matters remained in that condition until October 28, 1879, when Mr. Crigler came forward and moved the court that this fund, then in the hands of the clerk representing the sale of these hogs, alleged by him to have been unlawfully converted to be paid to him, and the court made this order, "that the clerk pay to Mr. Crigler, out of the funds in his hands, \$6,531.06; and it is further ordered that the balance of said funds be retained by him until further order of the court." Then, on the 27th of October, 1879, we find this order: "The clerk of this court is directed, by consent of parties, to pay the plaintiff, Gaff & Co., or their attorneys, the sum of \$1,353.55, the balance remaining in his hands out of \$7,834. 61, paid into court by the plaintiff in this cause, this order not to prejudice the rights of said parties to the recovery of said sum, or any part thereof." This disposed of the funds.

The cause then came on to be heard to a jury, and after Crigler had introduced all of his evidence, and Gaff & Co., all their evidence, Gaff & Co., by their counsel, moved to take the case from the jury, which motion was granted, and to which Crigler excepted. And thereupon the court proceeded to dispose of the question as to \$1,303, about which the parties at the last entry agreed to litigate as to who should have it, to-wit: \$600, and over, for interest that accrued upon the proceeds of the sale of these hogs from August 17, 1876, up to March, 1878, when, upon Crigler's motion, they were paid into court, and \$600. and over, for the feeding of the hogs, after the alleged conversion by Gaff & Co., up to the time of sale.

The court, in disposing of the case, decided that Crigler should be enjoined from prosecuting his case in the superior court against Gaff & Co., for the unlawful conversion of the hogs. The court decreed that Gaff & Co. should pay interest from the time the hogs were sold up to the time they paid the money into the hands of the clerk of court. The court further decreed that Gaff & Co. were not entitled to recover for the feeding of the hogs from the time of the alleged conversion up to the time of sale. No order was made as to the interest on the \$1,303 after it had been paid by the clerk into the hands of Gaff & Co. The court decreed that Grotenkemper should pay the costs of the action in the court of common pleas up to the time they went out of the case, they having gone out of the case before the money was paid into the hands of the clerk, upon their own motion confessing that they had no right to levy on the hogs. The court then decreed that Crigler should pay all the remaining costs of the action, and that it should be taken out of the \$1,303.

Various exceptions were taken, both by counsel of Gaff & Co. and for Crigler; and both prosecute in this court petitions in error to reverse the judgment of the court below. Crigler claims that the court erred in not allowing the jury to pass upon the question of damages for the conversion of the hogs, over and above the sum realized for them, and Gaff & Co. complain of the decision below, in that they were not allowed three cents per day for the feeding of the hogs from the 27th of June, 1876, to the time of their sale by order of court.

We are of opinion, after a careful examination of this record, that, while perhaps the court may have, on some points, erred technically, that no error has been committed to the prejudice of Crigler, except in two minor matters. The general conclusion reached was correct. The verdict of the jury upon the question of interest, and the feeding of the hogs, could not have been more favorable than the action of the court afterward. It was his right to have maintained his position upon his

answer, claiming damages for the unlawful conversion of these hogs, and up to the time he filed his motion to have the funds paid into court (with which he ought never to have had anything to do, if he would occupy a consistent position), he had the right to prosecute and recover any damages he had sustained by the action of Gaff & Co. in their unlawfully having sold and disposed of his hogs. The re-delivery of the property to him, by Gaff & Co., would not have cut off his right to any damages he may have sustained by the falling of the market or otherwise before the delivery. But in this case we find that upon the motion of Crigler—this motion to have the funds paid into the hands of the clerk of the court, and especially by the consent order made to have the balance of \$1,303 returned to the possession of Gaff & Co.—that he may by agreement with Gaff & Co. chose to liquidate the claim for damages,—that they substantially chose to look to the fund as the representative of the value of the hogs, and litigate as to it, and no further. The entry of October 27, 1879, reads: "This order is not to prejudice the right of the said parties to the recovery of said sum" (the \$1,303). At the time that this entry was made it was not a case of interpleader. It stood really as a case between Gaff & Co. as defendants, and Mr. Crigler as the plaintiff. It was his right to have stood, from the first, upon his claim for damages for conversion. The final entry, under which this \$1,303 was returned, to Gaff & Co., fixes and limits the controversy to that balance, as to who should be entitled to recover it. Any damages beyond this were in our opinion by the act of the parties waived. Now, was the action of the court correct in the disposition of this fund? We are of opinion that with the exception of the question of costs and as to the matter of interest on the \$1,303, the judgment of the court below was correct. We think the court erred in assessing all the costs of this action, after Grotenkemper went out of it, against Crigler. They should be paid by Gaff & Co., because after Grotenkemper & Co. withdrew from the case and admitted they had no right to levy upon the hogs, Gaff & Co., who were then no longer in danger of being prosecuted further by Grotenkemper & Co., should have come forward and paid Crigler, or offered to do so; but they did not. They desired to have determined whether they should pay interest, and whether they were entitled as against Crigler for the feeding of the hogs after the alleged conversion. The court below determined both of these claims against them; and we think the costs should have followed that decision. We think they should have been compelled to pay the costs not assessed against Grotenkemper & Co. This money was paid back to Gaff & Co. October 27, 1879, and for all that appears on the record, they still have that money. We think they should be required to pay interest upon it to Crigler. This being a case in which we think we have the right to enter such judgment as should have been entered in the court below, a judgment in conformity with this decision will be prepared.

V. H. McDowell and L. M. Strafer, for plaintiff.

Moulton, Johnson & Levy, for defendants.

DIVORCE.

20

[Hamilton Common Pleas, January, 1882].

EDSON S. WELLINGTON v. MARIA E. WELLINGTON.

Where without service of process in fact, but upon a false return of service procured to be made by fraud practiced on the sheriff, judgment for divorce is obtained at one term of court without any notice whatever to the defendant upon a charge of adultery, such judgment may be set aside by the same court upon petition filed at the following term, it appearing that neither of the parties had a domicile in the state, and that the charge of adultery was groundless.

AVERY, J.

The petition was filed December 23, 1880, to set aside a judgment of divorce and alimony, for adultery of the husband, entered at the preceding term of this court, September 4, 1890, upon the ground that the wife had procured the summons to be returned served by obtaining some one falsely to personate her husband, who was not within the jurisdiction, and had no notice whatever of the proceedings.

The evidence shows clearly that from their marriage in Vermont in 1870, until August, 1879, when the wife was detected by the husband in an act of adultery, they had lived together, that at the time their place of residence was Nashville, Tennessee, where the husband was, as he continues to be, teacher in the State Normal College, but they were upon the occasion visiting at the house of a half brother of the wife in New Hampshire; that they then separated, the husband supplying means to enable the wife to go to her friends in Massachusetts, but on his return to Nashville, at the close of September, finding her there, where she remained, although not living with her husband who had begun in the courts of the state an action for divorce which failed because he had not been a resident for two years, until January 8, 1880; that she first appeared here about the time her petition for divorce and alimony was filed June 26, 1880, her counsel having been previously advised by letter from a lady acquaintance in Chicago that a Mrs. Wellington would call upon him for his services in procuring a divorce, and to him she gave her residence as No. 173 W. Fourth street, which was a lodging or boarding house, and said her husband lived in the same house; that the deputy sheriff finding this address on the back of the summons, and going to make service, was told by the servant who answered the bell that Mrs. Wellington lived there, but not Mr. Wellington, and reporting this to her counsel he said there was some mistake, and he would go himself with the deputy the next day, and did go; that the servant again came to the bell; that something was said to her by the counsel; that she went up stairs and a man came down; that he was asked, are you Edson S. Wellington? that he answered yes! and the service was made.

The indubitable proof is that the husband was then at the house of his brother-in-law in East Middlebury, Vermont, and that he was in that state at the house of his brother-in-law, or at the house of his father in Bethel, from June 3, 1880, to the last of September; that he had no notice whatever of the proceedings, and had not been in Cincinnati except on May 28, when he stopped one day at the Burnet House on his way from Tennessee to Vermont for his summer vacation, and was not in the state again until between the second and fourth of October, when he passed through without stopping, on his way back to Nashville.

This suit finds the wife in Chicago, where summons was required to

be sent for service, and where her answer, which denies everything, but which she has not ventured to support by her testimony, was sworn to.

The judgment was obtained, it appears, upon depositions, except one witness, a physician, who testified in court that a year or two before, he had treated her private disease a man calling with the wife and representing himself as her husband, but whose impression now is, on being confronted with the plaintiff, that he was not the man. The depositions were taken at the office of the counsel, but the persons were strangers to him, and he cannot remember their names. They have disappeared from the files.

The evidence is too palpable of gross and flagrant imposition upon the officer charged with service of the process, and upon the court. The only question is as to jurisdiction upon an application at a subsequent term to set the judgment aside.

The case of *Parish v. Parish*, 9 O. S., 534, is regarded by the defendant as conclusive upon the point. It is there held that a decree of divorce from the bonds of matrimony, although obtained by fraud and false testimony, cannot be set aside on an original bill filed at a subsequent term. The reasoning of the decision is that the statute provided that no appeal should be taken from the decree, but the same should be final and conclusive, and that this was nothing more than a legislative recognition of the principle of public policy repeatedly affirmed, that a judgment which affects directly the status of married persons, and leaves them free to contract new matrimonial relations, should never be re-opened. *Bascom v. Bascom*, 7 O., part 2, 126; *Laughery v. Laughery*, 15 O., 404; *Bingham v. Miller*, 17 O., 445; *Tappan v. Tappan*, 6 O. S., 64.

The statute now in force providing that no appeal shall be allowed, omits to provide that the judgment shall be final and conclusive, but the effect is the same, and the rule of public policy has not changed. In *Parish v. Parish*, *supra*, however, the fraud was in preventing the defendant from really having notice, although publication as required to give jurisdiction was duly made. In that case there was service, here there was none, and by the fraud of the party, the record is made in that respect to speak falsely.

The power of a court over its own records continues for some purposes at least, after the term. In *Critchfield v. Porter*, 3 O., 519, where no process was served upon a defendant, and an attorney entered appearance for him without authority, and there was judgment, it was held that the court rendering the judgment might set it aside, on his motion, at a subsequent term. In *Huntington & McIntyre v. Finch*, 3 O. S. 445, 448, it was said this had become, in this state, one of the accustomed and settled remedies for relief against judgments wrongfully obtained, where the impropriety or irregularity had not been superinduced by the fault or negligence of the judgment debtor. In *Longworth v. Sturges*, 2 O. S., 545, *Ranney, J.*, it is conceded that power is possessed by all courts to set aside judgments and decrees obtained by fraud, mistake or irregularity.

The power is over the record itself, and reaching back to correct mistakes which when apparent would defeat jurisdiction, the judgment is at once set aside.

In *Ex parte Crenshaw*, 15 Pet., 119, judgment upon an appeal for the appellant was set aside at a subsequent term, it being shown that in printing the record for use by the court, the return of the marshal that

citation was not served upon the appellee, had been accidentally omitted. In *Wales v. Wales*, 119 Mass. 89, the court upon petition at a subsequent term, set aside a decree of divorce, which by inadvertence in not observing a legislative modification of the statute made pending the proceedings was without authority, and of no effect.

The jurisdiction is of an equitable nature, and in its exercise governed by the settled principles of equity; *Huntington & McIntire v. Finch*, 3 O. S., 445; *Tiernan v. Hammond*, 41 Md., 548; although for the reason that control over the record affords powers adequate to relief, it is held that chancery will not interfere. *McKee v. Bank of Mt. Pleasant*, 7 O., part 2, 176. Fraud, therefore, heightens the claim to relief.

In *Edson v. Edson*, 108 Mass., 590, a divorce of which the court had no actual jurisdiction, but only an apparent jurisdiction founded on a false allegation of domicile, was set aside upon petition at a subsequent term. In *Crouch v. Crouch*, 40 Wis., 667, 670, where the only jurisdiction obtained in a proceeding for divorce was by publication upon false affidavit of the plaintiff, it was held that this was gross and inexcusable fraud upon the court and the defendant, and vitiated the entire judgment and proceedings.

Fraud vitiates everything, and a court upon being satisfied of such fraud has power to vacate, and would vacate its own judgment, *Philipson v. Egremont*, 6 B. 606, *Denman, C. J.* The power being equitable may be subject to be controlled by considerations affecting third parties, but this must depend upon the nature of the case. To procure by means of false personation a return of the service of summons against a person never served, and not within reach of the process, is a fraud upon the jurisdiction, and leaves the court without capacity for judgment. Whether in such case the judgment shall be upheld, is a different question from that decided in *Parish v. Parish*, *supra*.

In that decision, the fact that jurisdiction had been obtained, is dwelt upon. The case of *Greene v. Greene*, 2 Gray, 361, is also considered analogous, and in the subsequent case of *Edson v. Edson*, this is distinguished, upon the very ground that it was an adjudication after due notice to the adverse party. The consideration involved as to innocent persons were in respect to a judgment that the court had power to enter. There was fraud in obtaining the judgment, but jurisdiction had attached and still left it a judgment.

That case is totally unlike this one. Here there is a judgment upon the record, without any jurisdiction in fact, and the record, although a falsehood, is not open to be collaterally impeached. *Callen v. Ellison*, 13 O. S., 446, 454. To deny to the court entering such judgment the power of correction, and to give it within this state, although void everywhere else, the effect of a valid judgment would dishonor the law. Public policy cannot require this, for it cannot be public policy that a fraud upon the jurisdiction of the state shall be upheld.

Neither the place of the marriage, nor the residence of the parties was in this state. The letter heralding the presence here of the wife, was from Chicago, and it is in that city, when the divorce has been obtained, that she is found. That she was here only for the peculiar purpose that was accomplished, and that she had no home in our midst with the intention of remaining, is morally certain.

Considerations as to the effect of setting aside the judgment, upon other matrimonial relations that may chance meanwhile to be contracted,

are of no weight, when if the judgment had been obtained under like circumstances in another state, a new marriage would be invalid under our laws. A decree of divorce granted by a state in which neither of the parties are domiciled, is beyond the limits of the state a nullity. *Van Fossen v. State*.

Whether this proceeding should have been by motion, is so far as concerns substantial ends, not material. A motion indeed was made, but when this petition was filed, it was by leave of court and without prejudice withdrawn. The petition is not in the nature of an original proceeding, but, as said in *Edson v. Edson*, is a petition addressed to the sound discretion of the court, in the nature of an application to correct the record, and prevent wrong and injustice from the effect of the judgment as it stands.

The case, it is submitted, is not affected by the decision in *Parish v. Parish*. The right to exercise the power may be deemed fully established in American courts, and when the special facts of the cases are regarded, there is no conflict. *Bishop on Marriage and Divorce*, 5 ed. 753*a*, 754*c*, 753*d*, 753*e*.

The information that the judgment had been obtained, chanced to reach the plaintiff at Nashville immediately upon his return in October, and it is objected that he had time enough to file a motion in the term, which ran to the first Monday of November. But until November 27, when motion was made, was not an unreasonable time to occupy in communicating with counsel here and in making inquiries.

The objection that the motion when made was an appearance, and cured the original want of jurisdiction, is equally groundless. It was not within the term. It was based upon want of jurisdiction. *Marsden v. Soper*, 11 O. S., 503, 506; *Simcock v. National Bank*, 14 Kans., 529.

The objection that, for a false return the remedy must be against the sheriff, is generally true, but the exception is where the return has been made, by fraud or collusion with the plaintiff. *Ridgeway v. Bank*, 11 Humph. 525 526; *Craft v. Dexter*, 8 Ala., 767; *Owens v. Ramstead*, 22 Ill., 161, 168; *Leftwick Hamilton*, 9 Heisk., 310, 313; *Walker Robbins*, 14 How., 584. The reason is the same as in judgments upon appearance by attorney without authority. *Critchfield v. Porter*, 3 O., 519, *Shelton v. Tiffin*, 6 How., 163; *Harshey v. Blackmore*, 20 Ia., 161. And see *Bradford v. Abend*, 89 Ill., 79, in which case a decree of divorce upon a bill filed in the name of a wife, who was insane, and in close confinement in another state at the time, was set aside.

The claim of the plaintiff to relief, upon the undisputed testimony of the case, is a strong one. Judgment of divorce and alimony, upon a charge of adultery made by the wife, stands against him on the records of this court. So far from his appearing to be guilty of any such charge, it is fastened upon the wife. She had no domicile within the state, the court had no jurisdiction over him, but misled by her fraud, in procuring a false return of service by the sheriff, entered judgment.

The judgment is set aside.

McGuffey, Morrill & Strunk, for plaintiff.

Caldwell & Caldwell, for defendant.

BUILDING ASSOCIATIONS.

29

[Superior Court of Cincinnati, General Term, January, 1882].

WINDHORST v. GERMANIA BUILDING ASSOCIATION, No. 3.

1. In the building association, in which the plaintiff was a member, the withdrawal of borrowing members and the cancellation of their mortgages before maturity was regulated, not by any provision of the mortgage, but by the by-laws.
2. That by-law in force when he became a member provided that the premium must be paid in weekly installments of one dollar each, and that such withdrawing member must pay the premium in full.
3. When plaintiff had in due course paid the greater part of the premium on his shares, the legislature passed an act, providing that in all building associations the premium shall be paid in equal weekly installments calculated for a period equal to the estimated duration of the association; that a withdrawing member shall pay, not the whole premium, but a relative proportion of it; and providing also that adjustments previously made should not be opened up.
4. Upon the passage of this act, the association repealed its existing by-laws and enacted new ones. The new by-laws regulating adjustment with withdrawing members made no exception as to old members. The plaintiff at once began to pay premiums in installments according to the new by-law, and both he and the association, in their mutual relations, acted under the new by-law.
5. Held: The association could not require the whole of his premium as a condition of withdrawing. Also, the plaintiff was not entitled to recover back any portion of the premium paid in accordance with the old by-law while it was in force.

FORCE, J.

This is an action brought to recover back money illegally exacted from the plaintiff, as is alleged, when he withdrew from the association.

Plaintiff having seven shares in the association, drew out his money in advance, giving a premium of \$79 per share, and gave a mortgage on real estate to secure his payment of dues, interest, fines and premium. When he became a member, and when he drew out his money, the by-laws provided, that the premium on each share should be paid in weekly installments of one dollar. They also provided, that the withdrawing member, withdrawing at any time, must pay the whole of the premium bid, as one of the conditions of withdrawing.

Subsequently the legislature passed the act of April 15, 1880, which provides that "the premium paid in any one year shall not exceed such proportionable part of the premium bid as one year bears to the approximate number of years which that class of years run," and that a borrowing member, in adjusting and paying off his loan, shall pay not the whole premium bid, but a "relative proportion of the premium bid for the time the loan is retained, as hereinbefore provided."

The association thereupon repealed its existing by-laws, and adopted new by-laws provided for payment of premium and adjustment by withdrawing members in the mode prescribed by the act of 1880.

After this, Windhorst gave notice that he desired to adjust his loan, cancel his mortgage and withdraw.

The secretary of the association made a statement of the amount to be paid by him, which statement was according to the by-law when he became a member. He objected to the amount, but being unable to continue payments having contracted to sell his land, and the purchaser being unwilling to take it unless the mortgage was wholly paid off, he

paid the amount under protest, and now brings this suit to recover back the amount which he claims was unjustly exacted.

The question is, whether or not the adjustment should be made in accordance with the by-law in force when he became a member, or the one in force when he left.

The terms of the mortgage do not affect the case. The mortgage provides the mode of satisfying the mortgage by continuing weekly payments until the association winds up. The by-laws provide for the mode in which a member shall adjust and withdraw before the association winds up. The question is, which by-law, the old one or the new one, controlled.

By-laws of an association, like statutes of a legislature, are repealable. At the same time it is a rule that where a party acquires a vested right in pursuance of statute, or by-law, that vested right will not be taken away by the repeal of the former.

It is also a rule that the parties may agree that a right which had vested may be waived, or may be changed. In some cases of the consolidation of life insurance companies, where all the policy holders agree, the policies can be given up and new policies issued by the new company. But if some member refuses to agree, the liability of the old company must be kept alive for his benefit.

Now, in this case the association having repealed the old by-law, and passed the new by-law without excepting from its operation members who came in under the old by-law, the association proposed to make all subsequent adjustments, with all members, old as well as new, in accordance with the new by-law. If the old members accept that, the agreement is complete.

The plaintiff, with other old members, began at once to pay the unpaid residue of premium in weekly installments of a few cents in accordance with the new by-law instead of weekly installments of a dollar, in accordance with the old by-law; and to accept diminished dividends, necessarily diminished by the operation of the new by-law. The new by-law, being by its terms applicable to the plaintiff, and the association and the plaintiff having acted in accordance with it from its passage, the plaintiff was entitled to have his final adjustment in accordance with it. The legislature understood that subsequent adjustments would be made in accordance with the new rule introduced by the statute, for it provides that all adjustments heretofore made in good faith, in accordance with constitutions and by-laws, shall be valid and binding.

There is a possible obscurity in the statute, which by a change in punctuation, and a slight change in phraseology in transcribing the statute into the by-law, becomes a real obscurity. The statute says: "The borrowing member shall be permitted to adjust and pay off his loan by paying to the association an amount, which added to dues and interest already paid, and earnings credited, will aggregate the sum actually borrowed, with the legal rate of interest thereon, and a relative proportion of the premium bid for the time retained, hereinbefore provided." That is, he shall pay a sum, which, to dues and interest already paid, and earnings credited, will be equal to the sum borrowed with legal interest thereon, and shall also pay a relative proportion of the premium bid.

The plaintiff had already paid considerably more than the "relative proportion of the premium bid," and he could not be required to pay more. During the greater part of his membership, he had paid his

premium in weekly installments of one dollar each. But these having been made in accordance with the by-law in force at the time when payment was made, and the association having conducted its operations upon the faith of such payments, the plaintiff cannot demand any reimbursement. But when he has paid all weekly installments of premium up to the time of withdrawal in accordance with the by-law in force at that time when such weekly installments respectively accrued, no more can be required of him.

The amount of premium which he paid in excess of this sum, was paid without consideration. And being exacted of him, and paid without consideration and under protest, and, under the circumstances of the case, to obtain what was his right, he is entitled to recover it back.

Judgment accordingly.

Foraker and Harmon, JJ., concur.

Francis Lampe, for plaintiff.

Baldwin & Bruner, for defendant.

SIDEWALK ASSESSMENTS.

30

[Hamilton Common Pleas, January Term, 1882].

CITY OF CINCINNATI, for the use of LLOYD v. BLYMYER MANUFACTURING CO.

In a sidewalk assessment, the resolution to improve and notice served upon the owner, must be reasonably specific as to place; failing to make it so will relieve the owner from the assessment.

SUBMITTED on a statement of facts.

AVERY, J.

This is an action to recover an assessment for 185 lineal feet of brick sidewalk in front of the property of the defendant, on the south side of Ninth street, between McLean avenue and Harriet street.

The resolution of the board of public works was duly passed and the notice was duly served upon the Blymyer Manufacturing Company, for construction of the sidewalk in accordance with the resolution, describing it simply as the sidewalk on the south side of Ninth street, between Harriet street and McLean avenue, in front of the premises of the Company 185 feet. At the same time from a notice served upon the same day, it appears that there had also been a resolution to improve 200 feet in front of the premises of the Blymyer Manufacturing Company, on the south side of Ninth street, between Harriet street and McLean avenue by laying down a plank sidewalk. There are two resolutions after the expiration of the time prescribed by law within which the owner of the property has an opportunity to comply with the resolution himself; one for the plank, and the other for brick sidewalk. These resolutions putting the work in the hands of the contractor are no more definite than the resolution to improve, perhaps not so much so, referring merely to the resolution to improve and describing the premises as belonging to the Blymyer Manufacturing Company on the south side of Ninth street between Harriet street and McLean avenue. The work was done under the superintendence of the city civil engineer, and during its progress the superintendent of the manufacturing company objected both to the contractor and the engineer, that the walk was not being put down in the right place.

The premises of the Blymyer Manufacturing Company front upon the south side of Ninth street, between Harriet street and McLean avenue, 385 feet in all. The brick sidewalk was put down in front of the west 185 feet. That part of the property is occupied by the store rooms for heavy machinery and castings, requiring in egress and ingress to the building that the pavement should be sufficient to sustain great weights. The east 200 feet of the premises is occupied by the shops and offices of the company, not requiring therefore that the pavement should be such as to sustain the weight necessary in moving heavy machinery and castings.

It would seem, although it does not definitely appear from the statement of facts on which this case was submitted, that, while the brick sidewalk for which the assessment in controversy was made was laid in front of the west 185 feet, the plank sidewalk for which the resolution seems also to have provided, was laid in front of the east 200 feet. The statement of facts is that the company was compelled to take up the brick sidewalk that had been laid under this assessment, and replace it by a plank sidewalk, and to take up the plank sidewalk and replace it by brick.

It is admitted that the contractor in laying the sidewalk acted under the direction of the civil engineer and under the resolutions as he understood them. If the question were one simply as to the weight of the evidence upon the question whether the sidewalk was laid in the proper place, it might be said that the weight was with the plaintiff, for here is an assessment, here are the acts of the civil engineer, here are the presumptions which attend the performance of duty by officers of law. And where the question touches an assessment which is valid upon its face, there must be something, some weight of evidence, when the question is one of weight of evidence, to overturn the *prima facie* presumption that attaches to the fact of the assessment itself.

In my opinion, however, the question is not one of the weight of evidence, but is to be determined by construction of the ordinances of the city providing for this character of the work.

The essential prerequisite to an assessment under the ordinance itself is that there should be notice; notice to the owner of the property; and the notice required is notice of the resolution, the initial act upon the part of the municipal corporation to improve.

The ordinance provides that when, in the opinion of the board of public works, it shall be necessary to construct or repair any sidewalk, they shall pass a resolution specifying the place. Under some circumstances it might be a sufficient specification merely to give the location of property, as upon a street between two other streets, with a specification of the frontage by number of feet. But if there are two pieces of property of the same owner which would answer the description, certainly a notice of that kind would not be specific.

This property of the Blymyer Manufacturing Company on the south side of Ninth street, between Harriet street and McLean avenue, was 385 feet in front. The resolution was to pave in front of the property 185 feet, without saying where, and the notice did not say where. The object of the notice is to enable the owner to do the work himself. Certainly the resolution ought not to be so indefinite as that if he acted upon his interpretation of the resolution, he might be required to do work over again.

It appears there was an interpretation put upon the resolution by the city civil engineer, and that the contractor acted as he understood it.

Upon the other hand, the superintendent of the Blymyer Manufacturing Company, charged with the supervision of their interests, acted upon his understanding when he objected that the pavement was not in the right place. Taking the circumstances which are detailed in the statement of facts, there would appear reason to believe that it was not in the right place. Of course it does not follow that the city in the discharge of this municipal function is bound by the reason of convenience that may appear good to the proprietor. The city might have required the brick sidewalk to have been in front of the 185 feet, although it might have been more convenient that the plank sidewalk should have been there, but the defect of the resolution is that the city has not acted by its board of public works in specifying that place, and the resolution and notice are both indefinite in determining in what place the sidewalk was to be put.

Now, the duty of the city civil engineer does not extend to locating a description which by the resolution itself has been left indefinite. The general provision of the ordinance is that the sidewalk shall be constructed under the direction of the city civil engineer, who shall give such grade stakes and information as shall be necessary to a strict compliance with the ordinance. But this is to be reasonably construed in view not only of the duties of the board of public works itself, but of the duties of the city civil engineer. The duties of the board of public works are to pass a resolution specifying the place, and it could not have been intended to leave such a resolution subject to varying understanding and judgments, whether it be of the owner of the property, or of the city itself; at least it requires some very specific provision of law to believe that that could have been the meaning of this ordinance.

In another point of view, the information to be furnished and direction to be given by the city civil engineer are to be taken as information and direction within the scope of the duties of his office. Now, the first section of the ordinance regulating the construction of sidewalks, which ordinance is under consideration, provides that the sidewalk shall be constructed under the supervision of the city civil engineer, so as to conform to the curb grade of the street and slope regularly from the top of the curb to the side of the street; in other words the supervision of the city civil engineer is designed to secure the proper construction of slopes and grades, and has nothing whatever to do with the place.

The resolution itself being indefinite is not within the authority of the ordinance. The assessment, therefore, which is upon the footing of the resolution and notice, must fall. There must be judgment for the defendant.

W. H. Whittaker, for plaintiff.

S. N. Maxwell, for defendant.

SALES--DELIVERY.

32

[Hamilton District Court, 1881].

MOWRY CAR AND WHEEL WORKS v. A. SHORTER.

1. Where on a purchase of iron the contract is that it is not to be paid for until it is delivered at the yard of the purchaser and weighed, the delivery is not complete until so delivered and weighed.
2. If before all the iron is delivered in the yard of the purchaser and weighed, a portion of it is attached on proceedings against the seller, the purchaser is

- not required to replevin the iron as his own, but may leave it in the hands of the officer as the property of the seller, and not delivered to him.
3. The purchaser of iron is entitled to reasonable time to examine whether it be of the quality purchased; but when it is seized or attached as above, and without examining it he offers to take and pay it if the defendant will have it released from the attachment, which the purchaser refuses to do, this does not estop the purchaser from afterwards examining the article and refusing to accept it if it does not conform to the contract.
 4. Payment of freight by the purchaser on presentation of the bills of lading before the iron reaches the place of delivery does not estop him from denying that it never was delivered, nor of the quality purchased.

PETITION IN ERROR to reverse the judgment of the Superior Court of Cincinnati.

COX, J.

An action was brought in the superior court by Alfred Shorter, to recover the sum of \$45 per ton for 250 tons of pig iron, the plaintiff claiming a balance due of \$10,870.50; giving credit for \$1,152, paid for freightage from Tennessee to this city. The defendants below set up a number of defenses. First, a general denial; secondly, that at the time of making the contract for the iron, one C. M. Pennington was the lessee, and engaged in the manufacture of cold-blast iron, and upon his representation that this iron was suitable for the manufacture of car wheels, they ordered this, and they say that Pennington, thereafter, without their consent, transferred the contract to Shorter, who shipped the iron; that they paid the freightage on it, supposing it to have been sent by Pennington, and to be of the quality they ordered; that they since learned it was not the quality of iron they had ordered, but was a very unsuitable kind of iron, and not worth to exceed \$30 per ton in the market. They say, further, that when they ascertained this iron was shipped to them by Shorter instead of Pennington, they at once notified him that they would not receive it. They also set up, in a third defense, that after the iron arrived at Cincinnati, and before it came into their possession, and before it was weighed, it was on the 20th of August, 1880, seized by the sheriff in proceedings in attachment instituted by E. C. Harper & Co., against Shorter and Pennington, and was so held until the 2d of January, 1881. That they on said seizure, without knowing the quality of the iron, offered to pay for it, if Shorter would get it released from the attachment of Harper, but that he refused to do it. The case was tried before the court below and a jury, and resulted in a verdict for the plaintiff, for the amount claimed. Some eight or ten errors are now relied upon. The plaintiff, in the first place, introduced his proof. At the close of his case the defendant asked the court to take the case from the jury and render a verdict in favor of defendant, for the reason that the plaintiff had proven to contract between plaintiff and defendant to purchase or to receive the iron. The correspondence relied upon to show the contract between the parties does not seem to have been introduced in evidence, and the court erred, therefore, in not taking the case from the jury. But it frequently happens, in a case of this kind, when this motion is made and overruled, that the defendant will proceed and make a case for plaintiff where plaintiff has not been successful in making out one for himself. But in looking all over this case, we do not think the plaintiff succeeded any better upon the testimony of defendant than he did on his own. It is claimed that the court erred in refusing to admit certain testimony offered by defendant. The contract relied upon is evidenced by certain communications between

the parties. The first one is addressed by the superintendent of the Mowry Car & Wheel Works to C. M. Pennington, lessee of the Ætna Furnace, Georgia. To this letter Pennington signed himself "agent," on a letter reading as follows: "Office of Ætna Furnace, Manufacturers of Strictly Cold-blast Iron." "Your note at hand. I enclose you a statement of the prices of our cold-blast iron. You will see by the report that much of it is of a high grade." To this letter a reply was sent. "Yours at hand. We wired you as follows which we now confirm: 'Ship all that you have of * * * 'Don't draw.''" The last claim is that they bought this iron from Pennington, and that it was furnished by Shorter. The first correspondence was between Mowry and Pennington, as agent. Upon each communication from Pennington he signed himself as agent, never professing to be acting in his own individual capacity. They continued to correspond in the same way, and finally, when the iron was shipped in the name of Shorter, we have the first revelation of the name of the person for whom Pennington is acting. The Mowry Company write Pennington that they had bought the iron from him, and refused to receive it from Shorter; but afterwards they continued to treat with Pennington as agent. We think that they are responsible to his principal, whoever he was, if they are responsible at all.

During the progress of the trial defendant undertook to show that the iron shipped to this city was not strictly cold-blast iron, and was not fit for car wheel purpose. The court permitted testimony to be introduced by them that this was not strictly cold-blast iron. There was a great deal of expert testimony, resulting as expert testimony generally does in a great deal of difference. The defendant offered testimony tending to show that this iron was not suitable for car wheel purposes. The court ruled this out, telling the jury that the contract was to furnish cold-blast iron, and that the contract was complied with if they furnished cold-blast iron simply, and that they should exclude all testimony as to the quality of the iron for car wheel purposes, because that question was not raised in the case. It was the duty of the court to interpret the contract and instruct the jury what it was, and then permit testimony to be introduced tending to prove the question at issue. The court construed the contract to be one to furnish simply cold-blast iron. We think the court below erred in its construction of the contract. All the circumstances show exactly what the parties intended. The letter-heads were from the "Mowry Car & Wheel Works." The first communication from the Mowry Co. says that they had learned that the Ætna Furnace made a strictly cold-blast iron at that furnace, and that they believed from the representations of their agent that it was suitable for the making of car wheels. They gave the Mowry Co. to understand that they furnished what is required, suitable for the manufacture of car wheels, and they say that they made a large quantity of it of that grade, because they supposed it would sell more readily for car wheel purposes than if made of any other grade. We think it is evident from these communications that the parties contracted for 250 tons of strictly cold-blast iron, suitable for the manufacture of car wheels, and that the contract was not complied with unless the cold-blast iron was suitable for car wheel purposes. In the trial of the case the defendant undertook to show that the iron was not fit for car wheel purposes. We think this was competent and ought to have been received. Our supreme court, in *Rodgers & Co. v. Niles & Co.*, 11 O. S., 48, have held, that a party who sells articles for a specific purpose, warrants that they are

fit for that purpose. We think that this iron was sold for car wheel purposes, and being sold for that purpose, there was an implied warranty that it should be fit for that purpose, and on the trial the defendant was entitled to show that it was unsuitable for that purpose,—and we may say, that in a case like this, where such interests are involved in the capacity of the iron for the making of car wheels, we should hold the parties very strictly to the performance of the contract that the iron should be of the very best quality. If this iron did not comply with the implied warranty, the defendant was not bound to receive it, or might return it when he found it was not fit. They offered to show that it was not of the value represented, nor was fit for the making of car wheels. We think, therefore, that the court erred in excluding this testimony.

Defendants also set up, that before the iron was delivered to them, it was attached, and they were garnisheed, and therefore the iron was never in fact delivered to them. The court interpreted the contract to be, that when the iron reached Cincinnati it was the iron of the Mowry Car & Wheel Works. We think the court erred in this. The question of time, place and manner of delivery is often a very vexed question.

But the parties have themselves fixed the time, place and manner of delivery here. The Mowry Car & Wheel Works says in effect: "We will not receive the iron until all of it is delivered. The place of delivery shall be in our yards at Cincinnati, and the delivery shall only be completed when it is all in our yards and weighed. Then we will pay you for it." Now, before it could be weighed, and before it all got to their yard, it was seized by the sheriff. There was no delivery according to the terms of the contract. A party who contracts for a given number of articles is not bound to receive the articles, unless all are furnished. There was no direct delivery to Mowry & Co., and the seizure by the sheriff was a seizure as the property of the plaintiff. It is claimed, however, that the parties made no objection to the quality of the iron after it arrived in Cincinnati. The purchaser had a reasonable time to examine and determine upon its quality. As proof that Mowry Co. had acceded to the point that this iron complied with the contract, evidence is offered to show that they offered to the agent of the Aetna Furnace Co., that if he would have the property released from the attachment, they would pay the money. They claim, however, that this was done before they had an opportunity to examine the property, and that it was done by way of compromise, which the other side did not accept. By this proposition, (and particularly as it was not accepted) they did not waive any of their rights, but they are entitled to a reasonable time to examine the iron after its delivery to them, and if they found it not according to contract, to reject it. The last of this iron was delivered at Cincinnati about August 25, and was held by the sheriff in attachment up to the 21st of January next year, and then the case was dismissed. Immediately afterwards Shorter commenced this action against the Mowry Wheel Co., to obtain judgment for the iron. Upon the trial it was in testimony that part of the iron, instead of being in the yard of the Mowry Wheel Co., was held in another place. Taking the whole case, we think the court erred, in the first place in not taking the case from the jury; secondly, in holding that the defendant had no right to show the bad quality of the iron; thirdly, in holding that the iron was delivered to the Mowry Wheel Co. in accordance with the terms of the contract, and the jury having rendered a

verdict for the plaintiff below, the court should have set the verdict aside, and given a new trial.

Judgment reversed.

[Hamilton District Court, 1882].

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HIRSCHMAN v. FRATZ, Treasurer, et al.

†For opinion in this case, see 6 Dec. R., 1109, (s. c. 10 Am. Law Rec., 486).

LIFE INSURANCE.

43

[Superior Court of Cincinnati, General Term, January, 1882].

Foraker, Force and Harmon, JJ.

CHARLES B. CHILD v. MARY GRAHAM et al.

1. The assignment by a husband to his wife of a policy of insurance upon his life payable to himself, and upon which he has paid the premiums, is voidable as to creditors, if made with intent to defraud them. Section 3629, Revised Statutes, must be construed with sections 3628 and 6344, and was not intended to dispense with the bona fides of such assignment.
2. When such assignment is set aside at the suit of creditors, the proceeds of the policy inure to the creditors, when the insurance permitted by section 3628, has been received by the wife.

HARMON, J.

The object of this action is to set aside the assignment by Charles Graham, deceased, to his wife, of a policy of insurance upon his life. The policy was for \$5,000, issued in 1864. It was payable to himself, his representatives or assigns, and he paid the annual premiums, \$186.50 each, up the time of his death, October 21, 1880. A few weeks before his death, he assigned it through a trustee to his wife, in due form, and with the consent of his insurance company. It is conceded that he was then, and for some years had been, insolvent; that the assignment was purely voluntary, and that in 1866 he took out a second policy upon his life for a like amount, payable to his wife, the annual premiums upon which, \$208.60 each, he paid, and the proceeds of which she received after his death. Plaintiff, and other creditors of Graham, who appear by cross petition, charge that the assignment was void, according to section 6344, Revised Statutes, because made to hinder and delay and defraud creditors, and the right to the relief they seek is clear, if not conceded, if the court in its inquiry and adjudication is to be governed by that section, not probably because of an active, actual intent to defraud creditors, upon the well settled doctrine of imputed intent. *Jamison v. McNally*, 21 O. S., 295.

The wife's defense, however, is that her rights are to be determined by section 3629, which provides that "a policy of insurance on the life of any person duly assigned, * * * to any married woman, * * * whether such transfer is made by her husband or other person, shall inure to her separate use and benefit, and that of her children, independently of her husband and creditors, or of the person effecting or transferring the same, or his creditors * * * but if a policy be procured by any person with intent to defraud his creditors, an amount equal to the premium paid thereon, with interest shall inure to the benefit of his creditors subject, however, to the statute of limitations."

It is conceded by her counsel that a policy of life insurance, payable to one's representatives or assigns, is, after premiums have been paid upon it and while it is in full force, a chose in action which, if fraudulently conveyed to any one but a married woman, could be reached by creditors under section 6344, but his argument is that its assignment to a married woman is expressly excepted from the effect of that section by the foregoing provisions of section 3629.

In seeking the meaning of these provisions, it is necessary to consider the history of our legislation upon this subject. The first act was that of 1847, the first section of which, still in force as section 3628, Revised Statutes, provides, that any person may insure his life for the benefit of his wife and children, as he may cause to be provided in the policy, and that she or they shall receive the amount thereof exempt from all claims by his representatives or creditors; but the annual premium is limited to \$150, and, in case of a greater premium being paid, it is provided that the insurance money, in proportion of such excess to the entire premium, shall be paid to the representatives of the deceased. The second section, still in force as the first part of section 3629, provides that any woman may cause the life of her husband to be insured for her sole use, in her own name or that of a trustee, and that the amount of such insurance shall be payable to her free from the claims of her husband's representatives or creditors.

The first appearance of the part of section 3629, upon which counsel for Mrs. Graham relies was in 1872, in section 30, of the act relating to life insurance 69 O. L., 150. Although repeating, with the exception of a single clause, the language of section 2 of the act of 1847, it contains no reference to, nor repeal of any part of that act.

It would seem that this law of 1872 was merely the adoption of the Massachusetts acts referred to in *Gould v. Emerson*, 99 Mass., 154. There being in that state no such law as our married woman act of 1861, these acts were necessary there to make such policies separate estate, as well as to cut off the husband's right to change the beneficiaries named therein. See *Gould v. Emerson*, *supra*. They were probably adopted here as part of the insurance law without considering how far the act of 1861 made them unnecessary, or from mere abundance of caution, life insurance policies being a comparatively new and peculiar kind of property. Such double provisions are not uncommon.

But even if we are bound to conclusively presume that when it passed the law of 1872, the legislature had in mind all previous legislation on the subject of the state, the law may be relieved of the charge of mere supererogation, and yet be considered as merely relating to the separate estates of married women, as the corresponding part of the law of 1847 seems to have been in *Ins. Co. v. Applegate*, 7 O. S., 292.

The omission from that law of the clause of section 2 of the law of 1847, making payment of premiums out of her separate estate a condition upon which policies procured by a married woman should inure to her sole use, enlarged its scope so as to make it include policies upon which the premiums should be paid for her, or by her otherwise than from her separate estate, for instance from choses in action acquired by her before the act of 1861, and not reduced into the husband's possession. This part of the law may also be construed as enabling a married woman to enter into *contracts* relating to insurance upon her husband's life. All the expressions used are apt, when considered as intending to create in

her a separate estate in such policies; witness the provisions as to a trustee. It contains no provision as to payment by the husband of premiums upon policies so procured by her, and in view of section 1, of the act of 1847, it cannot be that the intention was to permit such payments by him to the prejudice of his creditors in excess of \$150 per annum.

Now, when in the same act, with only a semicolon intervening, a provision is found that the assignment of a policy by the husband to his wife "shall inure to her separate use and benefit, independently of her husband or his creditors," is not the conclusion natural and plain that the same object was in view, *i. e.*, to make such policy her separate estate?

The expression "independent of his creditors," is an apt and usual one to that end. An equivalent expression is found in the act of 1861, sections 3108-3109, Revised Statutes. Property coming to a married woman by conveyance, gift, etc., it is enacted shall not be liable to be taken for her husband's debts. Was it meant by this that if her husband should make her a gift or conveyance in fraud of his creditors, they may not take the property so given or conveyed, and have it applied in payment of their claims? The original validity of the transfer to her is manifestly assumed, and the sole object of the law is to prevent the consequence which at common law would follow her ownership.

In our judgment the same is true of the provisions of the law now in question. We are not quite prepared to agree with counsel for the creditors that the expression "duly assigned," refers to more than the form of the assignment or the capacity of the assignor, but we are satisfied the legislature did not intend to dispense with the *bona fides* of the transaction. When in the same clause it is provided that the policy assigned to a married woman shall inure to her separate use independently of both her husband and his creditors, the meaning is, independently of both in the same sense—of the husband seeking to assert this common law rights to it as her property; of his creditors seeking to reach it through him. In other words, the creditors referred to are creditors seeking mere collection of their debts, not creditors seeking relief from a fraud upon them. Creditors merely as such cannot complain of a voluntary assignment. They must ordinarily have been creditors when it was made. The law means that her husband's creditors may not take the proceeds of the policy merely because it is hers. The right of such of them as are entitled to complain of the assignment to take the proceeds of the policy, because, as to them, it is *not* hers, is not affected.

In reaching this conclusion, we are only following the well settled rules of construction, that the object the framers of a statute had in view must be always considered, and that, when manifest, it must limit and control the language used. Dwarrris, pp. 144, 563. Only the plainest intention unmistakably expressed could lead us to hold that such a vain thing was intended as to carefully limit an insolvent husband to \$150 as the amount he may annually expend in insurance for his wife's benefit, and then permit him by merely changing the form of the transaction, to devote an unlimited amount to that purpose.

It appears in this case that plaintiff repeatedly loaned Graham money, although he was utterly insolvent, for the express purpose of paying the premiums upon this policy. The legislature cannot be held to have intended to legalize fraud, unless it has spoken very plainly. The legislature, however, not only by section 3628, but also by the proviso in section 3629, has plainly manifested its intention not to throw down the

barriers against fraud with which, by general principles of equity as well as by express enactment, the rights of creditors are surrounded. The maxim, "*expressio unius exclusio est alterius*" cannot be applied to that proviso. It might well have been supposed that express provision was necessary in case of a policy originally procured with intent to defraud creditors, but that in case of the fraudulent assignment of a policy honestly procured, the general provisions of section 6344 would be sufficient.

An argument is made against this construction from the different effects which would follow fraudulent procurements and fraudulent assignments of policies, all the insurance money inuring to creditors in the latter case, and only an amount equal to premiums paid in the former. We are not concerned with the reasons for permitting this distinction when it clearly exists, although reasons which may fairly be presumed to have actuated the framers of a law may be of aid where its proper construction is doubtful. A reason for this distinction is manifest. A policy cannot be fraudulently obtained if payable to the insured himself, unless, possibly, because grossly out of proportion to his means. The risk itself in a policy so obtained becomes part of the assets of the insured, to which his creditors have a right to look. The risk in a policy payable to another does not become part of such assets, and therefore all that can be taken from creditors is the money paid as premiums.

Besides, there is force in the argument that the proviso applies only to persons other than the husband referred to in the act, the rights of the husband's creditors being fixed by section 3828. It is settled that that section applies only to insolvent husbands. *Pullis v. Robinson*, 13 C. L. J., 13.

The case of *Cole v. Marple*, 98 Ill., 58, cited for defendant, was, as to the facts and the relief sought, similar to this. The Illinois statutes, however, contained no provision like our section 3628. They consisted merely of what with us is the first part of section 3629, with the proviso that "if the premium of such policy is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest, shall inure to their benefit, subject to the statute of limitations."

The majority of the court held that the assignment of the husband's policy to his wife, and its ratification by the insurance company, amounted, in substance, to the taking out, by the wife, of a new policy, so that the transaction came within the provision that she might cause the life of her husband to be insured for her benefit. They held the act to be in the nature of an exemption law, and entitled to a liberal construction, and that the only rights of creditors were those given in the proviso. The minority held that it was a case of assignment in fraud of creditors, and that the statute did not apply.

We are strongly inclined to side with the minority for the reasons above given, but had the law been there as it is here, we think the court must have come to a different conclusion. If the wife's acceptance of the assignment amounted to the procuring of a new policy, the husband's giving her the assignment amounted to his insuring his life for her benefit, and would come directly within the purview of section 3628. An unmistakable exemption being already provided in section 3628, the next section could not be held to provide another grossly inconsistent one, if a different construction were fairly possible. The case of the assignment of a policy being expressly provided for, an assignment could not be held to amount to the procuring of a new policy, which is the express subject

of another clause. And, the proviso relating only to the fraudulent procurement of a policy, and therefore not being applicable to the fraudulent assignment of one, there could be no implied exclusion of other remedies in the latter case.

It is contended that even if the assignment may be set aside as fraudulent, the remedy is to be governed by the analogy of the proviso, if not by terms, and only an amount equal to the premiums paid awarded to the creditors. For the reasons already stated, we think the remedy to be applied is that of section 6344,—that the assignment being set aside, the entire proceeds go to the creditors. But if this were not so, it would make no difference in this case. The premiums paid by Graham upon this policy, with interest, equal the amount due upon the policy, and none of them are saved to the widow by the statute of limitations. That statute does not begin to run until a cause of action accrues. The creditors could not have sued upon the payment of any of the premiums to the company, because they were all paid while the policy was payable to Graham himself. Besides, "an amount equal to premiums paid," which inures to creditors, evidently refers to a share of the insurancy money, and cannot "inure" until the policy is payable. Until then creditors can maintain no action. It is not provided that they might *recover* an amount equal to the premiums. From whom would they recover it?

For these reasons we disagree with the decision in *Cole v. Marple, supra*, upon this point. We think the court was wrong upon its own theory. If the assignment was taking a new policy, then all the premiums theretofore paid upon the policy assigned must be considered as paid upon the supposed new one at the time of the assignment; then for the first time they left the possession of the husband; until then they were simply invested, for his own benefit, with the insurance company.

A decree will be entered for the creditors, setting aside the assignment, and ordering the amount due on the policy to be paid over as provided by law.

Foraker and Force, JJ., concurred.

S. N. Maxwell and J. C. Healy, for creditors.

Bellamy Storer, for Mrs. Graham.

[Superior Court of Cincinnati, General Term, January, 1882].

46

JAMES T. WORTHINGTON v. LOUIS BALLAUF.

For opinion in this case see 6 Dec. R., 1121, (s. c. 10 Am. Law Rec., 505).

[Superior Court of Cincinnati, General Term, January, 1882.]

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FULTON BUILDING ASSOCIATION v. JOHN J. HOOKER et al.

For opinion in this case, see 6 Dec. R., 1123, (s. c. 10 Am. Law Rec., 559).

CITY LICENSES.

[Superior Court of Cincinnati, Special Term, December, 1881].

Ex parte RYAN AND JOHN W. RYAN.

1. Under section 2669, Revised Statutes, as amended (77 O. L. 74), the city council may delegate to the mayor the authority to fix the amount of license fees, within limits fixed by the council.
2. Even if such delegation were not so authorized, the entire ordinance of January 28, 1881, is not rendered invalid thereby, in so far as it makes the giving of performances without license invalid, the ordinance would still be lawful, and persons who would avoid its penalties should pay the license fee and sue to recover it back, if unlawfully exacted.
3. The court, upon habeas corpus, will not presume that the mayor has exacted any or more than the minimum fee fixed by the ordinance. Such fact can be shown, if at all, only as a defense upon trial.

QUO WARRANTO.

HARMON, J.

The answer of the chief of police, to whom the writ was directed, states that he holds the prisoner John Ryan by virtue of a warrant issued by the police court, charging him with "participating in a musical performance given in public without a license from the mayor."

The ordinance in evidence, passed January 28, 1881, under which the warrant was issued, provided that it shall be punishable by fine and imprisonment "to exhibit or participate in exhibiting in public any musical performance without a license from the mayor." The expression "participate in exhibiting" is very vague. It might be said it means taking part as a performer, or that it means being interested with the proprietor who is responsible for the performance. To hold that it means the former is to hold that every musical performer who is a member of a troupe, singing in public, is, unless licensed, guilty of an offense under the ordinance, and it is further to hold that the council intended to make it criminal to do so without a license, and at the same time make no provision for giving a license, because the other portions of the ordinance show, that the only persons to whom it is provided a license may be issued by the mayor are the persons "who shall have the actual ownership, management, or control of such performance." It is clear, therefore, that the phrase "participate in exhibiting" refers to being a joint owner, manager or controller of the performance; that the ordinance is directed only at the proprietors of the establishments where such performances are given and not at the mere performers. The warrant therefore, under which this party is held, states no offense under this ordinance; his detention is consequently unlawful, and he is entitled to his discharge on *habeas corpus*. *Ex parte Shaw*, 7 O. S., 81.

The answer of the chief of police to the writ of *habeas corpus* in the case of John W. Ryan shows that he detains the prisoner by virtue of a warrant under the same ordinance, charging him with "giving a public musical performance without first having obtained a license from the mayor."

While the language of this warrant is open to criticism in that it does not exactly conform to the language of the ordinance, yet it does substantially comply with ordinance. To give in public a musical performance is to exhibit in public a musical performance, and if the fact be that what the prisoner did was to give a musical performance in the sense of being a mere performer, it would be a matter of defense on his trial, of which he can not avail himself upon *habeas corpus*.

But it is strongly urged on his behalf that the ordinance in question is void, and therefore his detention unlawful, because the amount of the license fee to be exacted in cases of musical performances is left to the mayor, the ordinance merely providing that the fee shall not be less than \$1 nor more than \$20.

By section 2669, Revised Statutes, relating to licenses, it was provided that "the council may license all exhibitors of shows and performances, etc., and in granting such license may exact such sum of money as it may think expedient." It having been decided in the case of *Snelbaker v. the Mayor*, 4 B., that under this section the council could not delegate to the mayor the power therein conferred, the section was amended, (77 O. L., 74) to read as follows: "The council may provide by ordinance for licensing all exhibitors of shows, etc., and in granting such license may exact such sum as it may think expedient," and that "the council may confer upon, vest in, and delegate to the mayor the authority to grant and issue licenses, and revoke the same."

The trouble arises from the retention, without change, in the amended section, of the clause, "and in granting such license may exact such sum," etc., which was evidently a blunder of the drawer of the bill. Literally, this language could apply only to a case where council itself should grant the license, as provided in the original section. It is not required that in providing by ordinance for licensing under the power to delegate to the mayor, the council shall fix the sum, and in the opinion of the court, the language of the proviso is sufficiently broad to give to the mayor, if the council shall so determine, all the authority vested in itself. The clause as to fixing the amount of the license fee was, in the original section, mere surplusage. The right to license implies the power to charge a license fee, provided that under the guise of a license fee there is not an attempt to exercise the power of taxation, but merely the charging of a sum which, in the judgment of the municipal authorities, will pay not only the mere expenses of issuing the license, but for the additional care and vigilance imposed on its police authorities by the existence of the performance. *Cincinnati v. Byrson*, 15 O., 645; *Baker v. Cincinnati*, 11 O. S., 534, 543; 40 Mich., 258; 78 Minn., 115; 38 Ia., 96.

This clause is equally unnecessary in the section as amended, so far as concerns the right to exact a license-fee. Its introduction into the legislation upon this subject dates many years back and was due no doubt to some of the early decisions. See *Cincinnati v. Buckingham*, 10 O., 257; *Mays v. Cincinnati*, 1 O. S., 268. It seems from the use of the definite article in the proviso, "the authority," and the mention of power of revocation, that it was not the mere ministerial act of granting and issuing the license which it was intended to authorize the council to delegate to the mayor.

This view is sustained by the case of *Village of Decorah v. Dunstan Bros.*, 36 Ia., 96. The law conferred upon council power "to regulate and license auctioneers, etc., and to pass all ordinances necessary to exercise the authority herein conferred." There was no express authority to charge a license fee or to delegate the power. The ordinance fixed the minimum at \$20, and gave the mayor power to grant and issue licenses. The court says: "We do not see, either upon authority or principle, any valid objection to the ordinance under the general power above given, whether we construe it as fixing the fee at \$20, or as leaving it for the mayor to determine."

The question is not free from doubt; and while that is my view, I do not find it necessary to decide the case wholly upon that ground, because even if the position assumed by counsel for the petitioner here were correct in that regard, it would by no means follow that the entire ordinance is void. In the first place, the council has fixed the amount to be charged, the minimum and the maximum amount. Now it does not appear here that the reason why the mayor does not issue a license to Ryan is because upon legal grounds he objects to paying the fee. It does not appear that the mayor had exacted any fee at all, or had asked more than a dollar; and if the mayor, taking the same view of the ordinance which the learned counsel for the petitioner do, should see fit to exact only the minimum amount, it certainly cannot be said that the mayor is exercising any authority in this respect. And even if the mayor were demanding more than the minimum amount, and it should appear that that is the reason why the license is not issued, still it would not follow that this entire ordinance is void because the mayor is demanding a sum as a license fee that he is not entitled to charge. There is no question that the council has the right, under this section, to require the taking out of a license, to give the mayor power to grant and issue it, and to provide punishment for giving performances without it. There is no doubt that the ordinance passed upon the subject does not specifically provide that it shall be unlawful to give a musical performance without a license, and it gives the mayor power to issue such license. If this were a suit to collect or to recover back a license fee for giving a musical performance, then of course the validity of the ordinance requiring the payment of a license fee would be involved, but in this case the prisoner is charged with the offense of giving a musical performance without a license, and the question of a license fee is a mere incident. The Ohio reports are full of cases recognizing the principle that money exacted of a person unlawfully for a license can be recovered back. And it will not do for a person to say that an ordinance looking to the preservation of public peace and public morals shall be adjudged null and void because there is an unlawful requirement of money which, if he pays and it is exacted wrongfully, he can recover it back.

In *Cincinnati v. Buckingham*, 10 O., 257, the court recognized this principle and say, it is the duty of the person to pay the money, if he does not want to violate the ordinance making it illegal to proceed without a license, and then sue to recover back his money. And moreover, he is charged with an offense, by this ordinance, and nothing appears here to show that the reason why he is giving performances without a license is because of an unlawful attempt to exact the payment of a fee. This is a matter he must show in his defense, if he can show it anywhere. And to show a defense to the charge of a crime, is not sufficient to justify the court to interfere upon *habeas corpus*.

It has been urged upon the court that section 2669 must be read in connection with subdivision 7 of section 1692, which gives to cities and villages, in the enumeration of their general powers, the right to restrain theatrical exhibitions, for which money is demanded and received, and that therefore, when the council, under section 2669, is given power to license exhibitions, shows, etc., nothing being said about the exaction of money or other reward the legislature must be held to have referred to the general powers of the former section. It has been decided by Judge Avery, in the common pleas court, in the case of *Ryan v. State*, involving the validity of a conviction under this ordinance, that the latter section is

a specific power conferred under the general clause with which section 1692 begins. In that view I concur. And moreover it will be observed that the general power to regulate, restrain, or prohibit theatrical exhibitions, refers to the things, the exhibitions themselves, whereas, the power to license refers to the persons, the exhibitors of performances. And it will be observed, too, that while the things included in the general power under section 1692, are theatrical exhibitions, public shows, etc., the power being to prohibit as well as to regulate the power to license includes many other things, peddlers, exhibitors of horses, etc. So that it would seem that general power to regulate classes of things was given in the general enumeration in section 1692, whereas, the power to exercise supervision over individual persons was given in section 2669, and in giving the latter power it was made to extend to many other things than those mentioned in section 1692, things which council has no right to prohibit.

In other words, the council could not *prohibit* a performance unless it were given for pay or other reward, because its only power in this regard is that given in section 1692. It may, however, require a license for a pure gratuitous performance, under section 2669. Its police duties are not diminished by the gratuitous character of performances.

The prisoner will be remanded to the custody of the officer.

Moses F. Wilson and John J. Glidden, for petitioner.

Philip H. Kumler and John A. Caldwell, *contra*.

COLLATERAL MORTGAGE.

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[Hamilton District Court, January Term, 1882].

PEOPLE'S INSURANCE CO. v. AGNES McDONNELL et al.

A mortgage on a married woman's property, given to secure the note of her husband, which note being given to raise money to pay the debt of a lumber corporation of which he was a member, and used for several years as collateral to the note evidencing the debt of the corporation, which latter note was renewed without the consent of such mortgagor and was finally marked "paid" by the holder, and a different note, with other parties, executed in place of it, and the mortgage held as collateral to such substituted note, which was twice renewed without the mortgagor's consent. Held: Such mortgage was released thereby.

COX, J.

This is an appeal from the decree of the court of common pleas.

The suit was originally begun to foreclose a mortgage given by John McDonnell and wife, on the 1st day of June, 1870, on a tract of land in Hamilton county, Ohio, belonging to Mrs. McDonnell, to secure the payment of the note of John McDonnell, for six thousand dollars, payable ten years after date to the order of A. F. Baum, which note and mortgage, it is claimed, were, shortly after making the same, transferred to the plaintiff for a valuable consideration, without notice.

A great many defenses are set up. Defendants deny.

First—The corporate existence of plaintiff.

Second—Its power to loan money or take title to notes and mortgages.

Third—That it had no power to do business in Ohio, not having complied with the laws governing foreign insurance companies.

Fourth—Defendants claim that the mortgage was fraudulently obtained from Mrs. McDonnell, by her husband and Andrew F. Baum, when she was an invalid, confined to bed and of feeble mind.

Fifth—That it was represented to her by Baum and her husband that it was for the purpose of obtaining six thousand dollars in money for her husband, and

†This case was affirmed by the supreme court. See opinion, 41 O. S., 650.

that afterwards, without her knowledge or consent, it was deposited by them with the plaintiff as collateral security for a debt of like amount, then due, being the renewal of the debt of the Cincinnati Lumber Company.

Sixth—The plaintiff took from the Cincinnati Lumber Company a note for six thousand dollars, dated June 8, 1870, at one year, exacted and received in advance ten per cent. interest, and that Baum, without her consent or knowledge, left the note and mortgage as collateral for same.

Seventh—That after the lumber company's note matured June 6, 1871, the plaintiff, for a valuable consideration, without her knowledge or consent, extended the payment of it for one year, and that on the maturity of said renewal the plaintiff again, for a valuable consideration, extended it for another year, without her knowledge or consent; that at the expiration of this renewal the plaintiff received payment of the lumber company note by exchanging it for a note for \$6,000 made by Carrier & Baum, endorsed by Robert Campbell at eight months from October 7, 1871, which later note, also without her knowledge or consent, plaintiff at its expiration renewed for a period of five months, and after its renewal accepted instead a draft of Carrier & Baum for \$6,000, at one year, on Andrew F. Baum, in favor of Robert Campbell, and accepted by Baum and endorsed by Campbell, and afterwards extended the last draft to June 1, 1875.

Eighth—Defendants also say, that plaintiff put this last draft in suit in Pittsburgh, obtained judgment against all the parties thereto for principal and interest, which judgment plaintiff assigned to one Gillipsie, who brought suit on it in Pocahontas county, Virginia, and attached property there belonging to Baum and Robert Campbell.

Plaintiff replies, denying each and every one of these allegations.

The testimony upon many of these defenses is contradictory in many respects.

But it may safely be said that the following facts are established:

Carter Gazley had purchased a saw-mill from John K. Green, assignee of Whately, and gave him in part payment his note for eight thousand dollars, April 30, 1869, at one year, with interest. The Cincinnati Lumber Company was afterwards formed and purchased the saw-mill, agreeing to pay this note. John McDonnell and Carrier were members of the company, and Andrew F. Baum, a partner of Carrier's in other business, a large creditor.

The note of Gazley was not paid at maturity, and Green, assignee, was pressing for payment.

On the 1st of June, 1870, the note of McDonnell for six thousand dollars, secured by mortgage on his wife's property, was obtained for the purpose of raising money in some way to pay this note. It was made payable to Baum, he agreeing to raise the money to accommodate the company. In obtaining the execution of the mortgage from Mrs. McDonnell, Gazley says he was acting for all the parties, and that he represented that he was to raise money to pay the note to Green, so as to keep the lumber company's note out of the market, as it was a new concern and did not want its credit affected. Baum denies that Gazley acted for him. The money was raised, Baum says, by him at Pittsburgh, and either given there to McDonnell, or sent to this city, and the balance of the note to Green was paid, \$3,000 June 10, 1870, \$2,400 June 16, 1870.

What became of the mortgage after its execution is disputed; Gazley saying he kept it in his safe until June 22, 1870, when it was recorded; and Baum, that he received it a few days after its execution and deposited it with the plaintiff as collateral security for the note of the lumber company for \$6,000, at one year from June 8, 1870, receiving \$5,400, being the amount of the note less a discount of ten per cent.

The mortgage does not, from the testimony, seem to have been in the hands of the plaintiff at the time they claim this money was loaned to Baum upon the lumber company's note, for the fact is stated by the secretary that a memorandum transfer of it to them was made by Baum on a separate piece of paper, reciting that it was transferred to them as collateral security for the lumber company's note, payable to the order of McDonnell and Mathew Hall, and endorsed by Carrier & Baum, for \$6,000, payable in one year from June 8, 1870. This was two weeks before the mortgage was left for record at the recorder's office in this county. The books of plaintiff show that this note was, on the 8th of June, renewed for one year, and transferred to June, 1872; June 8, 1872, renewed for one year, and transferred to October, 1872.

June 8, 1871.—Cincinnati Lumber Co.—Mortgage collateral, one year, January 11, 1872, \$6,000. "Paid" in red ink.

This note was then given over to Carrier, and the note of Carrier and Baum, endorsed by Robert Campbell and A. F. Baum, taken in its stead, and this note was subsequently renewed twice, interest at ten per cent. being paid for the renewal.

At the time the lumber company's note was given up to Carrier, and the last described note taken, the lumber company was bankrupt, and had made an assignment to Carrier. But Carrier & Baum and Campbell were all residents of Pittsburgh, the city where plaintiff does business, and were of undoubted credit, and reputed to be worth a half million of dollars, and this was known to plaintiff.

It was not until the 18th of June, 1873, that Baum assigned this mortgage to the insurance company, on the instrument itself, and then it was not as collateral security for the lumber company's note, but to secure the payment of the original note made by McDonnell to Baum.

We thus see the repeated changes through which the note and mortgage go in the course of this transaction.

June 8, 1871.—Transferred to People's Bank as collateral security for lumber company's note.

June, 1872.—Lumber company's note renewed; one year.

June, 1873.—Lumber company's note surrendered and marked "paid" on their books, and note of Carrier & Baum, with Robert Campbell and Baum, endorses.

June 18, 1873.—Mortgage assigned on back to plaintiff for security for original note.—And afterward Carrier & Baum's note so endorsed renewed on payment of ten per cent. interest.

All this without any pretense that it was known or consented to by Mrs. McDonnell, who was known to be the security of her husband in the matter.

Afterwards the plaintiffs bring suit, not against the lumber company, for they had no longer any claim against them but against Carrier & Baum and Campbell, on the note taken as a substitute for the lumber company's note, and obtain judgment against them all at Pittsburgh, and then transfer their judgment to Pocahontas county, Virginia, and levy on property proven to be worth \$20,000 owned partly by Baum & Campbell.

It is said they were enjoined by the U. S. court from proceeding to sell the interest of Baum, because he had in the meantime assigned his interest to the commissioner in bankruptcy. But no reason is given why the interest of Campbell was not sold and this amount made out of him.

Without going further into the detail of the facts, we are of the opinion that the conduct of the plaintiff has released the property of Mrs. McDonnell from the operation of this mortgage.

First—There was an application of the mortgage to purposes for which it was not given. There is no evidence to sustain the claim that it was ever intended to be deposited as collateral security for the lumber company's note.

Second—Even if it were originally so intended and given, the note for which it was deposited as collateral was surrendered by the plaintiff when the lumber company failed, and notes of other persons then known to be amply able to pay if taken in its stead, and the original note marked "paid" by plaintiff's agent, and the note thus taken as a substitute renewed twice on payment of interest, thus showing that plaintiff had abandoned all claim against the lumber company, and looked only to the new paper taken in its stead.

Third—The character of Mrs. McDonnell as surety was known to all parties, and all these renewals, extensions and changes were made without her knowledge or consent.

We need only refer to the conflicting statements in regard to the holder of this mortgage during all this time.

Sufficient to say, that it was not actually transferred in itself to plaintiff until more than three years after its execution, and while the plaintiff and Baum claim that it was in plaintiff's possession, there is abundant testimony that in the meantime Baum repeatedly declared it was at his own house, and that it should be cancelled, and he would send it down from Pittsburgh cancelled as soon as he returned home.

A decree will be entered for defendants.

J. H. Bates and Rufus B. Smith, for plaintiff.

Long, Kramer & Kramer, for defendants.

HACK STANDS IN STREETS.

[Hamilton Common Pleas, 1882].

†CINCINNATI HOTEL COMPANY v. JOHN BRANAHAN et al.

A permanent right to maintain hack carriages on a street, though next the sidewalk and leaving room for passage in the rest of the street, is a nuisance, for the public have the right to have the whole width of the street free from permanent obstructions, and this being so, Revised Statutes, section 2671, authorizing the councils of cities to establish stands for hackney coaches, must be strictly construed, and a permanent stand for hacks on the street in front of private property, is as to the owner of such property an invasion of his right of access to the street and of his right in the street which may be prevented by injunction at his suit; and the owner of property rented out as stores is a proper person to bring about such suit.

SMITH, J.

In this case a petition was filed by the Cincinnati Hotel Company against John Branahan, and certain other defendants, to restrain them from using the west side of Central avenue, between Third and Fourth streets as a hackney coach-stand.

The petition alleges that the Cincinnati Hotel Company are the owners of the hotel, which they have leased to Gilmour & Sons, to be used as a hotel; that a portion of the building is divided into store-rooms; some of them on Central avenue and some of them on Fourth street; that the defendants being the owners of and having control of certain hackney coaches, have used the west side of Central avenue as a hackney coach stand; that they thereby are preventing access to the property; that the horses they keep standing there create a nuisance that is offensive to the lessees and patrons of the stores and an injury to the property generally; and they pray for an injunction enjoining the defendants from using that location on the streets as a hack-stand.

The answer of defendants denies that they are using the street in the way alleged, and denies that they create a nuisance, and that their use of the street causes any injury to the property; and they rely upon the ordinance passed on the 22d of September, 1879, establishing that locality as one of the hack-stands in Cincinnati, that is, on the west side of Central avenue, between Third and Fourth streets, and they say that their use of the stand is in pursuance of this ordinance.

The cause came on for trial, and a great deal of testimony was heard on one side and on the other, tending to show that the occupancy of this hack-stand created a nuisance; that the hotel company had several stores opening on Central avenue, which are in the possession and control of the hotel company, and by reason of these coaches standing there, access to the stores is interrupted, and that the standing of so many hacks there creates a nuisance in the street; that complaint was made to the hotel company by the occupants of these stores, and especially by Mrs. Couden, who has a millinery store on the corner of Fourth street and Central avenue.

It seems to me that the testimony is completely satisfactory to establish the fact that the use of this street by the hacks as a permanent stand is an injury to the premises and to some extent a nuisance. It is certainly an injury to the store occupied by Mrs. Couden, and to the stores opening on Central avenue.

Defendant's first objection to be considered is: are there proper parties plaintiffs? The testimony in the case shows that the hotel company leased the hotel to Gilmour & Sons at a rental of \$30,000.00 per annum. Gilmour & Sons apparently make no complaint. They control and they are in possession as lessees of the hotel. They are not brought in as parties plaintiff, not even giving an affidavit on one side or the other. They appear entirely indifferent. If they appeared as plaintiffs, as persons objecting to the use of this hack-stand on this side of the street, their objection ought to have some weight with the court. On the other hand, if they appeared as defendants, and desired to have these hacks stationed here, on this side of the street, as an advantage to their business, they having the principal control of these premises, their wishes ought to be respected. But so

†This decision was coincided in by the district court. See opinion, *post* 10 B.,

far as it appears in this case they are indifferent. But still, I think, the hotel company have an interest in the matter. They are not merely lessors, but owners, and in possession of part of the premises they claim to be injured, viz.: of Mrs. Couden's store and of those stores fronting on Central avenue, and I think as the owners and possessors of those stores, they have such an interest as entitles them to maintain the action. Therefore, I think the objection that the proper parties do not bring suit cannot prevail, though it would be more satisfactory to me to know how Gilmour & Sons, who pay \$30,000 a year rent, stand in relation to the occupancy of these streets.

The next question is, can these proceedings be maintained? The Revised Statutes provide (section 2640) "that the city council shall have the care, supervision and control of all public highways, streets, etc., within the corporation, and shall cause the same to be kept open and in repair and free from nuisance."

By section 2671: "Council may establish stands for hackney coaches," etc.

Now, by the first section above it is made the duty of the city council to keep the streets open and in repair, and free from nuisances.

The ordinance under which the defendants claim the right to occupy the street, locates in terms, stands for hackney coaches. It locates numerous hack stands throughout the city, and one on the west side of Central avenue, between Third and Fourth streets, except for a space of 20 feet opposite the side entrance of the hotel. The city ordinance permits the permanent occupancy of the west side of Central avenue, between Third and Fourth streets, as a hack-stand, and the effect of it is this: There is a permanent occupation by these hacks in this mode: As soon as one coach is driven away another takes its place; a third comes up to occupy the place of the preceding coach; and so from time to time the entire west side of the street is occupied by a series of coaches permanently from morning until night, and running far into the night, thus cutting off convenient access from the stores with that side of the street. Such being the fact, there is no question but that by the common law it is an act of encroachment. As far back as *Rex v. Cross*, 8 Campbell, 224, it was held that where a coach stands upon a public street applying for passengers, it was a nuisance at common law, for which a person might be indicted. And in the emphatic language of Lord Ellenborough, "No man can make a stable yard of the king's highway." Now, that decision has been supported by numerous cases both in this country and in England. The case of *The King v. Russell*, 6 East, 427, is very similar, though not one of hackney coaches using the street. In that case a man established a warehouse, and used the street to store long timbers, and this was held to be a nuisance at common law, the court saying that the proprietor of premises should have premises large enough to transact his business in. That same principle was expressed in 1 Denio, 524. *The People of New York v. Cunningham* in reference to a distillery, from which the owner sold slop to be transported, and the street in front of the premises was used as a stand from which persons could fill their vessels to carry it away; so that there would be a series of teams occupying that side of the street continuously. The business was in charge of a policeman, and regulated so as to preserve order in hauling the slop away. But when the case was brought before the court of appeals in New York, it was held that it was a nuisance, not only on the part of those who furnished the teams, but of the persons who permitted it; that the owners of the distillery could be indicted for permitting a nuisance in connection with their property. The same view was held in the case of *Wartman v. The City of Philadelphia*, 33 Penn. St., 202; and in the case of *the State v. City of Mobile*, 5 Porter, 279, that where parties permitted the street to be used to carry on business, it was no answer to say that there was sufficient travel-way left. It is claimed that these hacks occupy only a portion of the street, and that there is sufficient room between the hacks and the other side of the street for travel. The same argument was made in the case of *Wartman v. The City of Philadelphia*, *supra*. But it was held that it was no answer to say there was sufficient room left for the accommodation of the public. The street being a public highway, every one has the right to use every portion of the street for purposes of travel—not at all times or all at a time—but that no portion of the street can be permanently occupied to keep off the right of travel which the public has. It has been compared to the right of navigation. Take the Ohio river, for instance: it is a navigable river, and must not be obstructed; yet its obstruction near the bank might leave plenty of space for all crafts desiring to use its waters. But it has been repeatedly held that it is a nuisance for any portion of a navigable stream to be permanently obstructed so as to prevent the people who have the right to the

stream from using any portion of it. The same course of reasoning applies to a public street or highway. Not any portion of a public highway can be permanently obstructed.

This doctrine does not conflict with the other doctrines entertained from time to time in the courts of our state.

There may be such temporary interference, like putting up a building, or moving a building, or the temporary occupation by carriages at an opera-house, where carriages are waiting for the closing of a performance, a mere temporary occupation, for the convenience of the public, as well as of the hackmen, which would be permitted. It is a permanent occupation that I hold this ordinance cannot permit.

In *Clark v. Fry*, 8 O. S., 358, it is said that the right of transit may be temporarily interrupted by repairs of houses, constructing sewers and drains, etc. "But this temporary occupation must not be unnecessary or unreasonable, uninterrupted or prolonged," clearly intimating that where this occupancy is permanent, it should not be permitted. See also *White v. Kent*, 11 O. S., 550, to the same point.

So, except for section 2671—under the former section it was the duty of the city council to keep the streets free from nuisance, and any act of a citizen, which prevented the public from using any part of it, or permitted anyone to carry on a private business on the street, could not be permitted, and therefore might be restrained.

But it is claimed that this ordinance is permitted by the statute which authorizes city councils to establish hack-stands, and that this hack-stand has been established in pursuance of this provision of the statute. In reply to that it may be said: whatever authority may be granted by the city council in pursuance of such legislation, this cannot be so granted as to interfere with the rights of private property. When we come to consider the rights of property, the decisions of Ohio fully establish that the abutting proprietors upon the street have a right of property distinct from and independent of the general right of everybody to use and occupy the streets. There is a right of property distinct from the general use which the public have in the street. This has become the common law of Ohio. It was recognized from time to time in decisions made by the courts. In the case of *Crawford v. The City of Delaware*, 7 O. S., 459, this right of property was recognized. And in the case of *The Spring Grove Avenue R. R. Co. v. Cumminsville*, 14 O. S., 523, it was plainly and emphatically asserted by Judge Ranney, "that the right of property which the abutting proprietor has in the street, is distinct from the right of the public to use the street." This right of property is the right of access from his property to the street, not merely at one portion, but at every portion along the line of the street. It has been held in this state again and again that the right to assess property for improvement of the street is based on the right of the property owner to the use of the streets, and the benefits it confers on the adjoining lot. It is an element which gives value to the property abutting on a street, that the owner may have this access to the street; and therefore he is called upon to pay assessments for its improvement. The assessment for improvement is based upon the idea that a man's private property is benefited. There is a right of access to the street, and if there be an ordinance interposing an obstacle between the traveled part of the street and the property owner, it is an interference with his right of property. If it creates a permanent obstruction, if his private business suffers, then it is an interference with his right of property, which he has the right to restrain by proper proceedings in court.

To illustrate: If the city council has the right to establish, by ordinance, against the will of property owners, hack-stands here and there, they might put them before your residence or mine—in front of a livery-stable, in front of a dry goods store, in front of a millinery store—and thus by such act impair or detract very much from the value of property, and from the use and enjoyment of property owned by private individuals.

Now, this statute under which this ordinance was passed is to be considered at the same time with reference to the other statute which imposes certain duties, and requires a city to keep the streets clean from nuisances, and enjoin this duty upon the council. This ordinance, permitting the city council to establish hack-stands, must be in subordination to the legal rights of owners of property. As a general rule, a power conferred in general terms upon corporations or public officers in derogation of the rights of individuals or of the public, is to be strictly

construed. *Hickok v. Hine*, 23 O. S., 590; 5 Allen, 221; 4 Cush., 63. And in this case, if the city council, acting under authority to establish hack-stands, had seen fit to pass an ordinance under this general authority, and the statute is in derogation of private rights, it must be strictly construed, and extend no further than the letter of the statute will permit.

It has been frequently held, as in *Wartman v. Philadelphia*, 23 Penn. St., 202, 210, that municipal authority has no more right than a private individual to create a nuisance. It has been held that, where a city council has been authorized to establish a market in the street, it has no authority to establish a market so as to interfere with the rights of private property. There have been several cases of that kind. *St. John v. City of New York*, 3 Bosworth, 483. *St. John* was the owner of a store, house and lot, on one of the streets of New York. The city council had permitted, outside, on the sidewalk, on the street, another man to establish a market, carrying on the same kind of business in front of the store of the plaintiff. He brought suit against the city for damages, and obtained a verdict for several thousand dollars. The superior court of New York held, in pursuance of the doctrines I have laid down, that he city had no right to establish a market-place in front of the private property of the plaintiff, between him and the traveled part of the street. See also *Benjamin v. Storr*, L. R., C. P., 400; *Fritz v. Hobson*, 14 C. D., 542, 554.

There is a case almost parallel to this, in 34 N. J., 201. The language of the statute and of the ordinance are very similar to the present case. It was the case of the *State v. Lavarack*, decided by the New Jersey supreme court, wherein the defendant was indicted for an assault and battery. It appeared in that case that by the charter of the city the legislature authorized the mayor and aldermen to prescribe and locate certain streets of the city to be used for public markets, and prescribe spaces for selling meat and fish. In pursuance of that authority of the legislature, the mayor and aldermen passed an ordinance establishing that the east end of Main street shall be used for public market for the sale of country produce. There the complainant, one Miller, brought in his produce, and stationed his wagon on the street named in the ordinance, and the defendant having a store opposite, drove the wagon away. He was arrested for assault and battery; and the questions arose on the legality of the ordinance passed in pursuance of the act of the legislature. The court held that the legislature had no authority to permit such an ordinance to be passed which interfered with the rights of private property.

It seems to me that so far as the question has been before the court, that ordinances of this kind, which establish permanent places of business on the street, or on the side of the street, in front of the property or place of business of others, against their rights and protests, is a nuisance, an invasion of the rights of private property, and can be restrained. Therefore, I think the plaintiff is entitled to relief.

J. W. Worthington and M. F. Wilson, for plaintiff.

Otway J. Cosgrave, for defendant.

[Hamilton District Court, 1882].

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CINCINNATI GAZETTE CO. v. R. M. BISHOP.

For opinion in this case, see 6 Dec. R., 1113, (s. c. 10 Am. Law Rec., 488). For superior court decision see 7 Dec. R., 711. The case was filed in the supreme court, but dismissed for want of preparation, June 3, 1884.

SALES—REPLEVIN.

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[Hamilton District Court, 1882]

RODGERS, SMITH & CO. v. L. A. KINSEY.

1. A sale by a debtor in failing circumstances of his entire stock in trade and business for an adequate consideration in notes, which are used to pay creditors, cannot be set aside as fraudulent.
2. Where a judgment creditor levies execution on property alleged to be that of the debtor, but which the debtor has sold to another, who replevies it from

the officer holding the execution, the creditor cannot bring an action to set aside the sale by the debtor to the plaintiff in replevin as being in fraud of creditors while the execution subsists, for by the levy the execution was sub modo satisfied, and the replevin bond was substituted for the property, and the title of the purchaser in it cannot be disturbed, but the question of title will be settled in the replevin suit, and if decided adversely to the plaintiff therein, the execution will be collected from the proceeds of the replevin judgment.

BURNET, J.

This is a petition in error to reverse a judgment of the superior court.

The plaintiffs in error filed their petition in the superior court under section 6344, Revised Statutes, to set aside an alleged fraudulent sale, made by L. A. Kinsey to his mother, S. A. Kinsey, of the stock and fixtures forming the assets of a jewelry store, including his book accounts. The plaintiff in error is a foreign corporation, and the facts are these. L. A. Kinsey being in embarrassed circumstances, and finding he could not meet his current engagements, made an estimate of the value of his stock and fixtures, including his book accounts, which he put in aggregate at about thirty-six thousand dollars, his indebtedness being about nineteen thousand dollars. His principal creditors being in New York, he went to New York, and laid his case before his creditors there, asking them to give him an extension of two years time, proposing to pay dollar for dollar on his indebtedness; but upon a conference with the creditors they told him that he would not be able to pay his indebtedness, and advised against his proposition. They therefore came to no conclusion. Subsequently he made a sale of the entire assets in connection with his store to his mother, who executed to him her promissory notes for ten thousand dollars, being the price which she agreed to pay. The sum was divided into three equal installments, and payable all within one year. The first note was afterwards, at his request, divided up into such sums as he was able to use in paying certain of his creditors the percentage they were willing to accept, and was passed off to creditors and paid by the maker at maturity. The second note also was divided, and the greater part of it was used in the same way; the first two notes, or two-thirds of the purchase price, having been thus paid. He then made an assignment to Callahan, one of the defendants, and transferred to him the third note, for the benefit of his creditors. Callahan qualified in the probate court and assumed the duties of the trust. The plaintiffs having sub-divided their claim, so as to bring it within the jurisdiction of a magistrate, into four claims, then obtained judgments in the four cases before a magistrate, and levied upon so much of the stock in the store, as belonging to the defendant L. A. Kinsey, as was sufficient to pay its debt. Another party, the Meriden Britannia Company, also a creditor of L. A. Kinsey, had come in after the publication made as provided by statute, and by answer and cross-petition set up its claim reiterating the allegations of the plaintiff in its petition, and making a similar prayer for judgment. The cross-petitioner, also prior to this suit, had subdivided its claim so as to bring it within the jurisdiction of a magistrate, and obtained judgments; there were no levies made, however, under the judgments of the cross-petition. After the levies were made under the judgments obtained by the plaintiff in error in this action, S. A. Kinsey, the mother of L. A. Kinsey, who had purchased his store, took the goods that were levied upon, by writs of replevin. After the rendition of these judgments and the writs of replevin had been served, and the property had been taken again into the custody

of S. A. Kinsey, the petition in this case was filed to set aside the sale of L. A. Kinsey to his mother as fraudulent. Upon this state of facts, so far as the plaintiff in error is concerned, it is immaterial what the evidence was in the superior court in regard to the fraud. By the levy upon personal property, the executions were *sub modo* satisfied. In other words, the right of the plaintiff in error, the judgment creditor, to other remedies was suspended, and when the replevin bonds were given and the property was delivered to S. A. Kinsey, by one constable who had made the levies, the bond was substituted for the property. The plaintiff in error, therefore, had no right to file a petition to disturb the title of S. A. Kinsey to this personal property. This title will be settled on the trial of the replevin suit. If the transfer by L. A. Kinsey to S. A. Kinsey was fraudulent, the plaintiff in error will make its money out of the bonds given by S. A. Kinsey in the replevin suits. But the Meriden Britannia Company, coming in as a cross-petitioner, alleges merely the rendition of judgments upon its claim by the magistrate, and it seems that no executions issued upon those judgments, and this cross-petitioner stands precisely upon the same footing that the plaintiff in error would if its judgments stood in the same attitude, and that made it necessary for the court to examine all the evidence in the court below to determine whether the allegations contained in the petition and reiterated in the cross-petition are sustained.

We have gone through this voluminous mass of testimony contained in the bill of exceptions, and we find substantially this to be the fact. In the first place, L. A. Kinsey himself, desired simply time from his creditors, proposing to pay them dollar for dollar; that upon the advice of creditors given to him there was no such extension given, because they said he had greatly overestimated the value of his stock and could not pay dollar for dollar. Thereupon he made a sale of his property to his mother, which according to the testimony in the case was a fair sale, and for an adequate consideration. Some of the notes that he received from his mother, viz: two-thirds of the purchase price, were used in paying his debts, and have been paid. The other one-third, it is fair to presume, will be applied to the same purpose.

Under these circumstances there is a total failure of evidence to show that there was fraud in the transaction, and the judgment of the court will be affirmed.

Moulton, Johnson & Levy, for plaintiffs in error.

Hollister, Roberts & Hollister, for defendant in error.

TRADE MARKS.

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[Hamilton District Court, 1882].

JOHN M. MUELLER and JOHN M. MUELLER, JR., v. JAMES McDONOUGH.

A name, as "The Great Western Marble Works," put by a firm on a building wherein its business was conducted, to distinguish the establishment from an adjacent similar business conducted by one of the partners, which name, though used also on cards and letter heads, simply denotes the name of the place, is not a trade-mark, and one partner having bought out the other's right in the business, and after having used the name for some time, removing to another place of business and using the same name and place, cannot enjoin a person from using the same name at the old stand.

COX, J.

Judge Cox delivered the opinion of the court in this case.

This case comes up on a petition in error to reverse the judgment of the superior court of Cincinnati. In that court suit was brought by James McDonough against John M. Mueller and John M. Mueller, Jr., to obtain an injunction restraining them from using the name "The Great Western Marble Works" in carrying on their business. The petition alleges that in 1868, one Henning and John M. Mueller were partners in the business of cutting marble; that they carried on the business as a firm until 1873, when McDonough, who had been foreman in the establishment, became a partner, and then the business was conducted under the firm name of Mueller, Henning & McDonough; that after 1874 they adopted for the works the name "The Great Western Marble Works," these works being at Nos. 403-437 West Front street, at the establishment known as "The Buena Vista Freestone Works," of John M. Mueller; that the name in dispute was used upon a building which was separate from the other establishment, and that the name was also used on the cards and bill-heads, and in the business transactions of the firm; that this business was so carried on until July, 1878, when McDonough bought out the interest of Mueller, and, as he claims, all his interest in the firm and the good will of the business; that he, McDonough, continued to carry on the business at the old place until July, 1881, when he removed his establishment further east, to the corner of Second and Park streets, and by himself continued to carry on the business under the name of "The Great Western Marble Works." He claims that since then John M. Mueller, Jr., who had not been a partner, or had any connection with the original business, has, at the old place formerly occupied by Mueller & McDonough, began to carry on a business under the name "The Great Western Marble Works." He says that under that name the old firm acquired a good reputation for business; that a large number of letters have been received at the postoffice addressed to him under that name, which are detained by Mueller, and he therefore asks an injunction against the Muellers to restrain them from using the name of "The Great Western Marble Works."

The defendants deny that McDonough is entitled to the use of that name. They say that it is simply the name of the place of business; that they never sold the name to him, and that the business was carried on there, not with that name as the name of the business, but as the name of the place of the business; that the business was always carried on in the name of the distinct partners, and that this was simply the name of the place where the business was carried on, and McDonough having removed to his place of business, he had no right to continue using the name. In the superior court a decree was rendered in favor of McDonough, making the injunction perpetual.

Two questions are presented: First, whether this name was a trade mark of the business; secondly, whether it was ever sold to McDonough. We think, from an examination of the testimony, that this name was simply adopted as the name of the place of business. It was a sign put upon the building to distinguish it from the Freestone works carried on in another part of the premises by Mueller, and it was not a distinct trade mark of the business, because the business carried on was not one such as required a distinct trademark. There was no distinct article manufactured there which required a special trade-mark. It was simply the sawing of marble

for furniture, mantels and such articles as have no specific design about them, but are made at many establishments and did not require a trade-mark to give them currency in the market.

Now, as to whether the right to use this name was conveyed to McDonough, that depends upon the contract between the partners. In all of the contracts of the partners it is apparent that the business was to be carried on at that particular place. Mueller was to furnish the place for the business, the material and sand used, and was to receive payment of so much per foot of marble cut. Mueller was also to be paid so much rent for the occupancy of the building. So specific was the contract, that if McDonough procured the cutting of the marble at any other place, Mueller was still to be paid for it. When the partnership came finally to be dissolved, and the plaintiff, McDonough, stepped in to take possession and carry on the business himself, two contemporaneous papers of the same date were made. Both were made on July 8, 1878. The first one was a sale to McDonough by John M. Mueller, of the marble stocks belonging to, and all his interest in the late firm of Mueller & McDonough; also his right to a patent used in marble cutting, and all the stock then on hand. McDonough was to collect and have all the money due the late firm, and the business was hereafter to be conducted by McDonough in his own name; Mueller was to furnish for the use of McDonough the use of the premises heretofore occupied, together with the machinery described, and to furnish the steam power to run said machinery described, also to furnish to McDonough the marble used. McDonough was to keep all machinery in repair, and Mueller is to cut all marble at customary prices; and should McDonough have any sawing done by any other party, then he was nevertheless to pay Mueller for the sawing, and McDonough was also to pay each month a certain price for the sawing. This agreement was to be in force for three years.

By the terms of this agreement the stock of the marble works was sold, and this agreement was made that McDonough might carry on the business in the same place, Mueller to continue doing the sawing, to be paid at a specified price. At the expiration of three years, Mueller notified McDonough that he should charge an additional price for the sawing of marble. McDonough says that the price of marble was not increased, and that, according to their agreement, Mueller had no right to charge such additional price; that Mueller had become insolvent, and seeing that Mueller was about to break the agreement, and was insolvent, he determined to remove and carry on his business in another place under the name of "The Great Western Marble Works." Thereupon Mueller notified him, he, McDonough, must not continue business under that name, and McDonough at once filed his petition against Mueller to restrain him from using this name.

Upon a careful review of all the facts we think the court below erred, and that this was not technically a trade-mark used in the business, but a mark of the name of the place of business; just as if the party in the Emery Arcade, for instance, should put up the sign "Emery Arcade Tailor-shop," and remove to another locality still retaining the same name, and then another tailor moved into the Emery Arcade and used the same name. Certainly the first who had removed could not restrain the other who moved into the vacated store from using the name "Emery Arcade Tailor-shop." We think that is a parallel case to this. The name was

never sold. It belongs to the place, and belongs to whoever occupies the place.

Judgment reversed.

Long, Kramer & Kramer, for plaintiffs in error.

Ramsey, Matthews & Ramsey, for defendant in error.

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[Hamilton District Court, 1882].

KNICKERBOCKER CASUALTY INS. CO. v. JORDAN, Adm'r.

For opinion in this case, see 6 Dec. R., 1145; (s. c. 10 Am. Law Rec., 625.)

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BONDS—EVIDENCE.

[Hamilton District Court, 1882].

JOHN SHILLITO, Jr., v. MARSHAL ROBBINS.

Under a petition on a bond not alleging it is beyond jurisdiction of the court or out of the power of plaintiff to produce, and the answer being a general denial, which puts in issue the execution of the instrument, it is error in the court to admit a copy in evidence against defendants' objection, though the copy be accompanied by a deposition showing that the original is the subject of a litigation as to the ownership between plaintiff and a third person not a party to this action, and is held by the clerk of a foreign court under the order of such court to await the result of the litigation, and such copy only being produced with the deposition, it was error in the court to overrule a motion for non-suit.

Error to the Superior Court of Cincinnati.

JOHNSTON, J.

Shillito was defendant below and prosecutes this petition to reverse the judgment of that court. The action there, was an action at law, to recover on a bond, upon its face given for the sum of \$90,000, but the amount actually to be secured thereby being \$45,000, signed by John Shillito, Jr., and one John J. Ferris. The petition upon the bond was in the ordinary form, provided for in our Code of Procedure, and filed with the petition was a copy of the bond, that fact being referred to in the petition. The defense of Shillito was: first, a general denial. He was the only party served, and the plaintiff thereafter having amended his petition by filing another copy of the bond, an answer to the amended petition was filed by Shillito denying generally all the allegations of the petition as originally denied, followed by a special denial that Robbins, the plaintiff, was the real party in interest, but averring that one Lewis Robbins was the real owner of the bond, and he therefore asks to be dismissed. This was denied by Marshal Robbins. The case was submitted to a jury. During the progress of the trial, plaintiff sought to introduce in evidence, and did, against the objection of defendant to sustain the averments of the petition, a copy only of the bond. Defendant claimed that the original bond only could be introduced in evidence. The copy introduced was accompanied by a deposition that had been taken in the city of New York. At the close of the plaintiff's evidence, defendant moved the court to take the case from the jury, and to direct a non-suit, upon the ground that the plaintiff had failed to make out a case, claiming that he had not offered sufficient proof to sustain the averments of the petition, in simply offer-

ing a copy. This motion was overruled. It appears from the record that the reason why the original was not introduced in evidence, was, that at the time of the commencement of this action, and at the time of the trial of the case, a litigation was going on in the state of New York in relation to the identical bond, in which Lewis Robbins and Marshall Robbins, who sustained to each other the relation of father and son, both claimed title to this bond; that case had been tried once, and the court found in favor of plaintiff in this case, but an appeal had been taken from that decision to the court of appeals, and by an order made in that case it was ordered by that court that this bond be impounded and held by the clerk of that court until the question should be finally determined who was the owner thereof. It was claimed by the plaintiff that by reason of this fact of the obligation being detained in the state of New York by a court of record, that that excused the presentation upon the trial of this original bond. There was a verdict in the case in favor of Marshal Robbins, for the sum of \$72,000. It was a bond dated in 1872, to fall due in five years.

It is alleged among other things that the court erred in permitting evidence to go to the jury as to this bond, simply upon the production of the copy, and not requiring the production of the original. The general denial put in issue the making of this obligation. The case has been presented to us simply upon the question as to whether or not the court erred in permitting simply a copy of the bond to be introduced in evidence to make out the plaintiff's case. There has been no adjudication in this state directly bearing upon this question. Cases have been decided by our supreme court touching a lost note or a note that was destroyed before its maturity, but those cases are not similar to the case at bar. The supreme court of this state has decided that if a promissory note be lost before its maturity the maker is entitled to indemnity before judgment can be rendered against him. If, however, at the time the note is lost it is past due, or if it appear that the note has been destroyed, and, as the books put it, the maker is never in danger of having this note rise up against him, it is unnecessary, and the court will not require the owner of the note to give an indemnity. The principle is laid down in *Smith et al. v. Woodruff*, 4 East.

In this case the petition is under the Code. It is simply an action at law. No averment is made that the bond is lost or destroyed, or that it is beyond the jurisdiction of the court; but, as already stated, the petition simply states the contents of the bond, and that the plaintiff files with the petition a copy thereof. Virtually it is, according to the old pleading, a declaration with a profert. There is nothing in the pleading that would indicate that he, at the time he went to trial, had not the original bond ready to produce it in court. In the case at bar there was, among other things a plea of *non est factum*. In *Sargent v. Railroad Company*, 32 O. S., 455, the court says that the loss or destruction of the note on which the action is based constitutes no part of the basis of the action. The only reason any allegation as to the loss is necessary is to show an excuse for not making profert of the note. If nothing is said in the petition about loss of the note or failure to produce it, it is to be inferred that the party is ready, and does, in fact, make profert of the instrument.

In our opinion, therefore, the case falls within the doctrine laid down in 4 East.

The first recognition of this doctrine in this country was in cases where it was sought to hold the indorser of a note or other instrument, where it was developed by the evidence that when demand was made the officer did not, in fact, have the original instrument in his possession, ready to be surrendered up if payment should be made. The cases are uniform that where a notary has proceeded to protest a paper for non-payment, to hold the indorser thereon, he must be armed with the original note, so that the party, if he desires to pay it, may receive the pay, or see it cancelled and annulled. The principle of that class of cases has been carried into cases like that at bar. Perhaps the fullest exposition of that principle is to be found in the case of *Van Alston v. Commercial Bank*, 4 N. Y. Court of Appeals. The syllabus of that case is as follows: "The wrongful detention of the paper in a sister state by a person who claims title does not entitle the true owner to recover against the drawer without producing the paper." Says the court:

"These suggestions bring us to the inquiry above stated. Can a recovery of the amount of a bill of exchange be had in a suit without its production, on proof that another party claims he has title thereto?"

* * * Lewis Robbins, the defendant in the New York case, is not a party to this suit. Shall the defendant be required to settle plaintiff's dispute with the alleged wrongdoer? Not to accumulate authorities—for they are numerous—it is but proper to say that there are decisions, some of great character, the other way. The great weight of authority is in favor of the view just announced, and as stated in the 4 N. Y. Court of Appeals case. Many of the cases cited by the defendant in error had reference to instruments, papers and obligations, that were sought to be introduced in evidence through copies which did not form the subject matter or basis of the suit, but were only collateral to the main inquiry. Some of the courts have gone so far as to hold that judgment should not be entered in favor of plaintiff, where the maker of the instrument might ever be put to any inconvenience or run any risk.

We think that, upon principles of justice, the decisions referred to by plaintiff in error are correct, and that the contrary ruling should not obtain. The court, therefore, having, against the objection of the plaintiff in error, received in evidence simply a copy of this bond—the original not being lost—for the consideration of the jury, erred. This court ought to have refused its introduction, and the original not being produced, the court should have sustained the motion made by plaintiff in error to take the case from the jury and direct a non-suit.

Judgment reversed.

Perry & Jenney, for plaintiff in error.

Hoadly, Johnson & Colston, for defendant.

PLEADING—PARTIES.

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[Hamilton District Court, 1882].

MARGARET DUNNING v. HELENA CHOATE.

1. In an action for the conversion of part of property left on storage by plaintiff with defendant, an answer that the goods not returned were sold in an attachment suit brought by defendant against plaintiff for storage of the goods, and levied on the part of the goods not returned, needs no reply. This is not new matter but a special denial of the allegation of a wrongful conversion.
2. A petition for conversion of plaintiff's property by a married woman should join her husband with her as co-defendant, but a demurrer on this ground should be special, and the overruling of a general demurrer is not ground for disturbing a verdict for plaintiff.

Petition in Error to reverse a judgment of the Superior Court of Cincinnati.

BURNET, J.

The plaintiff in error was defendant in the court below. In that court the plaintiff Helena Choate, filed her petition against the defendant, Margaret Dunning, alleging that defendant, a married woman, was the owner of a certain leasehold estate which is described in the petition; that she used and occupied the property under her own sole management and care as a place for the storage of furniture and for other purposes; that the plaintiff stored with her a large amount of furniture, a portion of which had never been returned to her—the particular articles of furniture being set out in a schedule accompanying the petition—but had been sold, destroyed and in part converted to the use of defendant by defendant; that they were of a certain value named in the petition, and the plaintiff sought to recover a judgment for that amount. The defendant answers, admitting the storage of the furniture with her, but alleging that all of the furniture that had been received on storage had been returned to the plaintiff, except a portion thereof, which had been levied upon in an attachment suit brought by defendant against the plaintiff for the recovery of the storage due upon the furniture that had been stored, including that which had been returned and that which had been levied upon by the attachment. To this answer there was no reply. Before the answer was filed, however, there was a demurrer to the petition—a general demurrer. The petition was defective in this, that the wife was sued alone, and if the demurrer had been for defect of parties defendant, it ought to have been sustained. Section 3110, Revised Statutes provides, that for a judgment obtained against husband and wife, on account of the wife, the separate property of the wife shall be liable. Section 4996, Revised Statutes, providing how a married woman shall be sued, requires that in an action of this kind both husband and wife shall be made defendants. This is not one of the cases falling within the exceptions in that section; it is a case that comes within the general rule; but the demurrer being general, and not for defects of parties, it was properly overruled.

It is claimed on the part of the defendant in error, that the answer set up new matter, and there being no reply, there could be no evidence introduced, by the plaintiff, and although the verdict had been rendered in favor of plaintiff upon the evidence introduced yet, upon the motion which the defendant made subsequent to the rendition of the verdict, for

judgment *non obstante veredicto*, the court ought to have rendered judgment in favor of defendant. We think the answer does not set out new matter requiring a reply. The claim in the petition is that the defendant had converted to her own use a portion of the property left with her for storage. The defendant answers that she had returned all of the property except a certain portion which had been sold upon attachment proceedings in a suit by defendant against plaintiff. This is not new matter. It is simply a method of contradicting the allegation of a wrongful conversion to her own use. It is parallel to the case where a defendant, denying the contract in the petition, alleges that a different contract had been made between the parties. The allegation of a different contract is simply a denial of the contract alleged, unless it sets up matter by way of counter-claim. There was testimony offered by both plaintiff and defendant. From the testimony offered it is apparent to the court that the jury must have found that there was a portion of the property that had been left on storage with the defendant which had not been restored to the plaintiff other than the property that was taken in the attachment proceeding. The plaintiff gives a list of the articles which she says were not restored, and which were not included in the property which was taken by attachment. To this list she attaches the value of each article. The jury in rendering their verdict, however, very naturally cut down the amount claimed by the plaintiff. So it appears they cut it down sufficient to cover the counter-claim which is set up in defendant's answer for the amount of the storage which was not covered by the attachment. Under these circumstances we are not at liberty to disturb the judgment rendered upon the verdict.

Judgment affirmed.

Judge Cox concurs; Judge Johnston dissents.

A. J. Pruden, for plaintiff in error.

W. S. Cotton, for defendant.

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MUNICIPAL ASSESSMENTS.

[Hamilton Common Pleas Court, February 15, 1882.]

CITY OF CINCINNATI for the use of LLOYD v. ROBERT GORDON.

Section 2801, Revised Statutes, providing that when pavements are constructed in conformity to grades established by the authorities of a municipal corporation, and the expense is assessed on the abutting lots, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade, unless the change is petitioned for by a majority of the owners, requires that such assessments shall be occasioned by the change.

AVERY, J.

This is a suit to recover an assessment for a brick sidewalk in front of the premises of the defendant, described by the petition as at the northwest corner of Sixth street and Eggleston avenue, thirty-five feet in front on Sixth street.

There are two objections. First, that the assessment was for forty-four feet, and that the resolution to improve and notice to the owner were for that number of feet. It does not appear, however, that the resolution to improve and notice to the owner described the property in any way, except at the northwest corner of Eggleston avenue and Sixth street, being simply for an improvement by a brick sidewalk in front of that

property, without mentioning the number of feet. Even had the number of feet been mentioned, the location was certain, and that the number of feet exceeded the front of the property would not affect the resolution or notice so as to defeat the assessment.

The fact is that the forty-four feet included not only the frontage of the property, but an additional extent of the sidewalk upon the side of the property, in other words, the intersection. The assessment is irregular in that it includes a greater number of feet than the front of the property, and to the extent of the excess is invalid. Nevertheless recovery may be had for the proper amount, without, however, any penalty, provided the second objection taken is not fatal.

That objection is that the grade of Sixth street was established in 1846, and that sidewalks were constructed in 1863, and that assessment for the cost was levied upon this property and paid by the owner.

Section 2401, Revised Statutes is relied upon. That section provides, that, when pavements are constructed in conformity to grades established by the authorities of the corporation, and the expense is assessed on the abutting lots or lands, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade in such pavement, unless a petition for such change, is subscribed by a majority of the owners.

The grade of Sixth street was changed in 1871, and this improvement has been made in conformity to that grade. It is contended that the section which has been read applies only to pavement of the roadway, and not to sidewalks, for the reason that, in respect to sidewalks, the regulations are contained in another subdivision of the Revised Statutes. But the reason of the provision extends, as well to the pavement of the sidewalk, as of the roadway.

The point, however, is immaterial. Assuming that the section applies as well to the sidewalk, as to the roadway of the street, the essential condition is, in respect to the new assessment, that it shall be occasioned by the change of grade. It does not appear here, that the construction of this new sidewalk was occasioned by the change of grade of Sixth street. Upon the other hand, the contrary would seem to appear. If the new assessment had been occasioned by the change of grade, it might have been expected that the improvement would be called for soon after the change of grade, and not be delayed from 1871, when the new grade was established, until 1880, when this sidewalk was made.

The old grade was established in 1846. The pavement for which the former assessment was made, was laid in 1863. The interval of time itself accounts for the new pavement; in other words, that the assessment for the new pavement was occasioned by wear and decay from time, and not by the change of grade.

Judgment will be for the plaintiff according to the actual frontage of the property of the defendant, which is thirty-five feet, in other words, judgment will be for twenty-eight dollars, with interest from the 20th of February, 1881.

W. H. Whittaker, for plaintiff.

Jordan, Jordan & Williams, for defendant.

CONFLICT OF COURTS.

[Superior Court of Cincinnati, 1882.]

CHARLOTTE BRUCE v. JOHN B. GIBSON.

1. Upon petition of defendant an action was removed to the United States circuit court. Plaintiff filed in the circuit court a plea in abatement, and judgment was rendered that no further proceeding be had in that court.
2. It being considered uncertain whether the case was properly an action at law or a suit in equity, proceedings were begun for a review in the supreme court of the United States of the judgment of the circuit court by both writ of error and appeal, and supersedeas bond was allowed and filed in both proceedings.
3. Held: The state court will not resume consideration of the case pending the proceedings in the supreme court of the United States.

Motion to strike the case from the trial docket.

FORCE, J.

This motion in substance is to strike from the trial docket of this court, the case of Charlotte Bruce against John B. Gibson, which has been set for trial, on the ground that it does not properly belong here. The case being at issue at a former term, a motion was made to remove it under the act of congress to the circuit court for the Southern district of Ohio. The order was made removing it to that court. A plea of abatement was filed in the circuit court, and after hearing, judgment was rendered that no further proceeding be had in that court. A supersedeas bond after judgment was allowed, approved and filed to take the case to the supreme court of the United States on error and appeal. That being done, the case was set here for trial, and a motion is now made to strike it off the docket as not properly in this court.

The paper entered on the minutes of the court is a transcript of the proceedings in the circuit court. The fact that the word mandate is written on the back of the paper has no effect one way or the other. It is a certified transcript of the action of that court, obtained and brought here for the information of this court. The order made here removing the case to the circuit court is in our practice a final order, at least for the purpose of review on error. It may be reviewed on error, and thus taken to the district court, the supreme court of the state, and the supreme court of the United States. That order has not been modified. It stands therefore as on the day it was made. The circuit court, however, rendered judgment remanding the case here.

If that were all, the case would be here now for trial. But supersedeas bonds have been filed. By act of congress, a supersedeas bond on appeal in chancery has no greater effect than such bond on error in an action at law. A supersedeas bond in an action at law does not indeed vacate the judgment; but it suspends the carrying out of the judgment. A retransfer of a case from the United States court to the state court, is the carrying out of the judgment of the United States court. The retransfer is therefore the thing that is stayed by the supersedeas bond. And such bond having been duly filed, the case stands, as to this court, as if no judgment had been rendered by the circuit court.

The order heretofore made being unreversed and unmodified, and the case standing as if no action had been taken in the circuit court, it would at least be an irregularity in this court to proceed further.

It is urged by counsel that the question of further proceedings here is not a question of jurisdiction, but one of comity or courtesy; and that the judgment of the circuit court is so manifestly right that there can be no risk of the action of this court being finally set aside by the supreme court of the United States if I should proceed now to hear the case. I suppose it is true that the question of actual jurisdiction is determined, not by the views or action of either this court or the circuit court, but by the fact of there being or not being, actual cause for removal. But there is no means of surely determining whether there is not actual cause for removal, except by obtaining the opinion of the supreme court of the United States. An order has been made here which can be taken through the state courts up to the supreme court of the United States for review. A judgment has been rendered by the circuit court, which is now on its way up to the supreme court for review. Everything has been done that can regularly be done to expedite the question to the only tribunal that can finally solve it. It would be unseemly to speculate upon the chances as to that decision. And assuming to hear the case now, would be such speculation; it would be committing at least an irregularity under the hope that it might be condoned.

The motion to strike the case from the trial list will be granted, and if the parties prefer to file a supplemental pleading in place of, or in addition to the motion, of course they have leave.

Lincoln, Stephens & Slattery, O'Connor, Glidden & Burgoyne, for plaintiffs.

Thomas McDougall and Hoadly, Johnson & Colston, for defendant.

ASSESSMENTS OF TAXES.

96

[Superior Court of Cincinnati, Special Term, 1882.]

JOHN G. LUKEN v. L. A. STALEY, Treasurer, et al.

1. Where an assessor in 1873 omitted to report a new building erected by plaintiff on his lot, and the auditor in 1880 added on the duplicate against plaintiff the taxes for the omission for the intervening years, which amount was paid under protest by plaintiff, and subsequently refunded by the auditor on the ground of want of authority to add them, but the law being amended so as to give him authority, (78 O. L., 47), he again placed the amount on the duplicate.
2. Held: Such law is not unconstitutional; it created no new right, but merely provided a remedy.
3. The power of the auditor was not exhausted by one exercise, for the payment being under protest was not in a proper sense a payment, but being to stay the exercise of a power not to be resisted, has no effect on the claim, and a refunder makes the entire transaction as though it had never been.
4. As to whether the auditor exceeded his power by reason of the decennial board of equalization having completed its work, this must be shown. The court will not judicially notice the proceedings of such board.

HARMON, J.

The facts admitted by demurrer to the amended answer are, that in 1873 the assessor failed to report a new building erected by plaintiff upon a lot owned by him, and that consequently no charge was made upon the tax duplicate against said lot therefor until 1880, when the auditor, discovering such omission, added to the taxes of that year taxes upon said improvement for that and the years preceding; that plaintiff paid these taxes, but that the auditor, discovering that he had acted without authority

in the matter, refunded them; that in June, 1880, the auditor again placed these taxes upon the duplicate, together with those for the current year, and the treasurer is proceeding to collect them. The question raised is whether, upon these facts, plaintiff is entitled to an injunction.

The auditor refunded the taxes as aforesaid, because this court decided, in another case, that under section 2803 Revised Statutes, his authority to add back taxes was confined to cases where lots or lands had been omitted, and did not extend to cases of mere improvements. By the act of March 11, 1881, (78 O. L., 47), this section was amended so as to extend the auditor's authority to improvements; and it is by virtue of this act that he justifies the present charge upon the duplicate.

It is contended for plaintiff, first, that this act applies only to future omissions; second, that the former assessment of the taxes and their payment exhausted the right of the state, without regard to its subsequent disposal of them.

As to the first point, the statute is general in its terms, authorizing the auditor to add taxes for improvements so omitted "as far back as the next preceding decennial appraisalment and equalization thereof," and a statute solely remedial may apply to existing rights—even to pending cases. Here was an improvement which, under our constitution, should have borne its proper share of the public burdens, but which by the error of an officer it had escaped. This act imposed no new burden, created no new right. It merely provided a remedy for the enforcement of the right already existing.

As to the second point it is not expressly averred, but from the presumptions in favor of the acts of public officers it must be held, that the payment of these taxes by plaintiff in 1880, was not made voluntarily, but under protest, and subsequently demanded back. In other words, although plaintiff handed over a sum of money equal to these taxes, he did not, in the proper sense, pay them. Payment, which in law discharges an obligation, is the voluntary transfer of money to, and its receipt by a creditor, with intent to part with it absolutely and make it irrevocably his. When payment is so made the debt is no doubt forever extinguished, whatever becomes of the money—even though it be given back. But the mere transfer of money involuntarily, not only not with the intent aforesaid, but expressly without it, not to pay a debt, but to stay the exercise of a power not to be resisted, has no effect upon the claim. When the money so exacted is refunded, the refunding relates back to its original receipt, and makes the entire transaction as though it had never been.

Plaintiff, when he gave this money to the officer, protested that it was not meant to be, and should not be applied to these taxes. He enforced his protest by his subsequent demand and receipt of the money back. He cannot now be heard to say that what he did not intend to be, and what was not a payment, shall be held to be a payment. He knew when he paid these taxes and got them refunded, that they were morally due. He complained only of a technical want of power in the auditor. He took his chance of having to repay them if this power should be afterward conferred.

One who, to stay an impending execution, pays under protest the amount of a judgment irregularly obtained, and receives it back when the judgment is set aside for such irregularity, is certainly bound to pay again when judgment is regularly rendered upon the same cause of action.

As to the point that the auditor has exceeded the limitation provided in the act aforesaid, there is no averment that the equalization of the decennial appraisement of 1880 was or was not completed when these taxes were added, and the court will not take judicial notice of the proceedings of the various boards of equalization.

Demurrer sustained and petition dismissed.

L. S. Cotton, for plaintiff.

Charles Evans, for defendants.

REPORTS TO BOARD OF HEALTH.

97

[Cincinnati Police Court, February, 1882.]

STATE OF OHIO v. L. A. CHANDLER.

The method of procedure against a physician for failure to report small-pox case to board of health must be by civil action.

The defendant Mrs. L. A. Chandler, M. D., was arrested on a warrant issued from the police court. The affidavit, which was drawn under section 2118, Revised Statutes, charged that the defendant, being a practicing physician and being called to attend a person who had the small-pox, failed to give notice thereof to the board of health of the city of Cincinnati, within twenty-four hours after becoming cognizant of the fact.

A motion was made to dismiss on the ground that under section 2120, Revised Statutes, the proper method of procedure for a violation of section 2118, was by a civil action in the name of the state to recover the penalty, and not by warrant.

The motion was granted.

John A. Caldwell, for the state.

M. F. Wilson, for the defendant.

CONSOLIDATION OF RAILWAYS.

99

[Lucas Common Pleas, 1882.]

†JAMES COMPTON v. WABASH, ST. LOUIS & PACIFIC RY. CO., et al.

1. A "vendor's lien" in Ohio is a lien for the protection of the vendor, and not transferable, although it may descend or be devised, and where not released by the vendor, may be subjected by a judgment creditor to the payment of his judgment in an action for that purpose against the vendor and vendee.
2. A railroad company entered into an agreement of consolidation with other companies, whereby was created a new corporation. The old companies, upon the consolidation of the new company, ceased to exist; the new company succeeds to all the rights of the old, hence no vendor's lien for the value of the property of the old company is retained by it, to be reached by creditors. Whether a vendor's lien can be created in favor of creditors of the vendor, quere; but if it could, it cannot be made to pass from hand to hand, as the debt is assigned after the sale by the vendor to the vendee. Under the facts of this case the lien which accrues to the creditor is not what is technically known as a "vendor's lien."
3. Equity does not compel the execution of a naked power, not coupled with a trust. A railroad company executed to trustees a mortgage upon its property to secure a new issue of bonds of date simultaneous with the mortgage, "to be used for the purpose of retiring outstanding bonds of the company in such manner and upon such terms as the directors of the company should from time to time prescribe." The bonds secured by the mortgage were never

†This case was appealed by defendants to the district court, where it was reserved for decision in the supreme court. The latter court found for the plaintiff. See opinion, 45 O. S., 592, 624.

issued. The "manner and terms" were never prescribed by the directors. No demand was made upon them to do so for eight years; in the meantime the company had consolidated with others, mortgages were made upon the property of the consolidated company, proceedings in foreclosure commenced, receiver appointed and property sold: Held, the holders of the "outstanding bonds" have no lien under this mortgage, and equity will not treat it as a trust for their benefit, or the power conferred upon the directors as an imperative power, coupled with a trust for them.

4. The equitable rules: 1. That the property of a corporation is a trust fund for the benefit of creditors, which, when the corporation becomes extinct by a forfeiture of its charter or insolvency, or other cause, will be followed and applied by a court of equity until it passes to a bona fide purchaser; and, 2. That where one sells real estate to another upon condition that the vendee will pay the purchase price to specified creditors of the vendor, such creditors, in addition to the personal liability of the vendee upon the promise, obtain an equitable lien upon the property, which will be enforced in equity, applied to the facts of this case, (a consolidation of railroads), and the lien upheld.
5. The statute relating to the execution and record of mortgages does not prevent the existence of such a lien, or a priority over a subsequent mortgage, where the mortgagee has notice of its existence. Where the facts, which create this lien, are recited in the deed, or the instrument which some special provision of law makes equivalent to a deed, and through which the mortgagor must trace his title to the property, the mortgagee cannot claim to be without notice of such facts or their legal consequences.
6. The statute authorizing the consolidation of railroads considered and construed with reference to the power of the corporation entering into the consolidation by agreement to create for the benefit of their creditors a lien upon their property in the hands of the consolidated company.

On the first day of November, 1862, the Toledo & Wabash Railroad Company executed and issued a series of bonds amounting altogether to the sum of six hundred thousand dollars, which were styled equipment bonds. The principal of these bonds is due the 1st day of May, 1883, and they bear interest at the rate of seven per cent. per annum, payable semi-annually in New York city, from and after the first day of May, 1863. A series of interest coupons were attached to each bond. They were put upon the market at the time of their issue, and sold; and the plaintiff claims that he is now the bona fide holder for value of bonds in this series, having a par value of one hundred and fifty thousand dollars, upon which no interest has been paid since November 1st, 1874.

The Toledo & Wabash Railway Company, which issued these bonds, was a corporation organized under the laws of the states of Ohio and Indiana, especially the consolidation statutes of those states, and owned a line of railway extending from the city of Toledo to State Line City in Indiana, which railway is now a part of the main line of the Wabash, St. Louis & Pacific system.

The Toledo & Wabash Railway Company continued a separate corporation until the year 1865, when it was consolidated with various other companies to form the Toledo, Wabash & Western Railway Company. The consolidation agreement is dated the 29th day of May, 1865. Under this agreement, the following companies were consolidated: The Toledo & Wabash Railway Company, The Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company. The agreement of consolidation was duly executed and ratified by the stockholders of the various companies, and was filed in the office of the secretary of state of the state of Ohio, on the sixth day of July, 1866. It contains the following provisions:

"Now, therefore, the said companies, by their respective directors, agree to consolidate their roads, property and capital stock into one company, upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads to the stockholders thereof for ratification, to-wit: The Toledo & Wabash Railway Company enters into said consolidation, on the following basis, viz.:

| | |
|----------------------------------|--------------|
| The capital is | \$10,000,000 |
| Composed as follows: | |
| First mortgage bonds..... | 3,400,000 |
| Second mortgage bonds..... | 2,500,000 |
| Convertible equipment bonds..... | 600,000 |
| Convertible preferred stock..... | 1,000,000 |
| Common stock | 2,500,000 |

The contract requiring the Great Western Railway Company to make a cash payment to the consolidated company, so as to place that road "in equal condition with the Toledo & Wabash Railway Company, as estimated on the thirteenth of March last by Messrs. Tillon and Colburn, appraisers appointed for that purpose."

The agreement especially provided that all the rights, franchises, property, debts, and choses in action of the respective companies should vest in the consolidated company; and it also contains the following clause.

"It is further agreed, that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to principal and interest thereon, as the same shall respectively fall due, be protected by the said consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The convertible equipment bonds referred to in this agreement are the bonds referred to as having been issued by the Toledo & Wabash Railway Company, and as to a part of which this suit is brought. There is no other provision in the consolidation agreement relating to these bonds than those just quoted.

The new company, the Toledo & Western Railway Company, from this time on had possession of the railroad properties of the various pre-existing companies, and operated them as a single system of railroads.

On the first day of February, 1867, the Toledo, Wabash & Western Railroad Company resolved to make and issue its bonds to the extent of fifteen million dollars, and to secure the same by a mortgage on its entire property, and this mortgage was then made, the trustees for the bondholders named therein being the defendants, Knox and Jessup. This mortgage and its accompanying bonds are known as the consolidated mortgage and the consolidated bonds. It is dated the first day of February, 1867, and was delivered to the trustees therein named, and duly recorded.

The bonds were also duly made and executed, and a copy of one is found in the mortgage.

The scheme contemplated by the execution of this mortgage was the funding into a single mortgage indebtedness all the bonds of the pre-existing companies mentioned, whether such bonds were secured by mortgage or not.

It is recited in the mortgage that the property of each of the various companies out of which the Toledo Wabash & Western Railway Company was formed, was subject to certain bonded debts and mortgages created by them, amounting in the aggregate to thirteen millions three hundred thousand dollars, and that it was deemed for the interest of the company, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt upon equitable principles."

And further:

"For the purpose aforesaid, and for the objects herein stated, the said company, parties of the first part, has resolved to make and issue its bonds to the extent of fifteen millions of dollars and to secure the payment of the same by a mortgage upon its entire property; and that of the amount of said bonds so to be made and issued, there should be retained thirteen millions three hundred thousand dollars to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe, a like amount of the bonds of the various companies hereinabove enumerated and described and representing the aforesaid funded debt; and that the balance of said bonds, to-wit, one million seven hundred thousand dollars thereof, should be used to provide the said additional equipments and improvements hereinabove mentioned, and for such additional purposes as the said directors may deem advisable; and that all of said bonds should be for the sum of five thousand dollars each; and that all should bear date on the first day of February, A. D. 1867, and become due and payable in forty years from their date, with interest at the rate of seven per cent. per annum, payable quarterly on the first days of May, August, November and February in each year, in the city of New York, and to be all convertible into the common stock of said company at par at the option of the holders, at any time within ten years from their date."

The various classes of bonds referred to are specified in the recitals of the mortgage, and among them are the equipment bonds in question.

Consolidated bonds to the amount of two millions six hundred and ten thousand dollars, or thereabouts was thereafter issued by the company:

On the first day of April, 1873, the Toledo, Wabash & Western Railway Company, and Knox and Jessup, the trustees under the consolidated mortgage, entered into a further indenture and deed of further assurance, as it is called in these proceedings. In this deed of further assurance, the consolidated mortgage, and the

purposes for which it was executed, are cited, and it is expressly agreed by the Toledo, Wabash & Western Railway Company with said trustees "and with all persons whom it may in anywise concern," that the company would not make or issue, or attempt to make or issue, any of the then remaining twelve millions three hundred thousand dollars, consolidated bonds, which it is stated remained unissued and reserved, except for the purpose of simultaneously retiring an equal amount of the balance then remaining of the funded debt enumerated in the consolidated mortgage, so that when all of the said reserved bonds should have been used, the whole of the balance of the funded debt would be extinguished; and further, that the covenants therein contained should be supplementary to the consolidated mortgage, and constitute a part thereof, to be of the same effect as if they had been inserted therein, and the trustees bound themselves not to sign the trustees' certificate of any of said reserved bonds except as therein provided.

The object of this deed of further assurance is stated in it to be the desire of the parties, "by more express and specific stipulation than are contained in the said indenture of mortgage to give assurance to all persons whom it may in anywise concern, that the said reserved bonds shall not, nor shall any or either of them, be used for any other purpose than the retiring of the said funded debt or some part thereof." This indenture was duly executed by the company and trustees.

In February, 1875, proceedings were commenced in the court of common pleas of Lucas county, Ohio, and in the proper Indiana and Illinois courts, to foreclose a mortgage, commonly known as the gold mortgage, executed by the Toledo, Wabash & Western Railway Company, in February, 1873, to secure the payment of one million dollars of bonds, and a receiver was appointed of the road. This gold mortgage was executed and recorded prior to the deed of further assurance already mentioned.

In December, 1875, a decree was rendered in the suit in the Ohio court for the foreclosure of the last-named mortgage, whereby all the property and franchises of the Toledo, Wabash & Western Railway Company were ordered to be sold at a judicial sale. Confirmatory decrees were made by the Indiana and Illinois courts.

The property was sold under the decree by a special master commissioner, on the tenth day of June, 1876, to John W. Ellis and others, a purchasing committee. This sale was confirmed by this court, and a deed made to the purchasers on the first day of January, 1877, to carry it into effect.

The foreclosure decree made by this court, under which the property was sold, contained the following condition:

"And that the sale of said road, property, equipment and franchise to be made, subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called equipment bonds, referred to in the petition, as to which all questions arising are left open."

After the sale of the Toledo, Wabash & Western Railway Company, it was reorganized and became the Wabash Railway Company. Ellis and others, Committee, who purchased at the sale, organized a company in each of the states of Ohio, Indiana and Illinois, and then these companies were consolidated into one called the Wabash Railway Company, the articles of consolidation being filed on the tenth day of January, 1877.

On the twelfth day of January, 1877, the said Ellis and his associates transferred the property purchased by them at such foreclosure sale to the Wabash Railway Company. Both the special master commissioner's deed to the purchaser, and that of the purchasers to the Wabash Railway Company, refer to the decree of foreclosure, and are made subject to the payment of the liabilities charged upon the property by the decree of foreclosure and to the lien of the consolidated mortgage.

The Wabash Railway Company then took possession of this railroad property, and operated it until its consolidation with the St. Louis, Kansas City & Northern Railway Company, a corporation organized under the laws of the state of Missouri and operating a railroad from St. Louis, in the state of Missouri, with certain extensions and branch lines.

The articles of this consolidation are dated the fourteenth day of August, 1879, and they provide, amongst other things, that upon the ratification of the agreement by the shareholders of both corporations, all the property, rights and franchises belonging to each of the companies should pass to and be vested in the new corporation, whose name should be the Wabash, St. Louis & Pacific Railway Company. Supplementary articles were entered into by the same companies on the tenth day of October, 1879. The consolidation was duly approved by the stockholders of

each of the companies, and the articles were filed in the office of the secretary of state of the state of Ohio, on the twenty-fifth day of October, 1879.

This last company has since that time owned and operated all of the said railroad property and the franchises of the pre-existing companies.

The Toledo, Wabash & Western Railway Company paid the interest on the equipment bonds as the same matured, up to and including the first day of November, 1874, having thus paid the interest thereon from the year 1865.

The directors of the Toledo, Wabash & Western Railway Company have never prescribed the manner and terms for the exchange of the equipment bonds for the consolidated bonds, and have never issued consolidated bonds for that purpose, refusing to do this after demand was made upon them; but no demand was ever made by the holder or holders of said equipment bonds, or any of them, until the twenty-ninth day of June, 1875, upon said directors to prescribe such terms, or to exchange the equipment bonds for those secured by such mortgage. *Ham v. T. W. & W. Ry. Co.* See 29 O. S., 174.

Neither the Toledo & Wabash Company, nor the Toledo, Wabash & Western Railway Company own any property, or have any assets; and all of the property, franchises and assets which they did own have, through the various proceedings herein set out, passed to and become vested in the Wabash, St. Louis & Pacific Railway Company.

At the time of the consolidated mortgage there were two mortgages upon the property of the Toledo & Wabash Railway Company, one for nine hundred thousand dollars, and one for one million dollars.

In January, 1877, The Wabash Railway Company executed a mortgage on all its property to one George I. Seney, to secure certain promissory notes, amounting in all to one million two hundred and sixty thousand five hundred and fifty-five dollars and forty-two cents. Some of the promissory notes have been paid, and the plaintiff charges and alleges that the holders of said notes, secured by the Seney mortgage, are chargeable in equity with notice of the lien and equity of the equipment bonds.

In May, 1877, the Wabash Railway Company executed another mortgage on all its property to Solon Humphreys and Daniel A. Lindley, trustees, for the sum of two million dollars. This mortgage was recorded in August, 1879. The plaintiff charges that it is inferior and subject to the lien of the equipment bonds, and that the holders of the bonds which it secures, and the mortgage trustees, are chargeable with notice of the lien or equity of the equipment bonds.

There is unpaid on the equipment bonds owned by the plaintiff, the coupons that have fallen due since, and including the first day of May, 1875.

A suit was commenced in this court by the plaintiff herein against the Toledo, Wabash & Western Railway Company, to recover a judgment at law on so many of these coupons as matured on and prior to the first day of November, 1879. The defendant appeared, and on the fifteenth day of December, 1880, this court rendered judgment against the said defendant for the sum of \$64,236.16. On the same day the judgment was entered and execution issued to the sheriff of Lucas county, which has been returned wholly unsatisfied.

The Wabash Railway Company, and Wabash, St. Louis & Pacific Railway Company, have repudiated payment of these equipment bonds, though retaining the property of the company which issued them.

An application was made to the supreme court of this state at its December term, 1876, by Benjamin F. Ham, et al., for a mandamus to compel the Toledo, Wabash & Western Railway Company to issue in exchange for certain of these equipment bonds, the bonds mentioned in the mortgage of February 1, 1867, known as the consolidated mortgage, which application was refused by the court. See *Ham v. T. W. & W. Ry. Co.*, 29 O. S., 174.

DOYLE, J.

It appears from the pleadings and proof in the case that the only issue of fact which it is necessary for the court to pass upon is the question of whether the plaintiff is the owner of the bonds sued upon.

The testimony upon that issue consists of the deposition of the plaintiff and one George Arents, from which it appears that Arents, who is a stock-broker, owned the bonds, and shortly before the commencement of this suit transferred them to the plaintiff, who is a resident of Washington, the plaintiff agreeing to pay him sixty-six cents on the dollar for them, and executed his note to Arents for \$99,000 as the purchase price. Upon the execution of the note the bonds were delivered to plaintiff, and he produces them in court, with the coupons. The cir-

cumstances under which this sale or transfer was made are given by these witnesses quite fully; and I confess the first effect of reading the testimony upon my mind was, that the transfer was a ruse to enable the parties to maintain an action in this court in the name of Compton, a resident of the District of Columbia, in order to preserve a removal of the cause to the national courts.

I have carefully examined the testimony, however, and am unable to see why, if the transaction was just as these witnesses detail it, the transfer should not be upheld; or, in other words, why the plaintiff is not the owner of these bonds. The ownership of Arents is not questioned. He transferred them to plaintiff, receiving plaintiff's note in payment. The motives which prompted this action are not very material, if the transaction itself was real, and not a sham.

The plaintiff bases his claim to a lien upon the property of the old Toledo & Wabash Company upon four distinct grounds, namely:

1. The equitable lien, ordinarily designated as a vendor's lien.

2. By virtue of the security, which he claims was created in favor of the holders of the equipment bonds, by the consolidated mortgage, so-called.

3. Upon the principle urged that when a corporation is dissolved, or from any cause becomes extinct, its property is a trust fund, primarily applicable to the payment of its debts, and is always subject to this application until it has passed into the hands of a bona fide purchaser for value.

4. That the effect of the consolidation in 1865, upon the condition that these bonds should be protected as required both by the statute and the agreement of consolidation, created a lien upon this property in the hands of the Toledo, Wabash & Western Railway Company, which can be enforced against the world, except bona fide purchasers, and that there are no parties here who occupy that relation.

Let us examine those propositions: First—Whatever may be said of the wisdom of making any distinction between what is technically known as a "vendor's lien," and any other equitable lien resting upon a trust, it is too well established now in Ohio that a vendor's lien rests upon conditions, and has limitations peculiar to itself to admit of doubt. A difference of opinion as to the propriety of these limitations arose among the judges as early as the cases of *McArthur v. Porter*, 1 O., 99, and *Jackman v. Halleck*, 1 O., 320, in which cases Judge Burnet dissented from the opinion of the majority of the judges, he asserting that the lien and the debt ought to be co-existent, and whosoever held the debt ought to be entitled to enforce the lien. In delivering the opinion of the court in *Tiernan v. Beam*, 2 O., 383, Judge Burnet announces his opinion in terms so distinct that the court in the case in *Williams v. Roberts*, 5 O., 43, was compelled to disavow his language, while approving the decision of the particular case.

The doctrine in Ohio is said to rest upon the intention of the vendor to rely solely upon the estate conveyed as a security for the payment of the purchase price; and any act done, or any independent collateral security taken, which evinces the intention of the vendor to rely upon something other than the estate, discharges the lien, or it never attaches. This means, however, where the vendor parts with the title; where he retains the title he cannot be compelled to part with it until the price is paid. See *Williams v. Roberts*, 5 O., 40; *Railroad v. Lewton*, 20 O. S., 401; *Tiernan v. Beam*, 2 O., 383; *Mayham v. Coombs*, 14 O., 429.

This equity arises to the vendor for his own safety. It is personal to the vendor; not capable of assignment or transfer, although it may descend or be devised. *Brush v. Kinsley*, 14 O., 23; *Jackman v. Halleck*, 1 O., 320.

The cases which are claimed to depart from this rule are but applications of it. In *Neil v. Kinney*, 11 O. S., 66, the land was held in trust by A for B. A conveyed the land and took the debtor's notes, and passed them over to B, the real owner. By the court: "But this lien of the vendor, being a personal right, does not attach and pass with the claim as an incident when sold and assigned by the vendor;" and then, it holds, that B was the real owner of the lien at its inception.

In *Whetsel v. Roberts*, 31 O. S., 503, R sold and conveyed real estate to C, and received the notes of C. Subsequently C sold the land to W, who assumed the debt due R, and in lieu of the notes of C, gave to R his own notes. It was held that this did not release R's lien, because it was not taking any outside collateral security for the debt, or in any sense a transfer of the debt.

The nearest approach to a departure from the rule stated is found in *Edwards v. Edwards*, 24 O. S., 403, which holds that "a judgment creditor who seeks by action to subject to the payment of his judgment a claim for purchase money due to the judgment debtor, as a vendor, is entitled to the enforcement of the vendor's lien, to the same extent as it might be enforced, if the action had been by the vendor against the vendee."

But the general rule is again asserted, subject to the exceptions already noticed, that it may descend and be enforced by his personal representatives, and in an action like that, when both the vendor and the vendee are parties, and the lien has not been lost, it may be applied to the creditor's judgment as fully as if the vendor had first sued and obtained a decree.

It is, in the view I take of the case, unnecessary to determine whether this lien, as it is technically understood, can be created in favor of a creditor of the vendor by agreement; that is, where the vendee agrees as part of the consideration to pay A, a creditor of the vendor, the purchase price—or whether that is what is intended by an intimation of Judge Ranney in *Clyde v. Simpson*, 4 O. S., 445. Whether such agreement creates an equitable lien in favor of the creditor will be considered further on.

The objection to the transferability of such lien, under the principle we are considering, would as certainly apply to the creditors as to the vendor. The vendor cannot make the lien transferable by agreement, or by creating it in favor of some other person than himself.

In this case the vendor retained no lien itself. It ceased as a corporation to exist at the time of the consolidation, and if the lien ever attached in favor of those who were then creditors, this plaintiff cannot enforce it, because he is a transferee of the debt since the sale by the vendor.

It is impossible that this lien, as it exists and is limited in Ohio, can pass from one to another, as these railroad bonds are exchanged or bartered in the ordinary markets and in the stock exchanges of the country. No action could be maintained by the vendor company against the consolidated company to enforce this or any other right, and hence the principle in the case of *Edwards v. Edwards*, supra, has no application here. The error is in calling the lien, which is claimed to arise from the facts stated, a vendor's lien.

2. The mortgage of February 1, 1867, was made by the Toledo, Wabash & Western Railway Company to Knox and Jessup, trustees; was delivered to them, and recorded. The bonds were signed by the company, but except to the extent already mentioned, to-wit: two million six hundred thousand dollars, were not endorsed or countersigned by the trustees, and were not issued in the sense of becoming obligations of the company. Indeed, there is no evidence that they were delivered to the trustees.

The deed of further assurance, as it is called, was executed April 1, 1873, and these two instruments, so far as it is necessary to notice them here, are set out in the statement of facts already given. If any rights accrued the creditors enumerated in the mortgage under this deed of further assurance, in addition to those secured by the mortgage itself, it will be observed that they were subsequent in date to the execution and record of the gold mortgage, and, so far as they depended upon that paper of April 1, 1873, would be inferior to the gold mortgage.

It is conceded that the directors named in this mortgage never prescribed the manner in, or the terms upon which the bonds should be used, or the enumerated outstanding bonds should be retired; and it is not claimed that any holder of the equipment bonds, or any other of the bondholders named in the mortgage, ever requested the said directors to prescribe such terms until June 29, 1885, when such demand was made, and the action was taken preliminary to, and recited in, the mandamus case in *Ham v. T. W. & W. R. W. Co.*, 29 O. S., 176, already referred to. But, on the contrary, the holder of said bonds received and accepted the interest upon them, as the coupons matured, up to and including the instalment maturing in November, 1874, a period of nearly eight years after the execution of the consolidation mortgage.

By the deed of further assurance it is made to appear that up to April, 1873, there remained unissued of the thirteen million, three hundred thousand dollars reserved to retire outstanding bonds, the sum of twelve million, three hundred thousand dollars. In the meantime the consolidation of 1868 had taken place. In February, 1873, the mortgage, so-called, was executed for five million dollars, and the bonds secured by it placed in the market. It was no doubt partly to aid the sale of those bonds that the further assurance was given that the prior secured debts to the company could not be increased by the use and sale of the consolidated bonds and the application of the proceeds to any other purpose than retiring debts already existing and enumerated in the mortgage. The interest maturing on the gold bonds, and the company being in default, an action was commenced in this court to foreclose the gold mortgage. In 1875 a receiver was appointed, final decree entered, and the property sold. Under the circumstances, can the plaintiff, holding equipment bonds, claim the benefit of the security of the consolidated

mortgage? Does it secure his debt, so that he can now ask a court of equity to enforce it as completely as if his bonds had been exchanged for consolidated bonds?

In the mandamus proceeding *Ham v. T. W. & W. R. W. Co.*, 29 O. S., 176, the supreme court use this language:

"The manner and terms upon which the original bonds were expected to be exchanged for bonds under the consolidated mortgage, seem never to have been prescribed by the directors of the company. This was necessary to be done before the exchange could be made; and it is certainly very questionable whether the whole scheme was not abandoned before the relators acquired any right under it, even as against the company."

The consolidation of 1868, the execution of the gold mortgage, the suit to foreclose it, and appointment of a receiver intervening before the bringing of the proceeding, as well as the sale of the property, the application for a writ of mandamus to require the company to make exchange of bonds was refused. This opinion of Judge White is not authority which determines any question here, but so far as he has expressed an opinion, his well known care and ability entitle it to more than ordinary consideration. The case of *Calvin Claffin et al. v. South Carolina R. R. Co., et al.*, in the circuit court of the United States for the district of South Carolina, was decided by Chief Justice Waite. At a meeting of the directors of the company, May 21, 1872, it was resolved, some measure of relief for the large floating obligations of the company had become expedient, and some means of providing for annually recurring bond maturities should be devised; therefore,

Resolved, that a second mortgage, to the extent of three million dollars, be authorized, and that bonds be executed to be sold by the president at not less than eighty cents on the dollar; provided that he shall take payment for the same, one-third in cash and two-thirds in unsecured bonds of the company.

The mortgage and bonds were executed. The mortgage recited the resolution, and especially that the proceeds of the bonds "were to be applied exclusively to the extinguishment of the floating debt and the retirement of the unsecured bonds." Of the new bonds, one million, one hundred and thirty-four thousand dollars were issued and entitled to the full benefit of the security. After reciting these facts, the Chief Justice says: "The mortgage is not to the unsecured bondholders, or floating debt holders, or to trustees for their security. It was made to secure bonds, the proceeds of which were to be applied to extinguish the one class of debts and retire the other. The mode in which this was done is not provided for. All that is left to the discretion of the company or its officers. No creditor can demand the bonds upon such terms as he may dictate. He must submit to what the company requires, or get no advantage from what has been done. His specific rights under the mortgage all depend on the bargain he makes with the company in that behalf. He may, if the company consents, exchange his claims for bonds, dollar for dollar, or less, or more; but until some arrangement has been made by which a bond secured by the mortgage becomes in some way connected with the unsecured bonds he owns, or the floating debt he holds, he remains just where he was before the mortgage was made."

Then, after passing upon the rights of the parties claiming to hold the bonds actually issued and secured by the mortgage, he continues:

"The only question in this part of the case which remains to be considered is as to the rights of the outstanding unsecured bondholders under the second mortgage."

"It is insisted on their behalf that the mortgage 'was a contract between the corporation and its creditors, and constituted a complete and executed trust for the creditors of the company then holding its unsecured bonds and its floating debt, for the retirement and extinguishment of which the bonds secured by said deed were to be exclusively applied.' From what I have already said, it must be apparent that I cannot agree to the proposition. Whatever else the mortgage may be, it certainly is not an assignment for the benefit of these two classes of creditors. Neither, as I have before stated, was it intended in any manner for their security, so long as they held their unsecured bonds or floating debt unaffected by any contract they may make with the company with reference to it. They can only get what they especially bargain for, neither can they compel the company to make any particular arrangement in their behalf. The company was at liberty to make its own terms."

I have quoted at this length from the opinion of Judge Waite because it not only meets my approval, which is not very important, but because it states better than I could a conclusion applicable to the case at bar.

In the mortgage under consideration the bonds to be secured were not the equipment bonds, or any of the other enumerated bonds, but the new issue of bonds named in the mortgage. The mortgage does not entitle any class of creditors named in it to a change of obligations, one for the other, or upon any other terms. It contains a declaration of the purpose of the company, it being deemed for the interest of all concerned to consolidate all of these debts into one security, upon such terms and in such manner as from time to time the company's directors should prescribe, and, what was absolutely essential, as the creditors would accept.

The mortgage created no debt, and the only debt secured by it is evidenced by such of the consolidated bonds as have by agreement been used or issued.

The trustees, by the terms of the mortgage, were not permitted to issue or use them, as far as the thirteen million, three hundred thousand dollars are concerned, except for the single purpose of retiring these old bonds it is true; but they were not to use them for that purpose until the directors should arrange the manner and terms. It must be remembered that the bonds enumerated included first and second mortgage bonds upon specific and distinct parts of the property, maturing at different periods of time, from 1869 to 1890; these and other unsecured bonds also maturing at different periods of time and issued by different companies; and floating debts.

These debts bore different rates of interest, payable at different times. The bonds secured by the consolidated mortgage were to stand alike as to their security and rates of interest, and maturity, and were to constitute the lien upon the entire property of the consolidated company. To make the scheme which the company sought possible, it necessarily reserved to itself the right to prescribe the manner and terms upon which these bonds were to be issued, and the old ones retired. In other words, they reserved the right to contract with their creditors as to the terms upon which they would surrender debts which they held, for consolidation bonds; and as this contract, like many others, required the assent of both parties, the creditors were at liberty to accept or reject any terms offered or contract proposed.

Under these facts, it is insisted by plaintiff's counsel "that the consolidated mortgage is a complete and executed trust, so far as the company and the bondholders to be benefited thereby are concerned, and that the power in the directors to prescribe the manner and terms is an imperative power, coupled with the trust mentioned, the non-execution of which does not destroy the trust, but which a court of equity will execute in the event of an omission or incapacity on the part of the donee of the power."

I cannot agree that the effect of the mortgage is what is claimed. I do not see how these directors of the company cease to be directors, or become vested with any capacity or functions adverse to the interests of the company by anything contained in this mortgage, or that, by the provisions reserving to them the power to prescribe the terms named, they become in any sense trustees, under the mortgage, for these bondholders. The reservation of this power to the directors was in effect a reservation to the company itself, designating its legally constituted agents, through whom it acts, to exercise it. The power was coupled with no trust for these creditors. The trust would only arise from the exercise of the power and the ratification thereof by the creditors, and the moment that was done the directors would cease to be trustees. If these directors had prescribed terms, and they were rejected by the plaintiff, could a court of equity take the matter out of their hands and prescribe different terms, or enforce the mortgage on more favorable terms to the creditors? Certainly not. The company had not, at the time it executed this mortgage, and never had, so far as the facts here show, that contract, and the principle decided is, that no particular formula of words is necessary to the creation of an express obligation to do, or forbear to do a particular act. That where in the body of the instrument, or the recitals or reference, there is manifested a clear intention that a party shall do a certain act, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for non-performance of which an action will lie.

The covenant here is that the consolidated bonds shall not be used for any other purpose than to retire the outstanding indebtedness, but that covenant has the express condition that they shall be used for that purpose, only upon such terms as the covenantor's agent may from time to time prescribe, which terms are subject to acceptance or rejection by the holders of the outstanding indebtedness. Hence, it comes not within the rule of the cases cited to support the claim, that a covenant not to use them for any other purpose is a covenant to use them for that purpose. *Ketcham v. St. Louis*, 101 U. S., 306, grew out of a loan of seven hundred thousand dollars in bonds by the county of St. Louis to the Pacific Railroad Company,

under an agreement that "The fund commissioners of the Pacific Railroad, or such persons as may at any time hereafter have the custody of the funds of the railroad company, shall every month, after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of the Pacific Railroad, four thousand dollars, and one thousand dollars each December to meet the interest on said bonds; said payments to continue until said bonds are paid off by the Pacific Railroad Company." This was held to create an equitable lien. The authorities therein cited are all based upon agreements which the court finds, created a trust or lien, where such was the intention, but none of them present the question here raised. If the assumption was true that this mortgage was intended as a security for these equipment bonds, the case cited would be applicable; but I have already expressed my opinion that no such intention existed. If such was the intention, it might be true that it would not be necessary that the creditors should be technically parties to the instrument. It might be treated as an assignment for the benefit of these creditors, and in that event the question of laches on the part of the creditors would be a material inquiry, as to whether, after the lapse of time and the intervening of other rights, the same might not be revoked and the trust destroyed. But this is not an assignment, and no such question arises, although discussed in argument at some length.

Third and fourth. This will be considered together.

It already appears that on the twenty-ninth day of May, 1865, The Toledo & Wabash Railway Company was a separate organization, owning a line of railway extending from Toledo in Ohio, to State Line City, in Indiana. It owned the debts enumerated in the consolidation agreement, secured and unsecured. Its property was valued and went into consolidation at an agreed value of ten million dollars. Upon that day, May 29, 1865, it entered into an agreement of consolidation with the other companies named, by which was formed the Toledo, Wabash & Western Railway Company. This agreement of consolidation, which was submitted to and ratified by its stockholders, is fully set out in the statement of facts.

The statute authorizing this consolidation is the act of April 10, 1876, S. & C., page 827.

Section 2 provides that the consolidation shall be made under the conditions and restrictions following:

First—The directors of the several corporations may enter into a joint agreement under the corporate seal of each company, for the consolidation of said companies, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, * * * the agreement of a single creditor to enter into the scheme of consolidating these debts into a single mortgage, or of diluting the security of one class of creditors by mixing it with the unsecured debts of another class. It proposed a scheme which it no doubt believed the parties would eventually be able, by arrangement, to unite upon; but it was impossible then to do any more than it did do; place the power in the hands of agents to negotiate and agree with these creditors, and, if that was done, authorize the trustees under this mortgage to use these consolidated bonds to carry out such agreement.

What has a court of equity here to deal with? Equity never enforces the execution of a power where it is not coupled with a trust. Story Eq., 169, 170; Leading Cases in Equity—4th Am. ed., page 379; marginal page, 243; Howard v. Carpenter, 11 Md., 282; Powell on Powers, page 131; Sugden on Powers, II, p. 157, (marginal).

I do not deem it necessary to consider the question whether plaintiff, and those from whom he obtained his bonds, are, by reason of laches, to be denied the enforcement of any equitable right under this mortgage, or whether the claim is now stale, even if once meritorious, because I think no right ever accrued to them under the mortgage to be lost by laches, no right of election to be waived by a failure to exercise it.

I have examined the authorities relied upon by counsel for plaintiff, and they do not sustain the claim here asserted. I can only notice a few of them: *Stableton v. Ellison*, 21 O. S., 527, was a case where under the will of John Ellison, his widow took a life estate in the land of the testator, with the power of making distribution to his children, discretionary as to the time of making the distribution, the parcel to be given each and the valuations to be affixed to each parcel, but defined and limited in this, that the whole estate must be distributed, giving to each child a part, and to each what the widow honestly believed to be an equal part. She died without fully executing the power, and the action was for an equitable partition.

Had she executed the power in good faith, her discretion would not have been interfered with; but having failed to exercise it in part, the court did, allowing such portions as were executed to stand as final.

The case of *Huston v. Craighead*, 23 O. S., 198, is another case arising under a will, and is but an affirmation of the same principle as the former case.

Martin v. Funk, 75 N. Y., 134, decides that a donor, depositing money in a bank for a donee, does enough to make a valid gift, thereby creating a trust, to the validity of which it is not essential that the property should be possessed by the cestui que trust, or that the latter should be informed of the trust. The question was whether the gift was consummated, or whether it remained incomplete, or rested in mere intention. If the donor had reserved in herself the power to thereafter prescribe the terms upon which alone the gift should take effect, and never prescribed such terms, the decision would have been different, necessarily.

Payne v. Wilson, 74 N. Y., 348, is a case where H agreed with defendant P, in writing, who was the owner of certain lands, and with D, who had a contract for the purchase thereof, to advance money for the erection of buildings, they agreeing to give him a mortgage, which was defective, and subsequently another. In the meantime a mechanic's lien was filed, and the court enforced the equitable lien of H as prior to the mechanic's lien.

I do not find anything in the facts or opinion which adds anything to the case of *Neil v. Kinney*, 11 O. S., 58, decided in Ohio, or throws any light upon the question now under consideration.

Booth v. Cleveland Mill Co., 74 N. Y., 15, was a case upon a mutual contract, and involved the construction of and the manner of converting the capital stock of each of said companies into that of the new corporation, with such other details as they shall deem necessary to perfect such new organization and the consolidation of said companies.

Second—Said agreement shall be submitted to the stockholders of each of said companies; * * * and at the said meeting of stockholders the agreement of said directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same; * * * and the agreement so adopted, or a certified copy thereof, shall be filed in the office of secretary of state, and shall be deemed and taken to be the agreement and act of consolidation of the companies. And a copy of said agreement and act of consolidation, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of said corporation.

Section 3 providing—"Upon making and perfecting the agreement and act as provided in the preceding section, and filing the same, or a copy thereof, with the secretary of state, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this state all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of such a corporation of this state so consolidated."

Section 4, likewise relates to the corporate powers and the election of directors of the new company.

Section 5. Upon the election of the first board of directors of the corporation created by said agreements of consolidation, and by the provisions of this act, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all property, real, personal and mixed, and debts due on account of subscriptions of stock or other things in action, without further act or deed; and all the property, all rights of way, and all other interests, shall be as effectually, the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deeds, gift, grant, or by appropriation under the laws of this state, shall not be deemed to revert or be impaired by reason of this act. Provided, That all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same, and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation, and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it.

By this agreement of consolidation, and the force of this statute, as soon as the new company organized by electing its directors, all the property of every kind of the Toledo & Wabash Railway Company passed from it, and became vested in the Toledo, Wabash & Western Railway Company, and the old company became extinct, except for the single purpose provided in section 5 of the act aforesaid. Upon this agreement, filed with the secretary of state, for its foundation, stands the

new corporation and its right to the property of the old ones. (Section 3 of the act aforesaid.)

The subsequent proceedings down to the foreclosure suit on the gold mortgage, and the sale of the property, are sufficiently enumerated in the statement of facts.

It was upon the institution of this suit (the foreclosure suit), if not because of it, that the company ceased paying interest upon the equipment bonds, which it had done up to the November previous.

The decree ordered the sale of the property subject to the lien of all mortgages and trust deeds prior to the gold mortgage, including the lien of the consolidated mortgage, which was found to be duly made and recorded, and a lien upon the property (but without determining the amount thereof), and contained this clause:

"And that the sale of said road, property, equipments and franchises be made, subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called equipment bonds, referred to in the petition, as to which all questions arising are left open."

By this provision any rights the said bondholders may have in the property are reserved to them. *Ham v. Toledo, Wabash & Western Ry. Co.*, 29 O. S., 179.

This order of the court was made after the holders of the equipment bonds had asked the court to allow them to become parties to the suit, which was resisted by the company's attorneys, and to save their rights.

The sale was made June 10, 1876, to Ellis and others, who afterward conveyed the same to the Wabash Railway Company. The deeds from the master commissioner, and from Ellis and others, to the Wabash Railway Company, refer to the decree, and recite in effect its terms.

The Wabash Railway Company then, by articles of consolidation with other companies, yielded up its existence to the present defendant, the Wabash, St. Louis & Pacific Railway Company, which company now has, by virtue of the proceedings already cited, all of the property of the old Toledo & Wabash Railway Company (which company issued the bonds upon which this suit is founded), and claims that it has title to the property, freed from any lien or liability to pay any of these unsecured debts.

In the state of Alabama, the legislature of that state passed an act, which was approved February 23, 1860, (Acts of Alabama, 1859-60, page 253.) entitled "an act to incorporate the Western Railroad Company of the state of Alabama." Sections 21, 22, et seq., of that act are as follows:

"An act to incorporate the Western Railroad Company of the state of Alabama.

"Section 21. Be it further enacted, That said company may, by its president and directors, by and with the consent of a majority of the stockholders in value, contract for the purchase of the Montgomery & West Point Railroad and for the Alabama & Mississippi River Railroad, with all their outfits and property of every description, or for either of them, so as to form the continuous line of railroad contemplated and described by the acts of the congress of the United States, approved the 4th of September, 1841, appropriating the two per cent. fund of the states of Alabama and Mississippi, to-wit: From a point on the Chattahoochie river opposite West Point, in the state of Georgia, across the state of Alabama, in the direction of Jackson, in the state of Mississippi.

"Section 22. Be it further enacted, That with a view to such purpose, and in order that said railroads, or either of them, when purchased, may be incorporated into the Western Railroad Company of Alabama, the president and directors of said companies may, upon such purchases being made, by and with the consent of a majority of the stockholders in value, surrender their charter to the comptroller of public accounts; and upon such notice being given, and the publication of the same being made in some newspaper published in the city of Montgomery, for at least thirty days, the road, or roads thus purchased, shall be incorporated with the Western Railroad Company of Alabama, and be governed by the provisions of this act in all respects, as if said road or roads had been constructed under its provisions. The purchases herein provided for, or the surrender of the franchises, shall in no way affect the rights of the creditors of the company, or companies, whose roads may be purchased, and their separate existence shall be continued as to all the rights and remedies of creditors, and the president of the company incorporated by this act shall be held in law, as to service of process, as the president of the other company or companies, whose roads, works and property may be purchased; and the said Western Railroad Company may sue for and

recover in its name all debts due and demands from any debtor to said company whose roads and property may be so purchased.

Section 22, contains those provisions of the statute which are the corresponding ones in that act to those relating to the creditors of the old company in our statute; the material difference being that our statute expressly gives the creditor an action at law against the consolidated company. The agreement hereafter mentioned gave that right to the creditor in that case.

The Montgomery & West Point Railroad Company, at that time, was indebted to the amount of about two-thirds the value of all its property, a part of which debt was unsecured income bonds and floating debt. The stockholders of the Montgomery & West Point Railroad Company passed a resolution authorizing its sale under the provisions of the twenty-first and twenty-second sections of the charter of the Western Railroad Company, said last named company to assume all the obligations of this company, and issue stock of the new company share for share of the old stock." On the first day of September, 1870, the Western Railroad Company took possession of this property without any deed, and a surrender of the charter of the company was made to the state. Previous to the commencement of this suit next referred to, the Western Railroad Company made its bonds and trust deed to secure them for one million, two hundred thousand dollars, September 15, 1870, which was foreclosed by the trustees, and the entire property sold in 1875. The unsecured creditors already mentioned were not parties to the suit, but they bring a suit, in the chancery court of Montgomery, claiming that they are entitled to be paid out of the property of their original debtor, and had a lien thereon superior to that created by the trust deed of September 15, 1870. The case is reported in 15 Ala., 153, et seq., and I quote from the opinion of the court:

"It is agreed, though, that the enactment, declaring that the purchase of the railroad and other property of the West Point Company, and the surrender of its franchises shall in no way affect the rights of its creditors, was intended only to entitle them to sue at law as they before might have done. * * * The legislature did not (they say) mean to embarrass the transfer of the railroad and property from one company to the other, by incumbering the same with liens which did not previously exist; but the Western Railroad Company acquired the property in the same plight that the Montgomery & West Point Company held it, and succeeded to the power of the latter to create a lien, by a second or third mortgage to secure bonds of a new issue, the holders of which would be entitled to enforce this security against and to the prejudice of the holders of the unsecured debt of the Montgomery & West Point Railroad Company. Let us examine these propositions."

The court then considers the provisions of that statute, and in relation to the clause of the statute professing to secure the rights of the creditors, inquires:

"What were the rights that might be so preserved? A private corporation chartered to transact business is a trustee of the capital, property and effects—first, for the payment of its creditors, and afterwards for the benefit of its stockholders. True, while it continues in life and operation according to the design of its charter, its general creditors have no specific lien which would entitle them to sue it in a court of equity, yet during that time its property and effects, which the law presumes would not be dishonestly put out of its reach, are liable and might be subjected to the payment of its debts by an action at law against it, if not paid voluntarily. But if leaving its debt unpaid, its capital, property and effects are distributed among stockholders and transferred for their benefit to third persons who are not bona fide purchasers without notice, and still more, if the corporation be dissolved, or become so disorganized that it cannot be made answerable at law, then a court of equity will pursue and lay hold of such property, and apply the same to the payment of what it owes to its creditors.

"A suit having that object is the most direct, if not the only efficient means, of asserting and vindicating any right of the creditors in such a case as the present; and to hold that it is not maintainable would be to refuse to give any real effect to the saving clause in the statute, if any such clause was necessary to enable them to maintain the suit. Certainly, if by virtue of the act, one of the contracting companies might transfer all of its ample property and effects, out of which its creditors ought to be paid, to the other, perhaps, weaker company, in consideration of admitting the stockholders of the former to become shareholders of its property thus augmented, and might then—by a sort of legal suicide—step out of existence, leaving those creditors to sue at law the surviving company, which they had never dealt with or accepted as their debtor, their rights would be very seriously affected thereby."

That the Toledo & Wabash Railway Company, who issued these equipment bonds, was as completely dissolved and disorganized so that it could be made answerable at law as the Montgomery & West Point Railroad Company by the surrender of its charter, but that its separate existence continued as to the rights of creditors, is very apparent. All of its property of every kind passed as completely, under the consolidation, to the new company, as it could by any form of conveyance.

In *Shields v. Ohio*, 5 Otto, 319, Mr. Justice Swayne, for the court, in construing this same Ohio statute, says:

"The legislature has provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All, the old and the new, could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their validity and submit to dissolution. That being done, eo instanti, the new company came into existence."

See also *Railroad Company v. Georgia*, 98 U. S., 359, which construes the Georgia statute, decided by Justice Strong:

"That generally the effect of consolidation as distinguished from a union, by merger of one company into another, is to work a dissolution of the companies consolidating and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result.

Quoting *McMahon v. Morrison*, 16 Ind., 172; *Lanman v. Lebanon Valley Railroad Company*, 30 Pa. St., 42; *Clearwater v. Meredith*, 1 Wall., 40.

The principle of equity which is asserted in the Alabama case—that the property of a private corporation is a trust fund for the benefit of its creditors, which, upon the dissolution of the corporation, or the distribution of the property among its stockholders, or upon its being transferred for their benefit, or without consideration—will be pursued and laid hold of by a court of equity until it passes into the hands of a bona fide purchaser, and applied to the payment of the creditors, is well established.

True, while the corporation is doing business its power of disposition of the property within the scope of its authority and the line of its business cannot be embarrassed by any specified lien of the general creditor, but when the corporation ceases to have the power to manage and control it, by dissolution, whether by insolvency or otherwise, the lien of the creditor attaches to the property, and may be enforced against it until it passes to bona fide purchasers.

I cannot disconnect this proposition, very well, from the consideration of the other principle of equity referred to, which has an important force, and the facts out of which that principle is invoked.

Section 2 of the act provides that "the directors of the several corporations may enter into a joint agreement * * * for the consolidation of the companies, and prescribing the terms and conditions thereof."

The act then provides for the submission of this agreement to the stockholders, and the method of its adoption or rejection: "And the agreement so adopted * * * shall be deemed and taken to be the agreement and act of consolidation of said companies."

By this agreement of consolidation the property of the Toledo & Wabash Railway Company was put in at ten million dollars, with an express stipulation that by the consolidated company (as a consideration in legal effect) the bonds in question should "be protected as the same shall respectively fall due."

This consolidation, therefore, resulted from an agreement between the parties, and it was by virtue of that agreement, and the effect which the statute gave to it, that the property was transferred from the old to the new company. The terms of the transfer required the new company, the grantee, to pay the debts of the old company specially enumerated—to protect the creditors enumerated.

The principle of equity which is invoked here is, that when property is transferred to another upon condition of paying some third person a debt, the latter acquires, in addition to any personal remedy against the vendor upon his promise to pay the debt, an equitable lien which may be enforced by a court of equity against the property, until it goes into the hands of a bona fide purchaser. (*Story Eq.*, 1244-1246; *Clyde v. Simpson*, 4 O. S., 445; *Vanetter v. Vanetter*, 3 Grat., 148).

In the last case, 3 Grat., the grantor conveyed all of his real estate by deed in consideration that the grantee would pay his grantor's debts, and an annuity. The

action was by creditors, and the court held that the grantee was not only personally liable, but that a court of equity would treat the subject as in the nature of a trust for the creditors, and establish a lien on the property while in the hands of the grantees, or their representatives, as a means of compelling payment, although it was found there was no trust expressly created by the deed, and although bona fide purchasers might not be bound by it.

In *Clyde v. Simpson*, 4 O. S., 462, the same principle is announced in a case where a devise was made by will of real estate, with a direction to the devisee to pay a specific amount to each of the testator's children. The devisee conveyed the land to Clyde, who had notice that the legacies were not paid, and the legatees sought to charge their legacies as a specific lien on the property; and the court, after holding the lien attached, says:

"When Moore Simpson accepted the devise and took possession of the estate, he became absolutely bound to pay these legacies as a part of its purchase price. If he had taken the title by deed, an undoubted, equitable lien for these payments would have attached, and I am wholly unable to see how a doctrine resting upon the broad foundations of justice and conscience, and which will not permit one to keep the estate of another until the consideration is paid (*Second Story's Eq.*, 1219,) can be made to depend upon the manner in which the title is derived."

This equitable rule existed at the time of the passage of this statute. Has it been changed by the statute?

The difference between these two propositions, upon which the equitable lien is claimed, is, that in the first case the lien which arises upon the insolvency and dissolution of the corporation is a general charge in favor of all the creditors generally, while if the lien arose by reason of the transfer of the property by the agreement, it is a specific charge in favor of the specific creditors. In either case it would include the bonds.

If any importance attaches to the distinction, it might arise from a claim that the statute conferred power of sale on the new company, and that purchasers were not bound to look to the application of the purchase money, where the charge was in favor of creditors generally; while, if the charge was in favor of specified creditors, they would be so bound. *Clyde v. Simpson*, 4 O. S., 445.

The existence of these equitable rules is not denied, but it is asserted that they have no application to the facts here disclosed. It is contended, to state it briefly,

First—That the consolidation under the statute left the new corporation as free with respect to this property, as was the old company, to mortgage it for a new debt of its own contracting, or to prefer creditors other than those of the old corporation, and thereby create a lien which will be preferred to debts of every kind not thus secured, and in the execution of mortgages, since the consolidated company may have exercised that right; and,

Second—This property vested in the new corporation by operation of this statute, and the consolidation agreement is in no sense a sale, with'n the meaning of the equitable rule referred to, but rather, as one of the counsel claims, the formation of a partnership into which any person may put his entire property so as to subject it to the partnership debts in preference to his individual debts.

Let us examine these claims. In support of the latter proposition the case of *Railroad v. Georgia*, ante, is relied upon, but fails to sustain it. Justice Strong, in deciding that case, uses this language: "When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners in a new concern." The old corporation, by the decision, are held to be extinct, but the stock of the old corporations formed by consolidation the stock of the new, by force of the Georgia statute, and the stockholders become quasi partners. There is no partnership, certainly, between the corporations, under the new name, for no corporation entering into the consolidation survives it; and it would be a partnership with all its members dead.

It seems to me that if the old companies, by the terms of the agreement, expressly stipulated that the old debts should be a specific charge upon the estate conveyed, making an express trust, it would not violate any provision of this statute; and whatever name be given this agreement, it is by virtue of it that the property passes from one owner to another.

What, then, is the effect of the statute? It provides:

First—That all property of each of the corporations shall be deemed to be transferred and vested in the new company, without further act or deed, when the agreement is ratified and filed, and upon the election of the new board of directors; that is, upon completing the organizations of the new company. There were two

objects accomplished by this provision: First—As the old corporations were no longer to exist, the consolidation should embrace all their property of every kind. Second—Recognizing that by whatever name it might be called, it was in fact a transfer of the property; as a matter of convenience it provided a simple method of making that transfer, viz: by filing the agreement of consolidation with the secretary of state, instead of requiring the usual formal conveyance recorded in each county, leaving the parties free to make such agreement, however, as they saw fit, not in violation of the statute's express requirements.

The statute, however, contains a proviso which is to be a part of this transfer, a limitation upon the power to transfer; "provided, that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired; * * * and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation, and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it."

Without following the very able arguments of counsel on both sides, I am satisfied that this statute was intended to place upon the contracting parties these limitations:

First—It must embrace the whole property of the old corporations, which corporations thereupon surrender their corporate existence.

Second—All the rights of the creditors, and all liens, must be preserved, and upon that condition all the property of the old companies is so to be vested in the new company as completely as it was held by the old companies to the contract.

Third—In any event, the new company must be liable for the debts as completely as if it contracted them itself.

But this provision, which gave to the creditor a remedy against the new company as ample as existed against the old, did not intend, and does not operate, to destroy or limit any right which the creditors may have, and which results from any established rule of law or equity; nor does it preclude the parties from making such contract, as they see fit, enlarging the rights of the creditors, or securing, by any legal agreement, the payment of their claims. The old companies might stipulate for a mortgage by the new company, to secure general creditors, for instance. Hence, I conclude that this agreement of consolidation is to have precisely the same construction as if made under any of the ordinary methods of transferring property by contract, subject only to the condition that it shall not violate the meaning and spirit of the enactment.

Thus construed, it appears to me that the members of the old company, who held this property in trust primarily for its creditors, agreed to transfer that property to the new corporation for a consideration, to be paid by the transferee, and upon the expressed condition that it should pay to A, B and C, the creditors of the vendor, in specified amounts, and the residue in stock to the old stockholders. And this condition being expressed in the very instrument which the statute substitutes for the ordinary mode of conveyance, makes the payment of those debts an express and specified charge upon the property conveyed. It is brought within the principle announced by the supreme court in *Clyde v. Simpson*, already noticed. It may be said to be a general charge under the statute, and a specified charge under the agreement. See also the case of *Ketchum v. St. Louis*, 101 U. S., 301, and the numerous cases cited by counsel for plaintiff, of which no further special notice can be taken. It is therefore not in any sense a latent equity, such as purchasers, from those having title by deed, are not charged with the duty of inquiring into.

The claim that such a lien is forbidden by the statute relating to the recording of mortgages, at least to the extent that it shall not take preference of a recorded mortgage, is not well founded. The lien which existed here is neither a mortgage nor an agreement for a mortgage. It is a lien growing out of a trust subject to the payment of which the title to the property is held. No one with notice of the existence of this trust can obtain the property by deed or mortgage released from the trust without the act of the cestui que trust. No one could, having notice of a vendor's lien, obtain by mortgage a lien superior to it. The conveyance by which this title is held contains in it a condition that creates a trust upon the estate. Hence, the statute (*S. & C.*, vol. 1, p. 465,) or the decision under it of *Bloom v. Noggle*, 4 O. S., 45-6, do not affect the question. See *Clyde v. Simpson*, 4 O. S., 445, and *D. X. & B. R. R. Co. v. Lewton*, 20 O. S., 402, and *Whetsel v. Roberts*, 31 O. S., 508.

There are no parties here who can claim to be purchasers without notice, and hence entitled to be protected from this lien. Of course all liens prior to the con-

solidation were, and still are, superior to any lien created by or simultaneously with the consolidation; but those are not in dispute.

It is claimed that the agreement of consolidation, as filed in the office of the secretary of state, constitutes the evidence of the new company's title to corporate existence, but not evidence of its title to the property acquired from its constituent company. On the contrary, the agreement of consolidation is not only evidence of title to the property, but of the terms upon which the title is held by the new company. It is made—upon the happening of another event, viz.: the election of the new board; that is, as soon as the new corporation is so far existent as to be capable of receiving a grant—a sufficient transfer of the property without further conveyance by deed.

The statute does not transfer the property. It declares what form of instrument, when voluntarily executed by the parties, and what proceedings or acts shall be sufficient to effect a transfer. It declares, it is true, that the transfer shall be of the whole property; but upon what terms or conditions is left to the agreement of the parties.

Notice that the equipment bondholders were claiming rights in the property is furnished by the provision of the decree of foreclosure reserving such rights; and the reference to that decree in the several deeds of conveyance thereunder and thereafter made.

That the owner of land is chargeable with notice of facts recited in the deeds through which he traces his title is a proposition well established. (*Bonner v. Ware*, 10 O., 469; 17 Wall., 5; 15 Pet., 114; *Reeder v. Barr*, 4 O., 458; *Sugden on Vendor* chap. 24, sec. 1, sub. 25). Every fact necessary to establish the lien is matter of record, recited in the very instruments through which the defendant obtains its title to the property. No one denies knowledge of these facts who is a party to this action.

The very great peril to which every unsecured creditor would be subjected, if the claim of the railroad company is correct, would occasion justified alarm. Should creditors of a solvent corporation with assets ample for their payment, submit, without their consent, to have attached to those assets the liabilities of another, or a dozen other, corporations, perhaps insolvent, with only a personal claim against the aggregated corporation, which may owe debts of earlier maturity enough to sweep away the entire property? The new corporation may, if this claim be correct, cover the property with a mortgage to its entire value, to carry out some scheme connected with the purposes of the consolidation, as was done in this case by the gold mortgage, that will result in disaster and ruin. The creditors have no voice, and the directors and stockholders of the old company have no voice, beyond determining whether the consolidation shall take place; no power to fix the payment of these debts as a condition upon which the property shall pass out of their control. And a chapter might be written of perils to the creditor, not anticipated, but voluntarily undertaken, but which by the force of this statute assail him, if the construction claimed for it is correct. No construction could be given to any statute which results in injustice, or a possibility of injustice, unless its plain import requires it. The spirit of self-preservation, which is said here to be ample protection against these evils, and which would prevent unwise consolidations, is nothing more nor less than self-preservation of the stockholder whose interest may be, and indeed naturally are, antagonistic to the creditor. To rest the rights of creditors upon the interests of stockholders, as the stockholders determine what are their interests, is to destroy every safeguard of the creditor; to allow the stockholders to receive, as a reward or consideration for a consolidation, the stock of the new company, whether augmented or not by the aggregate property and debts, but compel the creditor to depend upon the solvency or honesty of a corporation he never dealt with, never trusted, is to allow a violation of the trust upon which the property is held by a corporation, if not to impair the obligation of the contract. True, this consolidation statute and the power granted by it, forms in a measure a part of the contract with the creditor; but to construe it now so as to abrogate well-settled rules of equity is unwise, and I think a violation of its true purport and meaning.

Decree for plaintiff.

Sprague, Milburn & Sprague, Rufus P. Ranney, and George J. Comstock, for plaintiff.

Wager Swayne, H. S. Greene, Baker, Hord & Hendricks, and John R. Osborn, for defendants.

FRAUDULENT CONVEYANCES.

[Hamilton District Court, 1882.]

W. H. CONSTABLE v. JOHN WEASER et al.

In an action to set aside a conveyance by defendant, to one F., as made after a judgment in favor of plaintiff against F. and one W., to defraud creditors, where the petition does not show that W. has any interest in the property conveyed, nor is any relief asked against him, a motion to make him a defendant, as being a necessary party, will be denied.

ON APPEAL from the Court of Common Pleas.

BURNET, J.

This was an action by a creditor of one of the defendants to set aside a deed made to the other defendants, which, it is claimed by plaintiff, was fraudulent. In the year 1869 the defendant John Weaser, together with Frederick J. Kiffer, made a promissory note to the plaintiff, Constable, for the sum of \$250.00, payable one year after date. The note was dated April 29th, 1869; Frederick J. Kiffer was surety upon the note for Weaser. In the month of December, 1869, some four months after the maturity of the note, Kiffer made a conveyance of a farm in this county to Weaser on the following considerations: In consideration of the following sum of money to be paid by Frederick J. Kiffer after the death of the grantor, the said Frederick J. Kiffer and his wife to the following persons, namely: \$817.00 to Jacob Kiffer, \$817.00 to Mary Rehm, \$460.00 to Elizabeth Schultz, \$280.00 to the heirs of John Weaser and Catherine Weaser who may be living at the time of the death of the said grantors, to be divided between them equally, and for the further consideration that said Frederick Kiffer will comfortably keep with him the said Frederick J. Kiffer and wife, and provide for all their wants during their respective lives, and for their decent burial after their death.

These are the considerations.

In this action the parties named in the deed to whom the special sums of money are to be paid upon the death of the grantor and his wife are not made defendants, but only the grantee. Frederick Kiffer answers the petition denying any knowledge of the judgment on the promissory note, and therefore denies the same, and denies that the conveyance was made for the purpose of defrauding creditors, but alleging that it was made for a valuable consideration. The facts appear to be as follows: The note was executed April 29, 1869, and became due April 29, 1870. The conveyance was made in December, 1869, and the possession of the property passed to the grantee. Subsequently, in the year 1870, a judgment was obtained before a magistrate against both of the makers of the note, principal and surety. An execution was issued to the constable and returned "no goods." In the year 1875, a transcript was filed in the court of common pleas for lien and execution, and an execution was issued in 1875 against the property of the defendant, and returned "no lands found whereon to levy." In the year 1877 the petition in this case was filed to set aside this conveyance, and to subject the property to the payment of the judgment. Meanwhile the grantors in the conveyance had been living with the grantee Frederick Kiffer, and receiving from him the fulfillment of his undertaking up to that time by the support that was furnished by Frederick Kiffer to them. The evidence in the case proved

that in 1869 the property was worth the sum of \$3,400, the sums required to be paid amounted to about \$2,400 in money, and in the meanwhile the grantors were to receive their support. At the close of the testimony of the plaintiff, a motion was made on the part of the defendant to render a judgment for the defendant. This motion was granted. A motion is now made for a new trial on the ground that the court erred. It is a principle well known to the law that he who is in debt cannot give away all his property, but must retain some with which to pay his debt. And if this conveyance were of that kind, upon promptly pursuing his remedy the plaintiff might have set aside the conveyance and subjected it to the payment of his debt. There is no evidence that the grantee in the conveyance was aware of the fact that the grantor Frederick J. Kiffer, owed anything to anybody. There was no evidence that at the time the conveyance was made he did not possess other property than that which was included in this conveyance. From the whole case we consider it highly probable that this was the only real estate that was owned by defendant, Frederick J. Kiffer, at the time he conveyed it, and our decision may be based upon the assumption that he did not own any other property. After the note fell due there was a judgment rendered upon it by the magistrate, and a return was made on the execution "no goods found whereon to levy." The plaintiff rested upon his rights, so far as he had any, for a period of 2 or 3 years before filing his petition to set aside this conveyance. Meanwhile the grantee was paying, in part, the consideration in the support that he rendered to the grantors. We might say that the equity, if there was any, was a stale one; but this was not a purely voluntary conveyance. It is a conveyance for a consideration, and the consideration is in part paid. Now, the persons to whom the amounts of money are required to be paid at the time of the death of the grantors are not made parties defendant in the action. There cannot, therefore, be considered in this case any right that the complainant might have had against them, and the conveyance, so far as they are concerned, cannot be set aside. The grantee, who is made party defendant in the action, gives them himself a valuable consideration. For all the rights that pass to him he buys the property and pays the price. He has undertaken to pay further sums to those who are to be the heirs—no, they are not his heirs—they are his step-children; but it would be, to them at least, a voluntary conveyance, if it were in the nature of a trust to convey to them the money; but it is simply a personal obligation assumed on the part of the grantee to pay those sums of money. If they were payable in the present time, and if the recipients of those sums were made defendants to the suit, it might be that any equity they had, might be subjected to the payment of those defendants consistent with the rights of the grantee in the property. We think that the court did not err, upon the motion of defendant, in rendering a judgment for defendant. The motion for a new hearing of the case will therefore be overruled.

John Foster, for plaintiff in error.

Forrest & Meyer, for defendant in error.

BUILDING AND LOAN COMPANIES.

[Hamilton District Court, 1882.]

THOMAS BURKE et al. v. HOME BUILDING ASSOCIATION.

The weekly installment of premium to be paid for shares purchased in a building association having been fixed in and secured by a mortgage on the property of a member purchasing, cannot be increased and covered by the mortgage by subsequent action of the association unless the constitution and by-laws of the association confer such authority in plain and unmistakable language.

ERROR to the Superior Court of Cincinnati.

JOHNSTON, J.

The action was commenced to foreclose a mortgage upon the property of Thomas Burke, located on Boal street, in this city. It was alleged that Burke was the owner of seven shares in that association, and had borrowed \$3,500 thereon, and failed to pay the dues and premiums as provided in the constitution and by-laws of the association. There were amounts unpaid, it is claimed, by way of dues, interest and premiums. Burke and wife answered and deny that they are indebted in any sum whatever, and deny the right of the association to ask for a sale of the property. They allege that they complied with the terms of the mortgage, and of the constitution and by-laws of the association, and paid the dues as they were required thereby; and farther, they alleged by way of cross-petition that they have paid largely in excess of the dues that the association had the right legally to claim against them, and they asked that the case may be referred to a master, and an account taken and stated between them. The court found for the association, and that there was due for interest and weekly dues and premiums the sum of \$300, and ordered a sale of the property.

It appears from the evidence in the case that this was an association whose shares were \$500.00 each; that Burke, at the time this loan was obtained, was a member of the association and owner of seven shares, and that he agreed to pay \$410 per share for the privilege of obtaining \$500 on a share. The constitution of the association contains this provision: "The premiums shall be paid in regular weekly installments of 50 cents per week for four years. After that time the board of directors shall determine the amount of premium to be paid per share weekly." It is set forth in this petition that at the expiration of four years from the time when Burke executed the mortgage, which was in 1878, the board of directors did determine, that while the members theretofore had been paying premiums at the rate of 50 cents per week on each share, they shall thereafter pay in double that sum per week. In the case of Burke, where he had been paying at the rate of \$3.50 per week, he should pay the rate of \$7.00 per week. The court below held that that was a proper construction of this clause of the constitution, and for the reason that Burke had failed to pay the premiums in accordance with the new order of the board, entered a decree against him.

Burke claims that this was unjust, and not a proper construction of that section of the constitution; and, further, claims that the mortgage itself, in the clause of defeasance—if that be a proper construction of that section—did not follow it, but simply called for the sum of fifty cents per week, and no more. Now, in construing this section of the constitution

of the association, it is to be subjected to the same principles of construction as a statute that emanates from a legislative body. It is to receive such a construction as will not contravene any principle of the constitution of the state or any well settled principle or rule of public policy governing the right of property or of person. Generally considered, a statute enacted by a legislative body is to be prospective, and not retrospective in its character—it is to operate *in futuro*. A law that seeks to act upon the past—that is retroactive in its character, is not favored by the constitution of the state, but, on the contrary, is inhibited.

I read an English authority upon the subject. (Dwarris 540.) "A retroactive act would partake in its character of the mischief of an *ex post facto* law, as to all cases of crimes and penalties; and in matters relating to contracts or property would violate every sound principle."

Coming down to the decisions of our state, there is a well considered case in *Irad Kelley v. Kelso & Loomis*, 5 O. S., 199. In the syllabus occurs this: "Statutes affecting substantial interests and rights of property have a prospective operation only, unless the contrary intention is clearly expressed." Among other things the court says: "It is clear that this statute was never intended to have a retrospective operation; and equally clear that, without such an effect is given it, it cannot reach the present case. Long before it was passed, the rights of the party before us were fixed; a contract, perfect in form and substance, was made, the obligation of which could not be impaired by any state legislation." * * * "Viewed in the light of the well regulated rule that statutes affecting substantial interests have only a prospective operation unless the contrary intention clearly appears, it speaks only for the future" * * * "and in the absence of clear and unmistakable language, it ought never to be imputed to a legislative body."

Now, looking at this provision of the constitution of the association in this case, it does not set out with that clearness that it might, that this board was to be vested, or was vested, with the right to raise the weekly premiums of members who theretofore—that is, before the expiration of the four years—had become members of the association, had borrowed money, and had agreed according to the constitution as it then stood, and according to the terms of the mortgages, to pay these sums at the rate of fifty cents per week, and no more. It would not be an unfair interpretation to hold that this right to increase the weekly premiums was to apply simply to such members as obtained their money after the expiration of the four years from the time when the association commenced its operation. The language of the constitution is that after four years the board shall determine the amount of the premium to be paid weekly. This could well apply to the premiums of persons who had borrowed their money after the board had elected and gone forward according to this section of the constitution, and provided that thereafter the members shall pay in double the amount that had been required of members for the four years prior thereto. But, looking at the mortgage, there certainly is nothing in its proviso or clause of defeasance that anticipates the enlargement of its terms, so as to require the mortgagor to pay increased or double premiums if the board of directors should after the expiration of four years by resolution so determine. This is the proviso: Provided, nevertheless, that if said Thomas Burke shall, according to its constitution, pay said association the dues, interest, and the premiums in weekly installments of fifty cents per share, according to its constitution and by-

law, etc. Here is a stipulation in plain and explicit terms signed by Burke and wife—his wife not being a member of the association. It is distinct and specific that they shall pay these premiums at the rate of fifty cents per week until the association shall be dissolved, or until it shall be repaid the amount borrowed from the association. It is claimed by the association that the defeasance provides that he shall pay these dues in accordance with the by-laws and constitution of the association, and that he therefore impliedly obligated himself to pay this increased amount per week, which the directors sought to impose upon him four years after he had taken his loan. We think this clause is ambiguous. In the section already adverted to, there were other matters and things to be done by members of the association in accordance with the by-laws and constitution—than the payment of the weekly premiums—to which that phrase might as well apply as to the prospective increase of dues. For instance, it is provided by the constitution and by-laws that every member shall not only pay his weekly premiums, but also that he is to pay upon Tuesday of every week at a certain hour of every evening; that he shall have the money counted out, the exact change, and other provisions.

We are of opinion that inasmuch as the claim made by the association here is a claim that, if it obtains, would have the effect to enlarge the terms of this mortgage, would, in effect be retroactive in its character, and would have the effect to encumber this man's property to a greater extent than by the terms of the mortgage plainly expressed he intended it should be encumbered, the interpretation claimed cannot be sanctioned, since the language of the provision of the constitution relied upon does not clearly and unmistakably give that interpretation. We think that when Burke borrowed this money, and when he gave this mortgage and agreed to pay these premiums at the rate of fifty cents per week, his right to pay that and no more became fixed as between him and the association, and the court below erred, in our opinion, in holding that he should have paid in accordance with the order made by the board of directors four years thereafter in requiring him to pay \$7.00 per month premiums, or an increase of \$3.50 per week.

It is claimed by counsel for the association that Burke was in default, not only for these premiums, but that he was in default also for weekly dues and interest. From our brief examination of that portion of the case, also in the absence of any denial or claim to the contrary by counsel for plaintiff in error, we must find such to be the fact. If such be the case, we must reverse the judgment of the court below in so far as it imposed upon plaintiff the payment of premiums at the increased rate of \$7.00 per week, and a judgment should be entered for any other dues for which he was in arrears. If this be the fact, and there is no dispute about it—a judgment may be entered here, or it may be remanded to the court below and entered there on the basis indicated.

Judgment reversed in part and affirmed in part.

Logan & Logan, for plaintiff in error.

Mannix & Cosgrave, for defendant in error.

DISTRIBUTION OF ESTATES.

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[Hamilton Common Pleas Court, 1882.]

†W. H. CARUTHERS, Adm'r, v. R. J. TARVIN et al.

Where a widow, who has property which came to her as sole heir of her deceased husband, earned by her during his life, dies intestate, leaving brothers and sisters of her own, and there are brothers or sisters of her deceased husband surviving, these latter take one-half the estate, under section 4162, Revised Statutes, although that section was enacted since the death of her husband. For the right of her brothers and sisters to be her heirs is not a vested right, but a mere expectation dependent on her dying intestate, and it was competent for the legislature to provide that one-half of such property left by her should go to the husband's brothers and sisters.

MAXWELL, J.

W. H. Caruthers, administrator of Matilda C. Gundry, deceased, brings this action against Richard J. Tarvin, Samuel W. Tarvin, Joseph W. Tarvin and Sarah Broughton, alleging that as such administrator he is ready to distribute the estate of the deceased, but that the defendants set up conflicting claims to the estate, and he asks that their respective rights may be settled by the court.

John Gundry died June 7, 1875, intestate, without issue, leaving a real and personal estate which he had acquired during his life, and none of which came to him by descent, devise, or gift from any ancestor, and leaving as his relict and widow Matilda C. Gundry.

Matilda C. Gundry was appointed administratrix of his estate, and as such took charge of his personal property, and in due time filed her account in the probate court, in which she charged herself as administratrix with the proceeds of the personal property, credited herself with the expenses of administration, and with debts paid by her, and took the balance of the personal estate, and the real estate as distributed under section 4159, Revised Statutes.

She died November 13, 1880, intestate, without issue, leaving the real estate which she had inherited from her husband, John Gundry, unchanged, and leaving a large proportion of the personal estate, or the proceeds thereof, which she had also inherited from John Gundry.

The Tarvins are brothers and next of kin of Matilda C. Gundry, and as such claim all the property of which she died possessed; while Sarah Broughton, as the sister and only next of kin of John Gundry, claims one-half the property under section 4162, Revised Statutes, which provides:

"When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real or personal estate which came to such intestate from any former deceased husband or wife, under the provisions of section 4159, then such estate, real and personal, shall pass and descend one-half to the brothers and sisters of such intestate or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife from whom such personal or real estate came, or their personal representatives.

But it is maintained by counsel for the Tarvins that section 4162, was not passed until April 11, 1877, after the death of John Gundry; and to give it the effect claimed by counsel for Mrs. Broughton would make it retroactive, and therefore void, under section 28, article 2, of the constitution, because it takes the property back to John Gundry and starts on a fresh line of descent; and, second, that the property must be traced and identified, which cannot be done with personal property.

A retroactive law may be defined as one "that takes away or impairs a vested right." *Rairden v. Holden*, 15 O. S., 207. But the Tarvins had neither a vested nor a contingent right in this property. The property belonged to Mrs. Gundry, after the death of her husband, absolutely; she might have sold it, given it away, or devised it away, and the Tarvins could not have complained. An anticipated interest in property can not be said to be vested in any person so long as the owner of the interest in possession has full power, by his or her ownership, to cut off the expectant right by grant or devise. Hence, as section 4162 did not take away

†This decision was affirmed by the district court, *post*, and the district court opinion affirmed by the supreme court, without report, November 11, 1884.

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Caruthers, Adm'r, v. Tarvin et al.

or impair a vested right in this case, it was not retroactive. It appears that Mrs. Gundry had but \$400 of a separate estate at the death of John Gundry, and as she took the balance of his estate as distributed in the form of money, the mingling of the \$400 with over \$10,000 presents no serious difficulty in the determination of the question. The order will be that the balance of the estate be distributed one-half to the Tarvins, and one-half to Mrs. Broughton, after deducting expenses of administration, debts, and the \$400 of Mrs. Gundry's separate estate, which should also bear its proportion of expenses.

Reuben Tyler, for the administrator.

L. G. Collins, for the Tarvins.

King, Thompson & Maxwell, for Mrs. Sarah Broughton.

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[Hamilton District Court, 1882.]

G. W. WARD v. JOHN RITT.

Dissenting opinion of Judge Johnston.

For this dissenting opinion see 6 Dec. R., 1132.

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[Hamilton District Court, 1882.]

DUBY GREEN v. W. H. FISHER, et al.

For opinion in this case, see 6 Dec. R., 1138; (s. c. 10 Am. Law Rec., 570.)

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[Hamilton District Court, March, 1881.]

S. KUHN & SONS v. O. I. FRANK.

For this opinion, see 6 Dec. R., 1142; (s. c. 10 Am. Law Rec., 622.)

This case was reversed by the supreme court, see opinion, 41 O. S., 166.

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APPEALS.

[Hamilton District Court, March 7, 1882.]

BRAEHLE v. BRAEHLE.

No appeal is given from an allowance of alimony, pendente lite, made by a court in session, or a judge in vacation, either by the act of March 11, 1853, "concerning divorce and alimony," or the amendatory act of April 15, 1857. The allowance and amount in such cases rest in the sound discretion of the court.

JOHNSTON, J.

On the 24th day of September, 1881, the plaintiff filed her petition in the court of common pleas, against the defendant, for alimony alone. At the following November term of the court the case was heard upon a motion for alimony *pendente lite*, and a judgment rendered in favor of the plaintiff against her husband, John Braehle, for her reasonable alimony during the pendency of the suit. The defendant, John Braehle, thereupon gave notice of his intention to appeal from this court to the district court, and afterwards, on the 31st day of December, 1881, filed his bond for an appeal to the acceptance of the clerk, in the amount fixed by the court.

This case is simply here upon a motion to dismiss the appeal, and the question is not an open one, but has been settled in our state by a decision

of our supreme court, in the case of *Taylor v. Taylor*, 25 O. S., 71, the court there holding that an order for alimony *pendente lite* is not appealable; and that being the law of our state, the motion to dismiss the appeal will be granted.

Gasser & Spangenberg, for the motion.

Paxton & Warrington, *contra*.

EXECUTIONS.

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[Hamilton District Court, 1882.]

GEORGE W. WEBER v. THOMAS B. KING.

1. The sheriff is liable if he does not levy executions against the same person in the order he gets them.
2. Where execution creditor No. 1 told the sheriff he knew of no property to levy on, but said that a later creditor would point out the property, and that he must levy the first one first, if the sheriff allows creditor No. 2, who had, by employing detectives, found property, to persuade him to levy the second execution first, such sheriff will be liable for the deficiency in the earlier execution.

ERROR to the Court of Common Pleas.

SMITH, J.

The error alleged is in refusing charges asked by the defendant below, and in giving a charge excepted to by him. King having recovered a judgment against one Weaver, his attorney sent to the clerk's office and took out execution on that judgment and placed it in the hands of the execution deputy, telling him to hold on to the execution; that he knew of no property to levy on, but that, in the course of a few days, another creditor of Weaver would hand him certain executions, and would point out to him property of said Weaver to be levied on, and that, when it was pointed out, to levy his (King's) execution first. In the course of a few days, the other judgment creditor, by his attorney, did give the sheriff certain executions against the same defendant and told the officer he would point out the property to be levied on. The officer told him that, having had his earlier execution, he must levy that first, and the attorney of the second execution remarked that he had been at great expense and trouble in hunting up the property to satisfy the execution; that he had employed and paid detectives, and that it would be a great hardship for him to lose the fruits of his exertions by having the property levied on by the earlier execution. It appeared he over-persuaded the officer to levy his execution first. The property was not sufficient to pay both, and after the levy was made, under the said execution, the judgment debtor turned over the property levied on to the judgment creditor in the second execution, and thus paid that debt. King, the prior execution creditor, brought suit against the sheriff for the default of his deputy in not levying his execution first, according to law and the direction given by his attorney.

On the trial below, the defendant asked the court to charge that if the jury found the sheriff or his deputy did not know of any property to levy on, and that a subsequent execution was handed to him, coupled with a condition to point out property to be levied on, provided his execution was levied first on said property, the sheriff might consent to make a levy on the property pointed out under the second execution first. The charge was refused, as was also a charge that the sheriff was not chargeable with

neglect, as the property was not pointed out by the prior creditor, but by a party holding a subsequent execution. But the court did charge, that, except the executions were issued on judgments secured during the same term, it was the duty of the sheriff to levy the executions in the order in which they are put into his hands, and that it was not the policy of the law, when executions were issued, to regard the matter as a race of diligence between creditors, as such holding would be to open the door of fraud and misconduct on the part of the officers.

In the argument it was claimed by the defendant that the law encouraged diligence on the part of the competing creditors, and that the rule thus laid down was contrary to equity and the spirit of the law, and contrary to the diligence the law encourages upon the part of creditors.

The rules and practices in relation to this question are different in different states. In our state the matter is entirely regulated by statute. Section 5375, Revised Statutes, provides that goods and chattels levied on are bound only from the time they are seized in execution. Section 5383, provides that an officer receiving an execution shall levy it at once, if he can find the goods and if not, indorse on the execution, "No goods or chattels," and then levy on the real estate. Section 5382, which is the same as the original section 424 of the Code, provides that, when judgments are recovered at the same term, executions issued during the term, or within ten days thereafter, if there is not property sufficient to satisfy all, shall be satisfied pro rata. If executions are placed in the hands of the sheriff on the same day, they are to be satisfied pro rata if there is not property enough to satisfy all, and, in all other cases, the writ of execution first delivered to the sheriff shall be first satisfied by the officer, and he shall indorse on the writ when it first came into his hands.

The language of this section is plain and peremptory, and it was the duty of the sheriff, following that direction, to levy the executions on the property in the order in which he received them. This view is sustained by a decision in *Murphy v. Swadener*, 33 O. S., 85, where Judge Johnson, of the supreme court, delivered an elaborate opinion as to the priorities when executions are delivered into the hands of the officer at different times.

The same doctrine is recognized in *Freeman on Executions*, section 251, and the author cites *Knox v. Webster*, 18 Wis., 406, in its support.

It is claimed in this case that it is an extreme hardship upon the junior creditor, that after he had been at the trouble and expense of pointing out the property to the sheriff, he should lose the fruits of his labor, but if a hardship, it is one inflicted by the statute, and cannot be rectified by the court or by the sheriff. This is not a controversy between judgment creditors, one having the advantage of the earlier execution, the other, the advantage of knowing where the property is—that would present a case for negotiation or arrangement between creditors. But in such arrangement, it is not the duty of the sheriff to take sides, which seems to be the complaint here. The sheriff's deputy took sides in levying the second execution first when he had a prior execution in his hands, and in that respect mistook his duty, and subjected his principal to liability. To rectify the apparent hardship of the statute is a matter for the legislature, and not for the court. The judgment of the common pleas is affirmed.

EXTRADITION.

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[Superior Court of Cincinnati, 1882.]

†Ex parte JOHN LARNEY.

Extradition does not depend upon guilt, but upon flight from charge of guilt, and the prisoner cannot, by proof of his innocence of the charge, deprive the governor of his jurisdiction to extradite him. Nor will proof that he was never in the demanding state, for as an accomplice, or otherwise, he may have been constructively a fugitive from such state. But proof of an alibi at the time laid in the charge, is not proof of innocence or absence at the time of the crime, for the time at which the crime is laid is an immaterial part of the charge.

HARMON, J.

John Larney, (known as Mollie Matches), was arrested in Cincinnati on a requisition from the governor of Illinois, charging him with complicity in the bank robbery at Galesburg. The prisoner endeavored to introduce certain testimony tending to show that he was not a fugitive from justice, not having fled from the state of Illinois, as he was not within that state at the time he is charged as having committed the crime set forth in the indictment, and that, therefore, the governor of Ohio had no authority to issue the warrant upon which he was in custody. The motion is to exclude this testimony.

The question is a double one. What is it competent for the prisoner to prove in such a case, and does the evidence tend to prove it? It is broadly contended for the prisoner that the fact of his being a fugitive from justice in the sense of having fled from the demanding state on purpose to avoid the consequences of his conduct there, is jurisdictional, and that, therefore, if it appear that there was no evidence of that fact before the governor when he issued the warrant, it is void, while if there was such evidence, it is open to be rebutted by the prisoner in this proceeding. These propositions followed to their logical results would abolish all limitation to the inquiry to be made by the court upon habeas corpus in such

†Motion for leave to file a petition in error to reverse this judgment was overruled by the supreme court, December 6, 1881. A petition in error was filed to reverse the judgment of the common pleas, and overruled, December 16, 1881. No report was made by the supreme court in either case.

This case being decided without report, an attorney who was interested in it wrote to the court, asking for the grounds of the decision. Judge Okey, C. J., replied, stating the points of the decision as follows:

1. When the governor signs a warrant for extradition in blank, it is a nullity, and he may issue a valid warrant on the same paper.

2. Such warrant need not be countersigned by the secretary of state. It is not a grant. Besides, the warrant is issued under the constitution of the United States and act of congress.

(Note—In that case the secretary of state being absent, the governor's secretary had affixed the seal of state.)

3. Evidence is not admissible to show that on the day named in the indictment found in the demanding state, the prisoner was not in that state. (*Wilcox v. Volze*, 34 Ohio St., followed).

Judge Okey adds:

The points raised by the prisoner were: (1) That he had never been in the county named in the demanding state in which the crime was committed. (2) That the offense was committed on a particular day, and that on that day he was not in the demanding state. Held: (1) That notwithstanding he had never been in the county named, still he may have been in that state, and committed larceny in that county, and be a fugitive from the demanding state; (2) that on habeas corpus the question of the guilt or innocence of a party cannot be inquired into.

cases. While it is settled that the question of the prisoner's guilt or innocence cannot as such be raised, because all the constitution requires for his extradition is that he be duly charged with crime in the demanding state, yet, if the actual fact that he fled from justice in the sense contended for be the basis of the governor's jurisdiction to surrender him, and not the fact that he is charged with actual criminal presence in the demanding state, and demanding as having left it before he could be arrested, why may he not prove his innocence as bearing upon the question of his having fled and being a fugitive from justice? If he committed no crime, how can he be a fugitive from justice? If he merely left the state, not having offended its laws, and not even aware that he was charged with so doing, how can it be said that he fled from it? The constitution refers to "a person charged * * * with crime who shall flee from justice," while the act of 1794, R. S., U. S., 5278, provides for the surrender of any person "demanded as a fugitive from justice," as does our act of March 3, 1875.

The argument of prisoner's counsel would require the very strict construction of the constitution that it refers only to those who flee with not foot because already charged or about to be charged with crime. But such has not been the rule of courts, nor the opinion of jurists. It is sufficient if the person "withdraws himself without awaiting to abide the consequences of his conduct;" *Matter of Voorheis*, 3 Vroom, 147; *Judge Cooley in Princeton Review*, 7 A. L., Rec., 722.

The framers of the constitution naturally used language which described the ordinary conduct of guilty persons in such cases, yet it cannot be doubted that they intended it to cover any cases of voluntary withdrawal by physical presence, however deliberate, and although in fact occasioned by other motives than fear of prosecution. They certainly did not refer to a person not actually, but only constructively present in the demanding state. The language is not "a person charged, etc., in one state and found in another," but "who shall flee and be found;" *Wilcox v. Nolze*, 34 O. S., 520.

Upon the case just named the prisoner's counsel mainly relied, and some of the language of the opinion, considered without reference to the question under discussion, would perhaps bear the construction that the absolute fact of actual presence of the prisoner in the demanding state at the time of the alleged offense and flight therefrom is jurisdictional and always open to disproof. But when it is considered that in the same opinion it is said as to the questions open to inquiry, "nor have the courts larger powers in these respects than the governor;" that in *Work v. Corrington*, p. 64 of the same volume, it is held that when requisition is made, "and that the case shown to be within the provisions of the constitution and act of congress, no discretion is vested in the governor, but it is his imperative duty to issue the warrant;" and that in *ex parte Sheldon*, p. 319, *id.*, it was held that "an alleged fugitive, etc., will not be discharged on the ground that there was no evidence before the executive issuing the warrant showing that the fugitive had fled from the demanding state to avoid prosecution," "that it was for the executive to put a construction upon this language" of the affidavit before him upon the subject; we are bound to understand the court as meaning that where it is made clearly to appear, not that there is greater testimony for the prisoner than for the demanding state upon the issue of his having been present in that state when charged with so being, but that the prisoner is not really charged with having been actually present there at all, or really demanded as a

fugitive in the sense of the constitution, but only as constructively present and a fugitive, the governor has no jurisdiction. The court found that there was "no conflict in the testimony that Nolze's statements were all made in this state," referring to the statements alleged to have been false pretenses, upon which he was charged with obtaining goods from New York. It appears that the court had before it all the papers and proofs upon which the governor had acted, yet there was no conflict upon this question. The prisoner was probably merely charged in those papers *ex parte* Sheldon, which being a fugitive—a mere legal conclusion.

But suppose there had been a conflict in the testimony. Suppose the papers and proofs upon which the governor acted had specifically charged, that Nolze had made, in the state of New York, the false statements with which he was charged, that he had been there and afterwards came to Ohio. Did the court mean to say that upon the preponderance of evidence to the contrary, the jurisdiction of the governor would cease and the prisoner became entitled to his discharge? I do not think so. The prisoner was permitted, not to disprove what was proven on behalf of the demanding state, but to prove something which did not appear before the governor, which took away his power to act. I do not understand the court as dissenting from the well settled law, see Wharton on Criminal Practice and Pleading, section 35, No. 6; Spear on Extradition, page 303, that the averments of the indictment and affidavit cannot be contradicted by parol. I do not think the governor's jurisdiction depends upon the uncertain and varying judgment of the many courts to which the prisoner may appeal by habeas corpus upon a question of weight of evidence. Even if the same evidence were presented, courts might differ as to the side having the preponderance. The ultimate power of determination must rest somewhere, and the policy of the law requires that it be with the governor.

When the prisoner is demanded as having committed a crime, while actually in another state as having placed himself beyond the reach of prosecution there or by withdrawing his presence, and the evidence duly presented by the governor of such state sustains those facts, our governor's jurisdiction attaches and certainly does not shift and re-shift by any subsequent conflict of evidence; though the prisoner's rights are fully protected by the governor's right to revoke his warrant; *Work v. Corrington*, 34 O. S., 64.

But if I am mistaken, and the supreme court means to announce the broad rule that it is always open to the prisoner, not merely to show upon habeas corpus what I have just indicated, but to overcome, by evidence, the proof made against him, the evidence sought to be excluded here does not go far enough to entitle him to invoke the principle of that case.

The indictment charges that the prisoner committed the crime of grand larceny at Galesburg, Ill., on July 3, 1879. The accompanying affidavit avers that on or about July 4, 1879, he fled from that state to this. The crime charged is one requiring his actual presence at the place of commission. He is not sworn in general terms to be a fugitive, which might include construction by the witness, but to have fled from that state to this at or about a certain time. The depositions and the prisoner's own testimony are to the effect that during the whole of the 3d and 4th days of July 1879, he was in Cleveland, Ohio, his home. He says he arrived there at 6 a. m. on the former day, whence he does not state. There is no evidence that he was not there about the time laid in the indictment, and mentioned in the affidavit. For ought that appears he may have been

there on the 1st of July or the 6th. He does not apply his evidence to the material portions of the charge against him, as Nolze did. He does not show that he was in Illinois when the money was stolen which he is charged with stealing. He does not contradict the affidavit that he fled from that state on or about July 4, 1879. He assails only the immaterial part of the charge in the indictment, the time laid, variance as to which even upon trial would be immaterial; Roscoe's Criminal Evidence, page 100; Wharton's Criminal Evidence, section 103. Nor does he make it appear, the evidence does not even suggest the possibility, that an effort is being made to extradite him upon the theory of his constructive presence at the commission of the crime.

While the fact that the evidence offered might be competent upon his trial to prove an alibi is no objection to its use for another legitimate purpose here, yet the fact that it tends to prove nothing but a mere alibi is fatal to it.

The suggestion that a guilty person may escape extradition by showing that he did the guilty acts in another than the demanding state, while a person fully prepared to show his innocence may be taken if the evidence be excluded, has no weight. Extradition does not depend upon actual guilt, but upon flight from a charge of guilt, and in showing he never was present in the demanding state and never fled therefrom, he shows he was guilty somewhere. As in the case of Nolze, it is a mere incident.

The motion will be granted and the prisoner remanded to the sheriff's custody, to be dealt with according to law.

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DOWER IN LEASEHOLD ESTATES.

[Hamilton District Court, 1882.]

R. KAMPMANN v. OSWALD SCHAAF.

1. The common incidents of leasehold estates, so far as dower is concerned, yet obtain in Ohio.
2. Where S., having the title to and being in possession of a permanent leasehold estate, agrees to sell it to K. for a consideration named in the agreement, and K., upon tendering the consideration, demands a deed executed by S. and his wife, she releasing her right of dower in the leasehold, which S. refuses to give, but is ready and willing and offers to receive the consideration and deliver properly executed his own deed with covenants of general warranty therefor, which K. refuses to accept, S. has satisfied the contract on his part, and is not liable in damages for breach of contract to convey in an action by K.

JOHNSTON, J.

The plaintiff in error was plaintiff in the court below. The action was commenced for the purpose of recovering damages in the sum of \$4,000, alleged to have been sustained by reason of breach of contract to convey the perpetual leasehold estate in this city, owned at the time the contract was made by the defendant, Oswald Schaaf. Plaintiff alleges that on the 31st day of May, 1881, or within a few days thereafter, he purchased this perpetual leasehold estate of Schaaf, under the following contract in writing:

"Andrew J. Heintz: I will take for my property on the north-west corner of Jones and Everett streets, being a nearly new 4½ story brick, containing store and 20 rooms, with attic and wash tubs, size of lot 30 feet 6 inches by 75 feet in depth; the ground being leased perpetually (99 years),

at \$250 per year, payable quarterly, \$62.50 every three months. For the improvements I will take \$9,000 cash, and pay the June taxes of 1880, last half, and warrant the cellar to be dry, and give thirty days to await the test; if not dry, no sale.

(Signed.)

Oswald Schaaf."

Witnesses: A. J. Heintz, S. P. Lane.

Below the signature occurs this sentence: "This open until June 31, 1881." Below that is this: "The within is accepted as per terms within.

(Signed.)

R. KAMPMANN."

Witnesses: A. J. Heintz, J. A. Weiler.

Kampmann avers that as soon as he had examined the title he raised the \$9,000 cash, called upon Schaaf at his residence; tendered him the money, and asked for the deed of the property; but, he says, Schaaf failed and refused to convey the property to him according to the contract; that by reason of the premises, and in order to get ready for the purchase, he had subjected himself to considerable expense to get this \$9,000 together; that he was put to expense for counsel fees, in getting the title examined; that the leasehold was reasonably worth to him the sum of \$12,000, and that he sustained damages in the sum of \$4,000 by reason of the failure to convey.

As against this Schaaf answers that it is not true that he failed and refused to convey this leasehold estate to Mr. Kampmann as provided in his written contract; the \$9,000 were tendered and at two or three other distinct times named thereafter, and at the time he filed his answer in court, he had always been ready and willing, and was then ready and willing to convey the leasehold to Kampmann, but he refused to accept his deed therefor. Defendant admits the making of the contract as set out in the petition, but claims that defendant did not comply with the terms of the contract on his part, refusing to accept the deed unless his wife joined, relinquishing her dower interest therein.

After the introduction of the testimony of Mr. Kampmann, Mr. Heintz and two or three other witnesses who were present at the time the tender was made, plaintiff rested, when the defendant moved the court to take the case from the jury and to enter a judgment for defendant. This was done, to which plaintiff excepted, and he now prosecutes this petition in error to reverse that judgment.

This case brings perhaps for the first time before the district court of this county the question whether or not, where the owner of a perpetual leasehold contracts to convey that leasehold estate to a purchaser, it is necessary for his wife, if he be a married man, to unite with him in the deed in any particular; or, whether having made a contract like this on his own behalf, covenanting and agreeing to convey his leasehold property forever, without any agreement whatever as to dower—whether his deed, without the wife uniting with him in any respect, satisfies such contract and obliges the purchaser to take the deed and pay the money. This question has been presented by the record at different times in cases that have gone to the supreme court, but, unfortunately, the record in those cases was such, that the court was enabled to either affirm or reverse without passing upon this question, so that, up to this time, the question has not been decided by the court. The superior court in general term has expressed itself, not upon this character of case, where a purchaser is suing for damages for the failure to convey a perpetual leasehold, but in a case where the widow of the former holder of the permanent leasehold estate,

not having united therein, sued for assignment of dower. The court held, in a very well considered opinion, an opinion abounding in good reasoning, that the husband, having during his life-time sold the perpetual leasehold estate, and not thereafter dying seized of it, or in possession of it, dower did not attach, the dower act requiring that, to be entitled to dower in a leasehold estate, the husband must have been the owner thereof at the time of his decease. *Abbott v. Bosworth*, 7 Dec. R., 300. There has always been a well recognized distinction between estates in fee and leasehold estates, even though they be leasehold estates for 99 years, renewable forever. In *Loring v. Melendy et al.*, 11 O., 355, when it was not necessary to decide the question, the court, in announcing the opinion, went forward and decided that for all purposes in this state, leasehold estates of a permanent character were to be treated as realty or estates in fee. That was a case in which the court was called to pass upon the effect of a judgment lien in connection with a leasehold estate. After having very properly decided, that by force of a special statute, leasehold estates were for purposes of lien to be considered as real estate; the court went further, and really as mere dictum said, that a permanent leasehold estate is not a chattel, but realty, subject to all the laws and rules which attach to land for all purposes. But, in the very next volume, *Lessee of Boyd v. Talbert*, 12 O., 212, it seems the court hastened to correct itself. Again, in *Northern Bank of Kentucky v. Roosa et al.*, 13 O., 361, the court recognized the force of the remark in 12 O., and distinctly reasserted: "that the question whether a lease be realty or personalty, is open." Except in relation to descent and distribution, and except as to judgment lien and execution, and as regulating the mode of conveying a permanent leasehold, except in these three special particulars provided for by statute, permanent leasehold estates remain in this state and are to be treated for all purposes as they always have been treated at common law, simply as chattels real as contra-distinguished from an estate of inheritance, or freehold estate. The latest case bearing upon this question is to be found in *Taylor v. De Bus*, 31 O. S., 468, where the lessee claimed, in a suit by the lessor for rent, the lease being perpetual, that he was not liable for rent; that he was really a purchaser—the owner in fee.

The supreme court here defines, we think, very clearly the line of distinction in this state between permanent leasehold estates and estates in fee, and expressly say, that except in the instances already named, the common law rule in respect to leasehold estates has not been abrogated. Judge McIlvaine thus upholds the distinction: "By the common law, leasehold estates were regarded as chattels—chattels real, to be sure, but nevertheless subject to the rules relating to chattel property; but by statute as early as 1821 leaseholds, renewable forever, were made subject to judgments and executions 'as real estate,' and in 1837 they were subjected to the same laws of descent and distribution as 'estates in fee,' and such has continued to be the state of our statute laws ever since. Now, it is contended that, by force of this legislation, such estates are no longer chattels; that the creation of such an estate in land is equivalent to an absolute transfer of the fee, and therefore the common law incidents of leasehold estates are abrogated. Such results do not follow such legislation. To the extent that leasehold estates have, by statute, been subjected to the rules which govern estates in fee, of course the rules of common law, in respect thereto, have been abrogated; but beyond this the common law

continues to furnish the only rules for the guidance of courts in determining the rights of parties in relation to leasehold estates. And it is quite clear to our minds that there is nothing expressed in these statutes, and nothing implied, that modifies the common law in respect to the rights or liabilities of the parties to this record. As to these lands, the plaintiff in error was lessor and reversioner, and defendants in error, lessees and owners of the term; and the annual compensation payable to the lessor for the use of the premises during the term, is rent, and nothing more."

Now, it is claimed on the part of Kampmann, that this contract obligated Schaaf not only to tender and give to him a deed conveying this property by covenants of general warranty, but in order to give him a merchantable title, the wife should have united with the husband in the deed, releasing her contingent right of dower; and it is claimed by virtue of the statutory enactments to which reference has been made, that the permanent leasehold estate such as Schaaf covenanted to convey to Kampmann, was an estate of inheritance, and the husband being seized of an inheritable estate, his wife would be entitled to dower therein if she did not unite with him in the conveyance and should survive him. Section 4181, Revised Statutes, reads as follows: "Permanent leasehold estates, renewable forever, shall be subject to the same laws of descent and distribution, as estates in fee simple." Section 5374, Revised Statutes, classifies permanent leasehold estates with lands for the purpose of judgment liens and execution. The following section is to be found in the dower act, section 4188, Revised Statutes, "A widow shall be endowed of one-third of all the lands, etc., * * * of which her husband was seized as an estate of inheritance at any time during coverture. * * * She shall in like manner be endowed with one-third part of all the interest that her husband at the time of his decease had in any land * * * held by bond, article, lease. * * *"

The first two of these statutory enactments are especially referred to in *Taylor v. DeBus*, supra, and declared not to have abrogated the common law incidents, of leasehold estates except in the particulars named in the respective enactments. As to the "descent and distribution act," it does not turn leasehold estates into estates of inheritance, but simply provides that for the purpose of descent and distribution they shall be treated, or be subjected to the laws governing estates in fee-simple. Furthermore, dower does not come by descent, but by purchase, and section 4176, Revised Statutes, provides that nothing in the chapter on descent and distribution shall be construed to affect dower. The dower act in referring to estates of inheritance, refers to common law estates of inheritance, estates in fee—freehold estates. This is made clear by reference to the second class of endowable estates in same section. Here leases by name are especially described as a class of estates of which the widow may be endowed, provided the husband at the time of his decease held or owned the same. In construing a statute there is no rule of construction more reasonable and none better settled, than that especial provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict.

"Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an execution." *Dwarris on Statutes*, p. 668.

The testimony in this case submitted on the part of plaintiff clearly shows these facts: that at the time when the contract was to be closed, Kampmann waited upon Schaaf and tendered him \$9,000; that Schaaf thereupon tendered him a deed properly executed by himself, and went even further than his contract obliged him to go—he offered to give him a deed with covenants of general warranty; that Kampmann refused to pay the money and accept the deed, claiming that Mrs. Schaaf ought to join in the deed. The testimony shows that when applied to, the wife of Mr. Schaaf declined to sign, the husband being ready and willing and anxious that he should take his deed for the estate so that he might receive the \$9,000. If the property was cheap, and Mr. Kampmann says it was worth \$12,000—we think he should have lost no time in accepting the deed. We think, therefore, the plaintiff's evidence showing that Schaaf was ready and willing to deliver his deed, the refusal of Mr. Kampmann to receive it put him in fault, not Mr. Schaaf, and the court did not err in taking the case from the jury. Until the supreme court shall decide differently, we shall continue to hold, that the common law respecting leasehold estates, has not been abrogated in this state further than indicated in 31 O. S., and that in conveying a perpetual leasehold estate, it is not necessary, where the husband is the owner thereof, that his wife should unite with him in the deed conveying the same.

Aside from the question of dower, looking at this contract to convey on the part of Schaaf, was he obliged to do more than he offered to do? It is not the office of the courts to interpolate into the contract of parties something that the parties did not agree upon at all. It is not claimed that this contract did not embody everything agreed upon. No mistake is alleged; there is nothing ambiguous in it. The testimony offered by plaintiff raised no such question. The contract was simply to sell his, Schaaf's, leasehold estate, for \$9,000—his improvements is the language of the contract. He did not covenant to give either a warranty deed, or for the release of dower.

The court in *Pugh et al. v. Chesseldine*, 11 O., 109, said that "when the contract is for good title, a quitclaim is sufficient, if the grantor has the title." In *Nyce's ex'rs v. Oberts*, 16 O., 75, the court say, "if A should bind himself for a consideration to be paid, to convey to B by deed, containing covenants of warranty against incumbrances, a tract of land, could B avoid the performance of the contract by showing that by possibility there might be, at some time, a dower claim? * * * It seems not, but that B would be compelled to take the land and rely on his covenants."

In *Ketchum v. Everts*, 13 John., 363, the question, what will satisfy a simple contract to convey on the part of a grantor, neither a stipulation for a deed with covenant of general warranty, or for the release of dower by wife, being embraced in the contract, is decided, and is in accordance with the Ohio decisions cited; and to the same effect is *Bostwick v. Williams*, 36 Ill., 65, and *Powell v. Marion & Brickfield*, 3 Mason, 355.

Upon the whole case, the judgment below must be affirmed.

Hildebrandt & Hildebrandt, for plaintiff in error.

Sayler & Sayler, for defendant in error.

LEASE OF MINISTERIAL LANDS.

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[Hamilton District Court, 1882.]

D. V. GOODHUE v. M. S. JACKSON.

In an action to recover for use and occupation, rent for part of ministerial section (section 29) Cincinnati township, brought by a devisee of the original lessee under a perpetual lease from the state, against an assignee of a sub-lessee, the defendant claiming that the act of 1875, authorizing the sub-lessees to purchase the reversion from the state by paying its value to the township trustees, he having made the purchase and received a deed from the governor, absolved him from paying rent to plaintiff. Held: There could be no merger of the reversion and the sub-leasehold exempting him from paying rent. The legislature could not exempt him by act of congress of 1833 without the consent of the lessees, and if the legislature intended to do so, it would be violating the obligation of a contract. Held: Also, that defendant having entered into actual occupation as sub-lessee, is estopped to deny his landlord's title.

SMITH, J.

In the action below, brought by Mrs. Jackson for the use and occupation of a part of section 29 (a ministerial section), Cincinnati township, the plaintiff recovered a judgment against Goodhue for rent. Mrs. Jackson claimed as devisee to Ethan Stone, who was the original lessee of the ministerial section, having leased the property in 1821 from the trustees of the township. Ethan Stone made certain sub-leases, one to a party named Childs, and one to Reynolds, and these sub-lessees had assigned to Goodhue. In these sub-leases Stone reserved certain rents, which he had devised to Mrs. Jackson and formed the subject of the action.

Goodhue denied his liability to pay rent to the plaintiff under these subleases, by reason of an act of the legislature of Ohio, passed in 1875, which permitted the sublessees to purchase the reversion of the original lease by paying its value to the trustees of the township. Having made the purchase and obtained a deed from the governor, of the reversion, he denied his liability to pay rent to Mrs. Jackson.

Held, in the first place, that there was no merger of estates which would exempt Goodhue from paying the rent. The act of the legislature would not exempt him for the reason that, by act of Congress passed in 1833, the legislature of the state could not convey the reversion, except with the consent of the original lessees, and the trustees of the township; and if the legislature in this case intended by the conveyance, to destroy the estate of Mrs. Jackson, it would be an act impairing the obligation of contracts, and therefore void.

The court held, also, that the action being for use and occupation, and it appearing that Goodhue entered in the possession of the premises as a subtenant of the plaintiff, and the agreed statement of facts showing he had been in the actual possession during all the time claimed, he could not dispute the landlord's title and his liability to pay the rent.

Judgment affirmed.

King, Thompson, and Maxwell, for plaintiff in error.

Goodhue, contra.

183 **SPECIFIC PERFORMANCE OF PAROL CONTRACT.**

[Holmes Common Pleas Court, 1882.]

JOHN E. R. EWING et al. v. MARY J. RICHARDS et al.

A contract made between the father and mother of a child born out of wedlock, that the mother would surrender to the father all her claim to the custody and control of the child, in consideration that he would take the child into his family, raise him and give him a share of his property equal with the rest of his children. When clearly and satisfactorily made out by proof, will sustain the claim of the child for an heir's portion of the father's estate. Second—That the right of action to the child to recover such share accrues upon the death of the father.

In the Court of Common Pleas of Holmes county.

VOORHES, J.

John E. R. Ewing, Sarah M. Mitten and Innes M. Ewing, and Samuel Swartz, as administrator of the estate of John Ewing, Jr., deceased, filed their petition, in which they alleged that on the 18th day of October, 1831, John Ewing, Jr., was born, being the illegitimate son of John Ewing, Sr., and Margaret Gushwa. That Ewing, Sr., and Gushwa never intermarried, but were both afterwards married to other parties. The plaintiffs are the surviving heirs and legal representatives of John Ewing, Jr., deceased, and the defendants, Mary J. Richards and Edith Ewing, are the only heirs and legal representatives of John Ewing, Sr., who died on the 24th of July, 1880.

It is averred in the petition that in the month of April, 1839, John Ewing, Sr., and Margaret Gushwa entered into a verbal agreement whereby John, Sr., promised and agreed, in consideration that Margaret Gushwa would then deliver and surrender to John, Sr., their illegitimate son, John, Jr., he would take him into his family; that he would raise him and give him a share of his property, the same as the rest of his children. That in pursuance to the agreement, John, Jr., was received into the family of John, Sr., that he was ever after called by the name of John Ewing, Jr., that he was regarded and treated by John, Sr., as his son; that he remained with, and obediently served his father until he arrived at the age of twenty-one years, when he was married, and he was then provided with a home upon his premises, and the plaintiffs were born to him as the issue of his marriage, all of whom were treated and regarded by John, Sr., as his grandchildren.

In 1861, John jr. volunteered as a soldier in the service of the United States with the knowledge and approval of his father, and died on the 3rd of April, 1863.

John Sr., at his death, was possessed of personal property amounting to the sum of \$11,325, and owned in real estate some seven tracts of land in Holmes county, which are described in the petition, and are regarded of large value. He made a will, in which he gave to Mary J. Edwards, his daughter, three of the tracts of land, and to his grand-daughter, Edith Ewing, he gave one tract, having died intestate as to the last three tracts of land described in the petition.

The plaintiffs ask the decree for a specific performance of the contract made between John Ewing, Sr., and Margaret Gushwa, and that they may have decreed to them an equal one-third interest of the estate after the payment of debts.

To the petition the defendants interpose a demurrer, stating as the reasons therefor: First—That the petition does not state facts sufficient to constitute a cause of action. Second—That there is a misjoinder of parties plaintiff. Third—That several causes of action are improperly joined. Fourth—That the cause of action did not accrue within six years. Fifth—That the cause of action did not accrue within four years. Sixth—That the cause of action did not accrue within twenty-one years.

The plaintiffs ask for the specific performance of the contract made in April, 1839, between John Ewing, Sr., and Margaret Gushwa, which was to be performed by Ewing when he made a disposition of his estate. This he was not bound to do by the contract until he made a disposition to his other children, when John, Jr., was to have a like share with the other children.

John, Sr., made his will disposing of a part of his estate to his legitimate children, leaving a portion undisposed of. The will took effect at his death, which occurred on the 24th day of July, 1880. As to the portion of his estate that was not disposed of by his will, it remained for a disposition after his decease, so looking at the terms of the agreement and the disposition made of the estate by John, Sr., we think the right of action accrued to the plaintiffs at the death of John, Sr., and it does not occur to the court how the statutes of limitation, raised by the demurrer, can furnish a defense against the action—and this disposes of the fourth, fifth and sixth causes assigned in the demurrer.

The second cause for demurrer is, that there is a misjoinder of parties plaintiff. If John, Jr., had survived his father, he would have been the proper party plaintiff. Where he is dead we are not able to see a necessity for any person to stand in his place and demand his rights besides his children and his administrator. These are now the plaintiffs, and we think necessarily and properly, and so this supposed defect does not exist in the case.

The third ground for the demurrer is that several causes of action are improperly joined in the petition. This objection is not apparent from reading the petition. In it there appears to be a brief single statement of a contract claimed to have been made between the testator and Gushwa, which was not performed by Ewing, Sr., and which is here sought to be enforced.

The first cause for the demurrer is, that it does not state facts sufficient to constitute a cause of action. This I regard as the most important—and the prime cause presented for the consideration of the court. If the plaintiffs have set forth the contract claimed to have been made between Ewing and Gushwa, and if it, when proved as alleged, would not secure to them the relief prayed for, then the demurrer should be sustained, and the petition be dismissed.

The plaintiffs ask nothing by reason of the Ewing blood that may run in their veins. Although John Ewing, Sr., may have been as truly the father of John Ewing, Jr., as he was the father of Mary J. Richards, yet John, Jr., having been born out of wedlock and no intermarriage of his parents having taken place, he is interdicted by law from making any claim to the estate under the laws of descent. But the claim of the plaintiffs is, that their ancestor, John, Jr., was the illegitimate son of John Ewing, Sr.: that their relation was mutually recognized; that when John, Jr., was seven and one-half years of age, an agreement was made between his father and mother whereby he was taken into his father's family, and there remained

under his control and parental direction, rendering obedient service until he arrived at the age of twenty-one years. In consideration for said services and obedience, etc., the father agreed that he would give him an equal share in his property with his other children. It is averred that this contract was strictly kept and fully performed on the part of John, Jr., until he arrived at the age of majority, being as long as the parties had power to contract for his society or labor.

Such were the terms of the contract as admitted by the demurrer, and if the contract is such a one as a court of equity has power to enforce, then the demurrer should be overruled.

It is conceded that the contract was verbal, and that it was entered into in 1839. But it is averred that by its terms, John, Jr., was to live in the family as a son and be in parental subjection to John, Sr., from that date until the time when he would be released from the obligation of further servitude by operation of law, which happened when he attained the age of majority, for which services John, Sr., obligated himself that he should have with his other children an equal division of his estate. John, Jr., went into the family and service of his father, and there remained for a period of some thirteen and one-half years, rendering to his father obedience and service that in law belonging to his mother only, but by the contract was rendered to his father. So if it is conceded that the averments of the petition are true, there was on the part of the ancestor of the plaintiffs an exact and full performance of the terms of the contract which he had a right to expect would bring him an equal share with the other children of John Ewing, Sr., of his estate.

But we are reminded by the demurrer that under the statute of frauds, contracts in relation to real estate, or any interests therein, and contracts that are not to be performed within one year from the making, must be in writing or some memorandum thereof made and signed by the party sought to be charged. If this cause must fail because it is not in writing, we presume that the one or the other of these provisions must furnish authority for its defeat.

It has long been settled in the courts of equity that a contract is not void because it is not reduced to writing. The statute does not in any way effect the substance of an agreement, but it simply prescribes as a rule that the same shall not be enforced upon oral proof alone. This is the case always, when the contract remains executory on both sides. But when both parties have performed the terms and conditions of the contract, it is as valid and binding as though it had been reduced to writing, and duly signed. And so, likewise, if one party has fully performed his part of the contract, the statute furnishes no shield to the other to escape from a performance because it was in parol. To do so would make the law a protection to a fraud, the very thing it was intended to prevent.

It is conceded by the demurrer, that in this case there has been a complete performance by the ancestor of the plaintiffs, by his work and labor for the period of over thirteen years, contributing to some extent in the accumulation of the large estate left by John Ewing, Sr. And we may well inquire, would it be equitable or just for the court to refuse to enforce the terms of the contract on behalf of John, Jr.? Could we so decree without aiding in the perpetration of a manifest wrong upon the plaintiffs and their deceased father, who was a party to, and long labored in the performance of the agreement? If this question be answered by the letter and spirit of the decisions of our courts of equity ever since the enactment of the statute,

the answer would be that the contract must be enforced, for it is not a case that falls within the terms and spirit of the statute.

Many things might be said as reasons why a contract such as set forth in the petition, might be presumed from the acts of the parties. The performance of the terms and stipulations as read in the acts of the parties, would be hard to account for in the absence of an agreement.

At one time the doctrine was well recognized in the courts of equity, that if a defendant by answer admitted the contract, and then set up the statute of frauds as a defense, it passed for no defense to the action, for when the contract and a part performance was once admitted, the chancellor would decree a specific performance notwithstanding the statute of frauds, and it was also doubted if the advantage of the statute could be taken by demurrer, by which the facts plead in the bill were admitted. The doctrine now prevails, however, that when the petition discloses the fact that the claim is obnoxious to the statute, it may be brought to the notice of the chancellor by demurrer, and if the decision of the court is adverse to the defendant upon his demurrer, he may still have the advantage of a denial.

Under our code the demurrer admits to be true all the facts that are well plead, at the same time securing to the party the right of making a more complete defense by answer after the demurrer shall be overruled. But taking the demurrer here as an admission of the facts set forth in the petition, that there was a contract duly made and fully performed by the ancestor of the plaintiffs, it would be hard to find a good reason for excusing the other party from a performance on his part.

The demurrer keeps from the view of the court many facts and trains of facts that might be sufficient or inadequate to establish such a contract as a court of equity would enforce by decreeing its specific performance; but when the defendants rely upon a demurrer, they distinctly admit the facts of the petition, and if they are ample to demand relief, the demurrer should be overruled.

Another question is made by the demurrer: That the contract between John Ewing, Sr., and Margaret Gushwa, was not to be performed within one year from the time it was made, and that it was therefore obnoxious to the statute of frauds, which requires all contracts which are not to be performed within one year to be reduced to writing and signed by the party to be charged.

The authorities upon this branch of the statute are abundant, that when the contract might be performed within one year, it is not within the statute. The statute of descents makes a disposition of a man's estate at his death. The contract here was on the part of Ewing, Sr., for the care, custody and control of John, Jr., intended, no doubt, to be until he should arrive at the age of majority. But the law would inject the condition in the absence of any conditions to be performed by the representatives of the parties that the contract would be performed and terminated upon the death of John Ewing, Sr., and that he might have died within one year is beyond cavil.

In a case reported in 10 Pic., 365, the facts were that a verbal contract was made to support a child, then eleven years old, until she should arrive at the age of eighteen years. This was held by the court to be a contract not within the statute, because the party might have died within one year.

We think the statute furnishes no defense against the claim presented by the plaintiffs, and the demurrer is therefore overruled.

Reed & Hoagland, attorneys for plaintiffs; Uhl, Critchfield & Huston, for defendants.

INJURIES BY STREET RAILWAYS.

[Hamilton District Court, 1882.]

CINCINNATI STREET RAILWAY CO. v. MARY J. FULLBRIGHT.

1. A petition by a passenger of a street railway company to recover for injuries caused by the negligence of the railway company, need not aver the exercise of due care by plaintiff. This averment is not necessary where there are no contrary indications, and where a person is presumed to take ordinary care of himself, as in case of a passenger in her seat, though the rule may be different in case of employees operating dangerous machinery, or of a passenger out of his place.
2. A corporation consolidated from other corporations succeeds by statute to all the obligations of the original corporations, and is liable to an action for injuries by the negligence of one of the original corporations, caused before the consolidation, and on the trial the pleadings not having averred the consolidation, but the same having been proved, without objection, it is proper after verdict to permit plaintiff to amend by setting up this fact, in order to make the pleading conform to the proof.

Petition in Error to reverse a judgment of the Superior Court.

MOORE, J.

In the court below the defendant in error filed petition and two amended petitions. The plaintiff in error filed a general denial to the original and the first amended petition. The plaintiff below alleged that on July 18, 1880, she was a passenger and being transported by the Walnut Hills Passenger railway Company. By the negligence of a driver of one of the cars of said railway company she received certain bodily injuries, for which she claimed damages in the sum of \$20,000. The trial resulted in a verdict for the plaintiff in the sum of \$4,120. After verdict and before judgment the plaintiff by leave of court filed an amended petition setting forth the acts of the said defendant and the Walnut Hills Passenger Railway Company in the matter of the consolidation of said companies which took place on the 19th day of July, 1880. This amendment was made for the purpose of conforming the pleadings to the facts proved, for it appears that at the close of the defendant's testimony the plaintiff introduced in evidence the articles of consolidation, to which no exception was taken by the defendant. The pleadings of the plaintiff did not aver the exercise of due care on her part at the time of the accident. The record displays several assignments of error, the third and seventh of which the plaintiff in error relies upon here. The error complained of in the third assignment was the refusal of the court to charge the jury to return a verdict for the defendant instead of the plaintiff, for the reason that the plaintiff's pleadings did not aver her freedom from negligence or the exercise of due care.

By the Court: The complaint need not aver the exercise of due care by the plaintiff, for it is to be presumed under the circumstances stated and the natural order of things that a person uses ordinary care. The plaintiff in her place, seated in the car, as a passenger is presumed to have used due care.

†This case was taken to supreme court, but was settled and dismissed December 9, 1884.

The question whether it is necessary to aver due care on the part of the plaintiff as a passenger, or infer the same from the absence of contrary indications, and leave the whole to the jury upon the evidence, is one which has been variously decided. (Sherman & Redfield on Negligence, sections 43, 44, and cases cited; 14 N. Y., 310; 15 Wall., 401; 51 Mo., 191.)

To authorize recovery the jury must eventually be satisfied that the plaintiff did not contribute to the injury by failure to take due care under the circumstances, and that the injury was occasioned solely by the negligence of the defendant. It appears to be settled in this state that in certain cases plainly distinguishable from the case before us, an allegation of the character and purport mentioned is necessary. We refer to cases of persons in the employ of railroads or in the operation of dangerous machinery, or where a passenger steps aside from his position as a passenger in a railway carriage. There an employment or position is taken which from the nature of things imposes a duty upon the person to use watchfulness and care. In the case of passengers a different rule of liability arises. They place themselves under the carrier, and undertake to run only those risks which cannot be avoided by the utmost degree of care and skill on the part of the carrier. *Railway v. Barber*, 5 O. S., 541, 567; *Railroad v. Sloan*, 28 O. S., 341; *Railroad v. Krouse*, 30 O. S., 222-230. Recent adjudications hold that "It would be a contradiction in terms to say that the majority of men in a civilized community do not take ordinary care of themselves; but when the statement of the facts impose a duty, or place a party in a position where safety is primarily in his hands, he is chargeable with duty, and its averment to make a *prima facie* case."

It is claimed by the plaintiff in error that the court erred in allowing the plaintiff below to file an amended petition after verdict, setting up the act of consolidation of the company in existence as a corporation at the time of the accident with the Cincinnati Street Railway Company, the defendant below, effectually changing the parties defendant by bringing in a new one.

The articles of consolidation having been admitted in evidence without objection, and the answer of the railway company to the former pleadings of the plaintiff being in the nature of a general denial only in the name of the consolidated company, it became the right of the plaintiff to have the pleadings conform to the facts proved. The amendment did not change the issue, or mislead or surprise the adverse party. Further, the statute fixes the present company as the party liable—under the consolidation it succeeded to all the rights and obligations of the company in existence as a corporation at the time the accident occurred.

Judgment affirmed.

LIEE INSURANCE.

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[Hamilton District Court, 1882.]

CHARLOTTE VAN DUERSEN, Adm'x, v. THOMAS SCANLAN et al.

Where a policy of insurance, taken out by a debtor on his life, is transferred to his creditor as collateral security for an existing debt, the creditor is not, in the absence of an express stipulation to the contrary, obliged to keep up the payment of the premiums, but this is the debtor's duty, and the fact that the creditor did pay one premium and charge the same on his books to the debtor, does not obligate him to continue so to do, or render him liable if the policy lapses for non-payment of premiums.

In Error to reverse a judgment of the Superior Court.

JOHNSON, J.

This action was brought by Charlotte Van Duersen, administratrix of W. P. Van Duersen, against Thomas Scanlan and Patrick Mallon, assignees of George H. Bussing, to recover in the first cause of action \$5,000, and in a second cause of action \$2,400, and asking for a statement of account. Recurring to the first cause of action, the petition sets out substantially these facts: That on the 16th of October, 1865, Wm. P. Van Duerson took out a policy of insurance on his life in the Mutual Life Insurance Company of Maine in the sum of \$5,000, on the ten-year non-forfeiting plan; that he paid the first premium, and that in July, 1866, being indebted to Bussing in a large amount, he assigned this policy to him to secure the indebtedness, Bussing being a member of the firm of G. H. Bussing & Co., bankers in this city. It is averred that Bussing paid the premiums annually until October, 1870, when he failed and neglected to do so, whereby the policy became void, and all premiums paid under it forfeited. The plaintiff further alleges that Van Duerson went to the state of Texas in 1870, returned in July, 1876, and about that time became insane, and died in an asylum in the fall of 1876, and that by reason of the forfeiture of the policy there was lost to the estate of Van Duersen \$5,000, which amount is claimed the administratrix is entitled to recover.

In the second cause of action the plaintiff avers her husband was insured in the Mutual Benefit Insurance Company in the amount of \$2,400, and that Bussing received the amount and refused to turn it over to her, and that an account should be taken between the estates of Van Duersen and Bussing.

The defendants, (Scanlan and Mallon, the assignees of Bussing) deny there is anything due by the estate of Bussing to the plaintiff, and aver substantially that while Van Duersen was indebted in a large amount to Bussing on his account, that neither Bussing, the assignee, nor Bussing & Co., of which firm he was a partner, were guilty of negligence in reference to paying the premiums: that the assignment of the policy was made as collateral security for the indebtedness of Van Duersen to the bank, without any agreement on the part of Bussing or the bank to keep the policy in force by paying the annual premium, and, so far as the first cause of action is concerned, that there is no right of recovery.

As to the second cause of action, it was alleged that Van Duersen being indebted to the bank in a large amount by virtue of an agreement between the parties, the proceeds of the policy of the Mutual Benefit Insurance Company were to be collected by Bussing and applied on account of the indebtedness of Van Duersen to the bank, which was done.

A reply was filed, and the case presented to the court on an agreed statement of facts, embracing substantially what has been stated, except in this, that it appears from the agreed statement of facts that not only was the first premium paid by Van Duersen, but that the second, third and fourth premiums were paid by him, and not by Bussing, and that the fifth premium, the last paid in 1869, was paid by money advanced by Bussing & Co., and charged to Van Duersen by them, and that in October, 1870, when another premium should have been paid, and was not paid, the policy became forfeited, Van Duersen being in Cincinnati at the time.

The first question that arises, looking at the facts as they appear in the record, the relation of the parties, and the assignment of the policy by Van Duersen to Bussing, is whether there was any obligation on the part of Bussing, or Bussing & Co., whereby he or they became obligated to go

forward annually without consultation with Van Duersen, and pay the annual premium to keep the policy alive. If such an agreement had been entered into, the most likely place to find it would be in the assignment itself. It is in writing, and is presumed to have contained everything the parties agreed upon. It imposes no such obligation.

In the opinion of the court, in the absence of any obligation on the part of the assignee of the policy to pay the annual premiums, it was a duty and obligation that devolved on Van Duersen. It is not the case of a policy taken out by a creditor on his application on the life of the debtor. But this is the case of a debtor on his own volition, without the understanding of his creditor, taking out a policy on his own life, for his own benefit. Bussing did not become the assignee of the policy for over a year after it was issued. It is claimed on the part of the estate of Van Duersen that because the record shows that on one occasion Bussing advanced \$151 to make the cash payment due October 16, 1869, he or the firm of Bussing & Co., became obliged to pay the future premiums as they became due, and having failed to do so, and the policy having lapsed, it was Bussing's fault. This is not the case of an agent undertaking to carry a policy for another. Nor of an assignee having received the money to pay premiums from the insured, who neglected to do so. There was no agreement that Bussing would keep the policy on foot for Van Duersen. The money advanced by the bank is charged against Van Duersen, and the relation of agency did not exist between the parties. In the majority of cases cited by the plaintiff, the assignee had been instrumental in taking out the policy. In this case Bussing had nothing to do with taking out the policy on the life of Van Duersen. It was a transaction of his own, and when he assigned the policy it was simply as collateral security. There was no more obligation on Bussing to pay the annual premiums than upon the mortgagee of real estate to pay the taxes.

As to the second cause of action, it was admitted the amount collected was credited on account of an indebtedness existing in favor of Bussing & Co. The exact state of the account was not known, and could not be determined without a reference. On the whole case the judgment would be affirmed and remanded, and the cause referred as to the second cause of action to state an account between the two estates.

T. A. Logan, for plaintiff in error.

Mallon & Coffey, for defendant in error.

[Hamilton District Court, 1882.]

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HENRY MEYER v. JOHN OBERHELMAN.

For opinion in this case, see 6 Dec. R., 1151, (s. c. 10 Am. Law Rec., 686.)

CONTRACTS.

[Superior Court of Cincinnati, March 27, 1882.]

†CINCINNATI, SANDUSKY & CLEVELAND R. R. CO. v. CONSOLIDATED COAL & MINING CO.

1. A contract, whereby a plaintiff agrees to purchase of defendant all the coal it will require for a year, is not void for want of mutuality, as being a mere option; for it binds plaintiff to purchase of no one else and the defendant runs the only risk of the quantity being more or less; and the defendant is liable for failure to furnish the articles.
2. Under a contract with plaintiff, a railroad company, to furnish it coal free on board cars on the track, the defendant not being on the line of another than plaintiff's road, plaintiff is not obliged to furnish cars at defendant's mines.
3. Where defendant agreed to furnish all the coal plaintiff would require for a year, plaintiff to pay monthly on or before the 20th of the month, and on the 14th of a month defendant refused to deliver, plaintiff is not in default for not having paid, for it was not obliged to pay for part of a month, and, litigation being in contemplation, it might withhold the amount to cover its claim for damages.

HARMON, J.

Plaintiff sues for damages for the breach by defendant of the following written contract:—

"This agreement, made this 15th day of May, 1879, by and between Charles Howard, superintendent of the Cincinnati, Sandusky & Cleveland Railroad Company of the first part, and the Consolidated Coal and Mining Company of Ohio, of the second part, witnesseth that the party of the second part hereby agree to furnish and supply the party of the first part all the coal that may be required for the use of said railroad company for one year from May 20, 1879, to May 20, 1880, for seventy-one (71) cents per ton, free on board cars on the track of the Columbus & Hocking Valley Railroad, at Straitsville, Ohio, said coal to be of the first quality lower vein Straitsville lump, and to be delivered in lots of from three to ten car-loads, of twelve tons each, daily, as the party of the first part may from time to time order and direct; and the party of the first part hereby agrees to pay for the same as above, monthly, on or before the 20th day of each month for all the coal so delivered and received during the previous month.

ALEX. McDONALD, Pres't, for Consolidated Coal & Mining Company.

CHAS. HOWARD, Supt, for the Cincinnati, Sandusky & Cleveland Railroad Co."

Plaintiff complains that defendant performed the contract up to January 14, 1880, but has since then refused to perform it, although plaintiff has duly performed all the conditions to be performed by it; that from January 14 to May 20, 1880, plaintiff required for its use ten car-loads of coal per day, and so duly notified defendant, and has been compelled to pay more than such contract price therefor.

The answer is a general denial, and the points upon which defendant relies are:

First—That the contract shows upon its face that it was not made with plaintiff.

Second—That at the time it was made plaintiff's road was in charge of a receiver, with whom the contract was in fact made.

Third—That said contract is not obligatory upon defendant for want of mutuality, there being no other consideration, and the contract being bilateral.

Fourth—That plaintiff failed to put defendant in default, because plaintiff did not furnish cars at Straitsville.

Fifth—That plaintiff is itself in default, having failed to pay for the coal furnished in January up to the 14th.

As to the first point, it seems to me that upon every correct principle of construction the contract must be held to be made by one professing to be only an agent on behalf of a principal fully disclosed in the contract and by the signature. The words "superintendent," etc., are not mere descriptive personæ. The signature is expressly for the railroad company. The coal to be furnished is such as may be required for the use of the railroad company.

†The case was reversed by the district court, *post*. The judgment of the district court was affirmed by the supreme court February 1, 1887.

As to the second point, it appears that when the contract was made the affairs of plaintiff were in the hands of J. S. Farlow, receiver, he being also president of plaintiff, and that Chas. Howard, who was superintendent of plaintiff, acted as superintendent of the road while operated by the receiver. On January 1, 1880, the receiver was discharged and the affairs of the road restored to plaintiff. It appears further that all contracts made by the authority of the receiver were made in the name of the company, or of Chas. Howard as superintendent of the company, and that this contract was authorized by the receiver.

It is contended for defendant that it is competent for it to prove by parol, that although the contract is expressly on behalf of the company, it was in fact not on behalf of the company, and that the evidence furnishes such proof. I have great doubts of the admissibility of parol evidence to contradict the express terms of the contract in this regard. It is not a case of ambiguity raised by parol which may be dispelled by parol. The evidence creates no ambiguity. The fact that other contracts made by authority of the receiver were made as this one was makes nothing ambiguous. It simply raises the same question as to them now raised as to this. The existence and powers of the company were not taken away, not even suspended, by the appointment of the receiver. The period during which he would retain charge of its road was of necessity uncertain, so that it might well be thought unadvisable for him to personally make time contracts, if he had the power to do so. By making such contracts in the name of the company, as they might properly be made with the authority of its officers, they would inure to his benefit while he held such office, and to that of the company thereafter. And it is a question worthy of serious consideration whether a time contract made with him in his own name would not inure to the company's benefit after the expiration of his office.

To the suggestion that it is not to be supposed that defendant would make a contract involving giving credit with an insolvent railroad company in the hands of a receiver, it is a sufficient reply to show that defendant in fact did so. And it is doing no violence to human motives to suppose that defendant would be perfectly willing to make a contract, which was as nearly for cash as such contract could well be, with such a company, knowing, as it did, that the receiver stood behind it while the road was in his hands, and that it would in all probability remain in his hands until the removal of the company's insolvency. Defendant does not complain of any fraud or mistake in the form of the contract. On the contrary, the contract was sent to defendant for signature with a letter referring to it as "a contract for furnishing this company with coal." Defendant's officers knew the road was in the hands of a receiver. If they desired to contract with him, they should have done so. In their correspondence with plaintiff they speak of the contract as that of "your company," (see letter of January 2, 1880.)

As to the third point, the position taken by defendant's counsel is that the contract, being one whose only possible consideration was mutuality of obligation, failed to become obligatory, because plaintiff was not bound thereby to require or order any coal—that it was merely a proposition on the part of defendant which became binding only as accepted by orders from time to time, until revoked by defendant, as it might be at any time, and was on January 14, 1880.

Let us first determine just what the contract between the parties was, and then consider the authorities.

It appears that plaintiff invited bids for supplying all the coal required upon its road from May 20, 1879, to May 20, 1880, and that defendant's bid being the lowest, the writing above set out was signed. Defendant's bid—its proposition to supply all the coal so required, was repeated in the writing, but it is contended that by the terms of the writing plaintiff did not bind itself to take from defendant all the coal so required, but merely agreed to pay the stipulated price for all the coal it might order and receive. It seems to me that while the part of the language which expresses the obligation of plaintiff is not very explicit, it would not be putting a forced construction upon it to hold that it did express plaintiff's acceptance of defendant's proposition. The proposition was to furnish all the coal required upon the road. This amount is certain, because it was capable of being accurately determined by the necessities of the road. The daily quantities to be furnished were to be fixed by orders from plaintiff, the maximum and minimum quantities being named, but there can be no question as to the total amount to be furnished. It was all the coal required upon the road, no more, no less. The written undertaking of plaintiff was "to pay for the same," etc., not to pay for what they might see fit to order, for defendant's proposition was not to give them a mere option to order or not, and to order much or little, as plaintiff might see fit—but to pay for what defendant proposed to furnish, i. e., all the coal required upon its road, in such

daily quantities as the necessities of the road should fix. In what language could plaintiff have better accepted defendant's proposition than by agreeing to pay for what defendant proposed to furnish? And as the proposition to furnish the year's supply of coal is followed by a specification as to the times and amounts of its delivery, so the promise "to pay for the same," is followed by a specification of the times and amounts of such payments.

It was not necessary, however, that plaintiff shall accept in writing. It might do so by act as well, so that even if its agent's signature be held, as defendant's counsel claim it should be held, to be merely an assent to the terms proposed, to be complied with in case plaintiff should see fit to order coal, and not an agreement to take from defendant all the coal so required; still, by every principle of contract plaintiff became bound to take from defendant all the coal it needed during the year when it began ordering and receiving coal. There is no evidence whatever that defendant ever modified or was asked or consented to modify its proposition. The price must have been fixed with reference to the year's supply. Plaintiff could accept no proposition but the one made, and it bound itself to take all when it ordered the first day's supply. That order was accompanied by no condition or qualification. If it never accepted the proposition before, plaintiff accepted it then. The contract therefore was that defendant was to furnish and plaintiff to take and pay for, at fixed rates and prices, all the coal needed by it for the year named, and plaintiff would have been liable to defendant had it ordered any coal elsewhere during the year.

This case differs plainly, in that regard, from *R. R. Co. v. Dane*, 43 N. Y., 240; *R. R. Co. v. Mitchell*, 38 Texas, 85, and *Thayer v. Burkhard*, 90 Mass., 508. In the first the proposition was to transport at certain prices, during certain months, freight not exceeding 6,000 tons. The proposition was accepted. The court properly held that a mere option was created for which there was no consideration. Plaintiff did not agree to ship by defendant's route all the freight it might have occasion to ship. It would not have been liable if it had shipped by other routes. And as the proposition did not contain this element the court properly held that shipping some freight did not bind plaintiff to ship any more. The freight shipped was shipped without reference to future freight. In the case at bar the coal delivered was delivered as merely a part of an entire year's supply. It was not a series of deliveries under an option; it was continuous part performance of an entire contract. The second case is of exactly the same character. The proposition was to cut hay not exceeding 200 tons during a certain season at a certain price, and was accepted. The ruling was the same, of course. The third case was almost identical with the first. The proposition was to carry freight for a certain rate. It expressed no quantity, and no means by which a quantity could be fixed, nor did the acceptance. Plaintiff was obliged to ship none at all by defendant's route, and might ship all he pleased by other routes, and his shipping some could have no greater effect than in *R. R. Co. v. Dane*, supra.

The case of *Bailey v. Austrian*, 19 Minn., 534, and *Smith v. Morse*, 20 La. Ann., 220, however, are like the case at bar, and are in direct conflict. In the former, defendants agreed to furnish, and plaintiffs to take "all the pig iron wanted by them in their business" (of foundrymen), for a certain period at specified rates. The court held that defendants were not liable for not furnishing pig iron, because there was no mutuality of obligation. Plaintiffs were not bound to want any iron—not even to continue their business. In the latter case, *Smith & Co.* proposed to furnish Morse "all the ice he may require for the use of the City Hotel, etc." at a specified rate and for a certain time. The only acceptance upon the part of Morse was by beginning to order ice, which the court held sufficient to bind him to take all so required during the time named. It was argued that Morse was not bound to require any ice, and there was consequently no mutuality. But the court held that that principle could not apply "unless it be supposed that the contract contemplated that Morse might at his option dispense entirely with the use of ice at his large hotel, which is not sanctioned by any reasonable construction that can be placed upon the contract." The court held that Morse would have been liable in damages if he had purchased ice from other parties.

This feature of the contract was entirely overlooked by the court in *Bailey v. Austrian*. When one in a business requiring the article contracted for, binds himself to buy of no one else, as he of necessity does in agreeing to take all he requires from the other contracting party, this certainly is sufficient consideration, as is pointed out by Mr. Wald, in his note. *Pollock on Contract*, page 160.

I have no hesitation in following the Louisiana case in preference to the Minnesota case. It is difficult to see how parties could make contracts for the supply of quantities uncertain at the time of the contract, but entirely capable of being made

perfectly certain during the time it is to run, in any other way than that adopted here. The party proposing merely contracts for the benefit of the probability or possibility that more or less will be needed by the other. The party accepting fully secures this to the other, because he is bound not to buy elsewhere. Each gets all he bargained for. The distinction between such agreements and those whereby mere options are created is manifest. In this case it would seem a fair construction of the contract that plaintiff should take at least three car-loads of coal per day.

As to the fourth point, I can find nothing in the contract requiring plaintiff to furnish cars. The coal was to be furnished by defendant "free on board cars on the track" of another railroad over which plaintiff had no control. If plaintiff was to furnish the cars the contract should have so stipulated. As it is, it is difficult to see how defendant could perform its contract by furnishing coal on board cars without seeing to it that cars were there. If it had no permanent arrangement to that end with the C. & H. V. R. R., the latter's obligations as a common carrier were as great toward defendant as toward plaintiffs. The contract of the parties during the first eight months of the execution of the contract shows that they did not understand it as defendant now claims it to have been.

As to the fifth point, plaintiff was clearly not in default when defendant refused to continue to supply coal under the contract. The coal furnished in December, 1879, was paid for in full January 12 and 20, 1880, within the specified time. It was not bound to pay for that furnished in January, 1880, until February 20, 1880. On January 14, defendant refused to further perform the contract. On February 18 an arrangement was made between the parties by correspondence, whereby, coal having largely advanced in price, it was agreed that defendant should thereafter furnish coal at \$1.00 per ton during the remainder of the contract year, without prejudice to the rights of either party under the contract, which was done, and the coal paid for. As litigation for damages was in contemplation, plaintiff might well withhold the contract price for coal delivered during the first fourteen days of January to cover its claim for damages for non-delivery of coal during the remainder of January and up to February 18.

Plaintiff moreover was not bound to pay for part of a month. Defendant will not have completed the January delivery until it pays the damages suffered by plaintiff by its default during that month.

Plaintiff may have judgment for the difference between the contract and market prices January 14 to February 18, 1880, and for the difference between the contract price and \$1.00 per ton from February 18 to May 20, 1880, less the amount due for coal delivered from January 1 to 14, 1880, with interest.

S. A. Bowman and Charles Evans, for plaintiff.
Stallo, Kittredge & Shoemaker, for defendant.

SPECIFIC PERFORMANCE.

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[Hamilton Common Pleas, 1882.]

JONES v. LEWIS.

1. The authority of an agent to sign a written agreement to sell lands may, under the statute of frauds, be conferred by parol, and the authority need not be specifically an authority to sign the agreement, but authority to close the sale is sufficient, and the statement of the principal, on being requested to sign for himself, that he would not sign any paper, is of no importance.
2. Where an executor has, by will, power to sell real estate, no limitation on his liability for specific performance of his contract to sell is to be found in the fact that the power is not coupled with an interest, or that the title is incumbered.
3. A suit for specific performance to convey lands may be sustained against one to whom the party agreeing to convey had subsequently conveyed the land with notice.

MAXWELL, J.

The plaintiff brought this suit against Thomas G. Smith, executor of Charles W. James, deceased, and the defendant Lewis, to enforce specific performance of an agreement to convey to him certain real estate particularly described in the petition, situated on Walnut Hills, in this city.

The plaintiff alleges in his petition that Charles W. James, deceased, by his will, empowered his executor, Thomas G. Smith, to sell and convey the real estate of which he died seized, and that, pursuant to that authority, Smith, on the 20th of January, 1881, through his agent thereunto duly authorized, by a contract in writing agreed to convey to the plaintiff the real estate described in his petition, for \$9,000, to be paid \$1,500 cash and the balance in payments of \$1,250 each, in 1, 2, 3, 4, 5 and 6 years, the deferred payments to bear interest at the rate of six per cent., and to be secured by mortgage on the premises, each note to carry its own interest.

That the 1st of February was the day fixed for carrying out the agreement, and that plaintiff was ready on that day to carry out his part of the agreement, but that Smith refused to carry out his part of the agreement, and that afterwards, on the 29th day of March, 1881, Smith conveyed the premises to defendant Lewis, who took the conveyance with notice of the facts in regard to the contract with said plaintiff.

Demurrers were filed by both Smith and Lewis, and the demurrer of Smith sustained on the ground that as the property had been conveyed away, Smith had no interest in this action, but the demurrer of Lewis was overruled.

Lewis then filed an answer in which he makes two defenses to the claim of the plaintiff. As a first defense he denies the making of the contract between the plaintiff and Smith; and as a second defense he says that the power of sale given to Smith by the will of James was not coupled with an interest, but that the sale was necessary for the purpose of paying debts and legacies, and not for investment; that there was a mortgage of \$2,500 and interest on the property, and that it was charged with legacies to the amount of \$3,000, all of which were payable out of the proceeds of the said property.

The testimony in brief is that there was considerable difficulty in making a sale of the property. Smith, the executor, placed it in the hands of A. C. Horton, a real estate agent, for sale. It was offered at least twice at public sale, and not sold. Then Smith suggested that Horton should try to sell it on payments on long time. Several propositions and counter propositions were made between Smith and both Jones and Lewis. Finally Smith agreed to take \$9,000 in payments. Horton went with that proposition and submitted it to Jones, providing that he should pay \$9,000 for the property; \$1,500 cash, and the balance in six equal annual payments of \$1,250 a year, each note to bear its own interest, Jones assenting to that. Horton took it to Smith, who took the paper, read it over, and said he did not see anything wrong in it; if he could not get any more for the property he would take that. Horton at first asked him to sign the paper. Smith refused, said he would not sign any paper, but, after reading the paper he said that Horton might close the sale with Jones. There is some difference at this point between the testimony of Smith and Horton. Smith testifies that he said he wanted to submit all the papers to his attorney; Horton denies that he said anything about submitting the papers to an attorney. At any rate Horton took the paper, and the next day Jones called at his office and Horton signed the paper as Smith's agent. Jones then signed it and made the customary payment on account of the sale. Horton then informed Smith that he had closed the sale with Jones, and asked him for the deeds, etc., so that Jones could have the title examined, and notify Horton that he would be ready to complete the transfer. In the

meantime Smith called upon Horton, and said there was some misunderstanding about the payment of the interest; that he had understood that interest had to be paid annually. Horton showed him the contract, and said it was very plain. Smith said he might be stupid but he had not understood the part about the interest. The result was that Smith refused to make the deed, and afterwards sold the property to the defendant Lewis, who knew there had been dealings with Jones, and does not now claim to be an innocent purchaser.

As to the first defense it is now well settled that under that section of the statute of frauds which provides that no action shall be brought to charge any person upon any contract for the sale of lands unless the agreement is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized, authority to an agent to sign may be given by parol. *Honeyman v. Marryatt*, 6 H. L., 112; *Worrall v. Munn*, 5 N. Y., 243; *Lawrence v. Taylor*, 5 Hill., 107; *Mortimer v. Cornwell*, 1 Hoff. Ch., 351; *Yerby v. Grigsby*, 9 Leigh, Va., 390; *Johnson v. Dodge*, 17 Ill., 441; *Johnson v. McGruder*, 15 Mo., 370; *Curtis v. Blair*, 26 Miss., 324; *Long v. Hartwell*, 5 Vroom., 116; *Brown v. Eaton*, 21 Minn., 410; *Rottmann v. Wasson*, 5 Can., 552; *Riley v. Minor*, 29 Mo., 439.

But it is said by the defense here, that admitting that authority may be given by parol, it must be an express authority, not simply to make or close a sale, but to sign the agreement, and there are cases that seem to go to that extent, as *Coleman v. Garrigues*, 18 Barb., 60; *Edwards v. Johnston*, 3 Houst., 435; *Duffy v. Hobson*, 40 Cal., 240. But I am of the opinion, that the weight of the authority is as is held in all the English cases and in the cases I have first cited, that the authority to close the sale, the terms having been settled, embraces also the power to sign the agreement, for there is no binding sale until the agreement is signed, and it would be a vain thing to authorize an agent to close the sale and at the same time withhold from him the power to sign the agreement, which is the essential element of closing the sale. For that reason I attach but little importance to Smith's statements that he would not sign any paper. Besides, we have his acts ratifying Horton's action.

Again it is claimed, that he misunderstood the interest clause. This agreement must be construed like any other. It is clear and unequivocal, and there can be no room for misunderstanding as to the form of it. *Forbis v. Shattler*, 2 C. S. C. R., 95.

As to the second defense I cannot see that it affected this case. This was a sale for money, and I cannot find any authority that limits an executor, having power to sell, either with or without interest; nor can I find any authority that would warrant the court in relieving one from an agreement to sell, where he has the title, because the property is encumbered.

The decree will be for the plaintiff.

Healy, Brannan & Desmond, for plaintiff.

Thomas McDougall and John W. Herron, for defendant.

COMPOSITION AGREEMENT.

[Hamilton Common Pleas, 1882.]

R. BROWN & CO. v. THOMAS C. DAUGHERTY.

A secret agreement by a debtor with one of the creditors of a composition agreement, to pay such creditor in full, and paying him in full, the other creditors settling for less, avoids the composition, and the other creditors may recover the balance of their claims from the debtor. An agreement by the creditors to sell their claims to a friend of the debtor for the stipulated percentage of their amounts, which agreement was procured by the debtor and signed at his request, or at the request of the preferred creditor, is such composition agreement. The surrender of certain securities held by the preferred creditor as part of the consideration does not alter the effect of the preference.

AVERY, J.

The plaintiffs, as creditors of the defendant Thomas C. Daugherty, and of Lee & Daugherty, his former firm, signed the following agreement: Cincinnati, July 5th, 1877.

"We, the undersigned creditors of Thomas C. Daugherty and Lee and Daugherty, of Fleming Co., Ky., do hereby sell and transfer to David Wilson & Co., our respective claims on both Daugherty, and Lee & Daugherty, without recourse on us, in consideration of the said D. Wilson & Co. paying us fifty cents on the dollar of our respective claims within the next sixty days from this date."

All the other creditors, thirteen in number, signed the same agreement, including Lee & Pinckard who were the first signers, and Louis Stix & Co., Dickinson, Bishop & Co., and Owen & Barkley, who were the last. The amount of the claim of each, was set opposite their respective names. To induce the former to sign, and surrender certain collaterals they held, Daugherty gave them his individual note, which was afterward paid, for the additional fifty per cent. of their claim; the last three were paid in full before signing.

The plaintiffs who signed, and received fifty cents on the dollar under the agreement, in ignorance of these payments, have brought this action to recover the balance.

A secret advantage secured by one creditor signing a composition agreement over the rest, is a fraud upon them. This principle began with Cockshott v. Bennett, 2 T. R., 765, and is uniformly recognized. Way v. Langley, 15 O. S., 392; Crossly v. Moore, 40 N. J. L., 27; Loucheim's Appeal, 67 Penn. St., 49; Solinger v. Earle, 82 N. Y., 393; Fay v. Fay, 121 Mass., 560.

In Cockshott v. Bennett it was put upon the principle, that to allow a secret advantage to any one creditor would not only be in duress of the debtor, but would render abortive what the other creditors intended to do for him, by compounding his debts. In Leicester v. Rose, 4 East., 372, however, the ground was taken which has ever since been considered the true one, that the bargain by the creditors is for equality of benefit, and that any stipulation by a creditor for additional advantage is in fraud of the general agreement. The question is thus concisely stated in Knight v. Hunt, 5 Bing, 432, Best C. J. "It has been argued that here the debtor was not injured, nor the funds for other creditors rendered less available. No doubt those topics have been urged in some of the cases, but one question always is whether the judgment of the creditors has been influenced by the supposition that all are to suffer in the same proportion."

The effect upon a composition agreement, of the secret preference of a creditor, is to render it void as to him. *Howden v. Haigh*, 11 A. & E., 1033; *Higgins v. Pitt*, 4 Exch., 323; *Frost v. Gage*, 3 Allen, 560. But these cases go upon the ground, that no action will lie on the agreement in favor of one who, as part of the consideration, stipulates for a preference in fraud of the agreement. Not only can he take no advantage from the stipulation, but he is also to lose the benefit of the composition. *Erle, J., Mallalieu v. Hodgson*, 16 Q. B., 711.

The question here is, whether the debtor likewise is to lose the benefit of the composition, as against his other creditors. But, first, is the agreement here a composition agreement?

Upon its face, it was a sale to David Wilson & Co. They were friends of Daugherty, and between him and them, it had been arranged, although the details were not put in writing until afterward, that they would pay the creditors for their claims, if all accepted, fifty cents on the dollar, he transferring all his assets for the purpose, and they upon reimbursement with interest and something for risk and trouble, to turn over to him the claims.

The agreement of the creditors was procured by him, at least plaintiffs signed it, either at his request or that of Lee & Pinckard, who drew up the paper for him, and it was he who gave his note for the additional fifty per cent. to Lee & Pinckard, and paid the last three signers in full. In fact the agreement was for him, and that the equal percentage, in full of the claims, was to be paid by a third party made no difference. *Breck v. Cole*, 4 Sandf., 79. It was not in fact a purchase by a third party, although that was the form of it, but in reality the debtor was buying in the claims for himself. Thus it differs from *Goldenbergh v. Hoffman*, 69 N. Y., 322, in the very point upon which that decision turned.

If the creditors were left in ignorance of the truth, it was a fraud upon them, and the surrender of their claims was void. *Hamet v. Letcher*, 37 O. S., 356. If the true state of the case was known, they must be presumed to have been influenced by the supposition that all were to suffer in the same proportion.

The question then comes back as to the effect, upon the agreement itself, of an advantage obtained by one or more of the creditors. In *Mallalieu v. Hodgson*, 16 Q. B., 689, 715, where a creditor who had signed a composition agreement sought to prove in bankruptcy the full amount of his claim because of preferences to other creditors, but was defeated because he had stipulated for a preference himself, it was said, *Coleridge, J.*: "It would have been perfectly innocent to stipulate that no other creditor should have a preference, and a breach by the defendants of such a stipulation would clearly have avoided the release, and restored plaintiff to his original rights." In the same case all the force of such stipulation was given to the mere fact of the agreement, thus: *Erle, J.* "Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others, for a release from them to the debtor, in consideration of the release by him." Which indeed was but another form of expressing, that all were to suffer in the same proportion.

Advantage obtained by anyone who has come into the agreement, whether as the first signer or the last, defeats the consideration, and the rest are no longer bound.

Cases upon the point are not numerous and differ perhaps. In some, the ground taken is that to obtain advantage is a breach of the condition;

in others that it is a fraud. *Spooner v. Whiston*, 8 J. B. Moore, 580; *Durgin v. Ireland*, 14 N. Y., 322; *Grees v. Shriver*, 53 Penn. St., 259; *Kahn v. Gumberts*, 9 Ind., 430; *Hefter v. Cahn*, 73 Ill., 296; *Bank of Commerce v. Hoeber*, 8 Mo. App., 171; 14 Cent. L. J., 293.

But, while certainly in fraud of the agreement, it does not follow that the effect is to avoid the agreement. *Beck v. Cole*, 4 Sandf., 79, 84; and as to being the breach of a condition, that is only another name, where the considerations are mutual and dependent, for failure of consideration.

The result in any point of view, at all events, is the same; the plaintiffs are entitled to judgment. The amount of the composition was received by them in ignorance of the truth, and without returning, or offering to return it, they may recover the balance. *Hefter v. Cahn*, 73 Ill., 296; *Bank of Commerce v. Hoeber*, 8 Mo. App., 171. The consideration involved in the surrender of securities by *Lee & Pinckard*, did not alter the effect of the preference gained. *Cullingworth v. Loyd*, 2 Beav., 385. Besides there were other creditors preferred.

Judgment accordingly.

Archer & McNeil, for plaintiff.

J. D. Henry, for defendant.

SUNDAY OPENING OF SALOONS.

[Cincinnati Police Court, 1882.]

STATE OF OHIO v. FRIDOLIN SHUMANN.

An information for violation of the act of April 15, 1882, (78 O. L., 128,) against keeping places where liquor is sold open on Sunday, is sufficient if it charges the keeping open of a certain room. Keeping part of the place open is a violation of the statute. That the affidavit on which the information is based describes the place as a house is immaterial. Strict conformity between the affidavit and information is not necessary. That a lawful business, as an eating-house, is combined with the unlawful conduct is no defense.

On demurrer to information.

Charge:—Allowing place to be open on the first day of the week, usually called Sunday, where intoxicating liquors are sold, or exposed for sale, on other days of the week.

HIGLEY, J.

The prosecution is brought under the provision of section 1 of the act of the general assembly of the state of Ohio, which passed and took effect April 15, 1882. This section as appears by its title, is an "Act to amend section 6,944 Revised Statutes of Ohio," volume 2, Revised Statutes, page 1, 645, as amended April 9, 1881, see 78 O. L., 176.

The judge then quoted the law referred to above.

The affidavit under which the arrest was made is as follows:

"Before me, George E. Richards, clerk of the police court of the city of Cincinnati, personally appeared John Mechley, who being duly sworn, according to law, says that on the 23d day of April, 1882 at the city aforesaid, one Fridolin Schumann did unlawfully and knowingly allow to be open on the 23d day of April, A. D. 1882, the same being the first day of the week, commonly called Sunday, a certain house or place not a drug store, where intoxicating liquors are commonly sold or exposed for sale on

days of the week other than the first, commonly called Sunday, as deponent verily believes; and further deponent says not."

Sworn to and subscribed this 28 day of April, A. D. 1882.

George E. Richards, *Clerk P. C. C.*

By George Trumiter, *Deputy.*

The information filed herein is in the words following:

City of Cincinnati, ss.—The prosecuting attorney of the police court of Cincinnati, in the name and by the authority of the state of Ohio, informs the court, that Fridolin Schumann on the 23d day of April in the year 1882, being the first day of the week, commonly called Sunday, with force and arms, at the city of Cincinnati aforesaid, and within the jurisdiction of the said court, did unlawfully and knowingly, allow to remain open a certain room, said room being then and there and theretofore a place of public resort, where on other days of the week than the first, commonly called Sunday, were then and therein sold and exposed for sale, by the said Fridolin Schumann, intoxicating liquors, to-wit: brandy, whisky, gin, ale, beer and wine; the said room not being then and there a regular drug store, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

John A. Caldwell,

Prosecuting Attorney of the Police Court.

Judge Higley, in giving his decision, said:

The defendant has filed a petition to quash, and also a demurrer to the information, both of which are now before the court for decision.

A motion to quash is well taken in cases where there is a defect apparent upon the face of the record, but it addresses itself to the sound discretion of the court, and is never granted, except in very clear cases. I can discover no defect in the form of the information, or in the way the offence is charged, and therefore overrule the motion.

The demurrer goes to the facts stated in the information, and alleges that these do not constitute an offense punishable by the laws of this state.

To determine this the law in the case must be examined.

Jurisdiction in this case is given to this court under the provisions of section 1787 and 1788, Revised Statutes of O., p. 545.

"In general, an information for an offense created by statute is sufficient which sets forth the offense in the language of the statute. *Whiting v. State*, 14 Conn., 487. *Waterman's Criminal Digest*, 354.

"It is sufficient to charge an offense in the words of the act creating the offense, when the charge made in that form fully informs the defendant of the nature of the offense charged against him." *Cearfoos v. State*, 42 Md., 403. *American Criminal Reports*, 1 vol., 460.

"A presentment under the act, etc., which charges the defendant in the language of the statute * * * is good * * *." *Tenn. supreme court*, *State v. Odem*, 2 Lea, 220. *Criminal Law Magazine*, 1 vol., 540. *State v. Moore*, Iowa supreme court, 5 N. W. Rep. April 24, 1881, page 183. *Miller & Gibson v. State*, 3. O. S., 476, 489.

As to the alleged insufficiency of the information I will say:

First, that the word "room" in the information, designating the place or situs of the offense, is, in my opinion, a proper word under the language of the statute defining the offense.

In the case of *Moore v. State*, 12 O. S., 387, describing a kindred offense under a statute similar in its terms, the words employed were "at his

grocery in the township of Addison, in the county of Gallia, etc.," and this language Peck, Judge, the full bench concurring, held sufficient.

In the case of *Miller & Gibson v. State*, supra, Thurman, Judge, in announcing the opinion of the court in a case involving the same question, held that an information using the word "room" in describing place or situs is sufficient.

It may be claimed that the cases just cited were prosecutions under an act to provide against the evils arising from the sale of intoxicating liquors which passed and took effect May 12, 1854. See *Swan's Revised Statutes*, Derby's ed., page 898. This is very true, but nevertheless the authorities are pertinent and in my judgment conclusive of the point.

The case of *Miller & Gibson* was a prosecution for violating section 4 of said act of May 1, 1854. The language of that section was as follows: "And all places where intoxicating liquors are on other days sold or exposed for sale," etc.

The rule of construction is evidently the same in both cases.

It is also a well established rule of construction that when the general assembly or other law making power employ terms, as for example "all places," which have a well understood or judicially defined meaning, the presumption is that such words were used with reference to such well understood and defined meaning. *Cooley's Constitutional Limitation*, pages 72 and 102; *Sedgwick on Construction of Statutes*, 224-225; *Lessee of Gray v. Askew*, 3 O., 466; *Norris v. State*, 25 O. S., 217-224; *Bulkley v. Stephens*, 29 O. S., 620-622.

Second, as to the insufficiency of the affidavit as a predicate for the information, I have this to say: That in my judgment the affidavit described fully and with sufficient exactness the offense defined in the statute—and that the language employed in the affidavit and in the information is substantially the same and, therefore, not objectionable.

In the case of *Gates v. State*, 3 O. S., 293, Warden, Judge: "That jurisdiction being conferred, the information takes the place of an indictment, and within the limits in which an indictment might vary the charge and subject the accused to the consequences of a default on his recognizance, the information may vary or depart from the charge set forth in the recognizance or transcript."

Thurman, Judge, in deciding the *Miller & Gibson* case, says on this point: "But no very strict conformity between the information and the original complaint is necessary. If the charge is substantially the same in both there is no room to quash the information on the ground of variance." See also *Parker v. State*, 4 O. S., 565.

In prosecutions under this statute an inquiry may arise as to the effect and meaning thereof when applied to a place which the defendant allowed to remain open on Sunday and wherein he united and combined with the unlawful sale of intoxicating liquor, some other lawful business, such as keeping an eating house, ice cream saloon, grocery store, etc.

In such a case the opinion of the court is that the fact of uniting and combining in a greater or less degree the lawful with the unlawful act furnishes no excuse or protection to the offender. Were it otherwise all criminal acts would be robbed of their responsibility to the law by the carefully prepared and manifest pretense of some real or simulated act or calling apparently lawful in its character. The offender against the law would ever be ready to thus guard against the inflictions of its penal pro-

visions. This view is sustained not only by reason but by adjudicated authority as well.

In 1865, the legislature of Maryland passed an act prohibiting the sale of spirituous or fermented liquors, etc.; prohibited also the giving away of liquors on election days. One Cearfoos was arrested, tried, convicted and sentenced for giving to one Michael Burck spirituous liquors, to-wit: whisky on the day of election in Washington county, in said state. The defendant pleaded that said act was committed in his own house, when he was visited by some friends, who, in the course of hospitality, partook of some whisky which he had there for his own use. The state demurred to the plea, and the demurrer was sustained on error to the court of appeals. 42 Md., 403. The court among other things said: "A statute prohibiting among other things the giving away of spirituous liquors on election days by any person is held to extend to and include acts of hospitality in a private house.

"They are not allowed, directly or indirectly, to sell, barter, give or dispose of such liquors."

In Georgia the law requires tippling houses to be closed on the Sabbath day. If the whole house is used for tippling purposes, it must be closed. Where a part of a tippling house was used for a bed room, and between that part and the saloon there was an open way unclosed by a door or otherwise, keeping open a door for ingress and egress to and from the part used as a bed-room on the Sabbath day would amount to a violation of the statute. Georgia supreme court, *Harvey v. State*.

Our statute does not go so far as those above cited, but the theory of the law above set forth is applicable here, and may justly be supplied in its interpretation.

The judgment of the court is that the information is good, and the demurrer is therefore overruled.

VOLUNTARY PAYMENT OF TAXES.

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[Hamilton District Court, 1882.]

JACOB DEWALD v. L. A. STALEY, Treasurer.

A party who is informed by a person with whom the county commissioners have made a contract to hunt up property omitted from the tax duplicate, that improvements on his property have not paid taxes for a certain number of years, goes with such person to the auditor, and is lead by him to believe that he must pay, and does pay to the treasurer the amount that should have been assessed on such property, whereas, by reason of no taxes for said improvements ever having been returned by any assessor, these officers were not authorized to collect, cannot recover back such payment. The acts of the officers were not duress, for plaintiff's ignorance was an ignorance of law, and not of facts.

ERROR to the Common Pleas Court.

MOORE, J.

The plaintiff in error filed his petition in the court below, averring that he was the owner of lot No. 6 in Ochler's subdivision, in the City of Cincinnati; that he had paid all the taxes for state, county and municipal purposes assessed and charged against said property from the date of his ownership down to the present time. That in December, 1880, he was notified by the auditor of the county, that he was indebted for taxes due

thereon for new improvements erected on said lot by a prior owner thereof for the years 1872 to 1880, inclusive. That the same was a lien on said lot of land and collectible. That relying on said representation and believing himself liable for the amount claimed, he did, on the 9th day of December, 1880, on the order of the county auditor, pay to the treasurer of the county the said sum of \$400. That he afterward discovered that said improvement had never been returned for taxation by any assessor, and that no taxes for said alleged improvement were at that time or at the time of said petition, charged against said land on the tax duplicate of the county.

The defendant in error by way of answer admits that the plaintiff was notified, to-wit: that there existed an unpaid tax upon said land, but declares that the plaintiff appeared at the office of the county treasurer, and voluntarily paid into the treasury the amount stated. That the plaintiff had full knowledge of all the existing facts and circumstances, and that no demand was made for the amount so paid by anyone legally authorized to make or enforce such demand.

A reply was filed by the plaintiff, and upon the issue joined and the evidence, the court rendered judgment for the defendant, whereupon the plaintiff filed his petition in error, assigning among other grounds of error, that the court erred in its judgment and that certain testimony offered was rejected to his prejudice and against his objection.

The case stands before the court upon the right of the plaintiff to recover back money paid upon a tax which defendant admits cannot be enforced, and which the defendant claims the plaintiff cannot recover because he was not illegally induced to pay.

On the 11th day of August, 1880, the commissioners of Hamilton county took certain action as evidenced by the following entry on the minute-book or record of proceedings, to-wit:

Cincinnati, August 11, 1880.

Whereas the general assembly of the state of Ohio, on the 14th day of April, A. D. 1880, passed an act to more fully secure the taxation of real and personal property in the state of Ohio, and for levying taxes thereon according to its true value, as follows, to-wit:

Section 1. Be it enacted by the general assembly of the state of Ohio, that whenever the board of commissioners of any county of this state containing a city of the first grade of the first class, shall have employed any person or persons to ascertain and furnish the county auditor the facts and evidence necessary to authorize him to subject to taxation any property improperly omitted therefrom, etc.

Therefore, be it resolved that Charles F. Hornberger be and he is hereby employed by this board under said act to ascertain and furnish such facts and evidence to the county auditor, and it is hereby agreed by this board, that said Charles F. Hornberger shall receive as compensation for his services the compensation of twenty per cent. of all sums collected and actually paid into the county treasury, as taxes on such omitted real property, (not to include personal property) provided, that such employment shall only relate to omissions occurring prior to the 14th day of April, A. D. 1880.

The record in this case shows that in December, 1880, after the plaintiff had paid all the taxes assessed against his property, he received a written notice from Hornberger, representing that he was employed by the commissioners of Hamilton county to hunt up property omitted from the tax duplicate, and that he, the plaintiff, was indebted as before stated, and

requested the plaintiff to call and see him. The plaintiff did call on Hornberger, and together they went to the auditor of the county, and there the auditor asked the plaintiff if he "was satisfied to pay." The plaintiff replied, "if I must pay I must be satisfied." The auditor then gave the plaintiff an order on the treasurer to receive the amount claimed. The plaintiff and Hornberger went to the treasurer, and there, without anything further being said or done by either of the parties, including the treasurer, with reference to the legality or justness of the claim, the plaintiff paid over the \$400, and went his way.

The plaintiff offered to prove, but was refused by the court (which he assigns here as a ground of error), "that in obedience to said notice he called on Hornberger, and that Hornberger represented to him that he was regularly employed by the county commissioners to hunt up property omitted from the tax duplicate; that a house erected on his property by a former owner had never been returned by an assessor; that there were taxes due on said property, amounting to over \$400; that the same were charged on the duplicate against him; that if he did not pay them, penalties would be added, the property placed on the delinquent list and sold."

Admitting all the testimony offered by the plaintiff, including that rejected by the court, to be true, does it appear that the payment of the money in question was made under circumstances amounting to fraud, mistake or duress, for certainly the right to recover must be based upon either of these grounds.

No fraud is charged by the plaintiff, and in his petition he does not even state that the defendant, the auditor, or Hornberger, represented to him that the tax was on the tax duplicate.

It is settled by excellent authority that mistake, in order to be a ground for recovery, must be a mistake of fact, and not of law.

In the case of *Lambon v. County Commissioners*, 97 U. S., 185, and cases there cited, it is held that a voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back. See also cases cited in note to 2 Smith's Leading Cases, 403, 404.

In the case at bar the facts and circumstances bearing on the legality of the case, were known to the plaintiff, or he could have known them. It was his duty to examine the law and know whether the defendant could put him in a position where there was no other way but to pay. The only other ground left, therefore, upon which the plaintiff can base his right to recover back the money paid is, that the payment was not voluntary, but by compulsion or duress.

It has been held in this state in the case of *Marietta v. Slocumb*, 6 O. S., 471, that "where payment of a demand cannot be enforced without giving the parties against whom it is asserted a day in court, and there is no duress of his person or property, its payment, though made under protest, is in law a voluntary one." Also in *Mays v. Cincinnati*, 1 O. S., 268, cited and explained in *Baker v. Cincinnati*, 11 O. S., 534, the court held "to make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property (of the party) from detention, or to prevent a seizure of either by the other party having apparent authority to do so without resorting to an action at law.

It is admitted that at the time of the payment, the sum was not charged against the plaintiff's property on the tax-duplicate, but that there

existed a belief in the mind of the plaintiff, that it was so charged, which, in connection with the fact that Hornberger stated that the same was so charged, and a demand being made therefor by an official, as plaintiff claims, amounts to duress. We cannot adopt the conclusion that the plaintiff was, at that time, in law compelled to pay. The auditor, the agent and the treasurer, although appearing to the plaintiff at that time as officials, were not clothed with power to enforce collection by summary process. Their only power is such as they derive from the statute. The county auditor, in the assessment of all taxes, and the county treasurer in the collection of the same, are controlled by the statute. In this instance it was the duty of the county auditor (unless, as authorized by the act of April 11, 1881, the party concludes to pay before) to place the same on the tax duplicate, and then certify to the county treasurer for collection, and if not paid, such further steps in the delinquency of the same must be resorted to, as provided by the statute, before sale or summary process by way of collection can be had.

Every man is supposed to know the law, and if he voluntarily makes a payment, which the law will not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him legal remedies to recover it back.

To use the language of the court in *Stephan v. Daniels*, 27 O. S., 527, 542, and cases cited, "the authorities are numerous, and in the main uniform to the effect that what constitutes a compulsory payment to an officer, armed with process of law and clothed with power to enforce its commands, and where the party has had no day in court, is quite a different question from what it is between individuals, or where he has had an opportunity to be heard in a judicial proceeding. 5 Kan., 412; 8 Kan., 481; cited and approved in 97 U. S., 101.

Here the plaintiff had ample means to protect his property against any illegal or unjust attempt to charge a tax upon it, if he had so desired. The county auditor and the county treasurer and the agent authorized by the county commissioners, as aforesaid, were in their actions and representations at the time in question but simple individuals on equal footing with the plaintiff, having no power to compel him to act.

Cooley on Taxation uses the following pertinent expression: "the rule of law is a rule of public policy; also, it is a rule of quiet as well as good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made and into which they have not been drawn by fraud, or accident, or by any excusable ignorance of their legal rights and liabilities.

Therefore, if the plaintiff has relied upon the mere statement of Hornberger or the county auditor, with the full opportunity of knowing for himself that they had no power to make him pay, except by a resort to the statutory means, and having seen fit to ignore his legal rights in the matter, he cannot complain if the law fails to give him a remedy to correct his mistake.

Judgment affirmed.

J. R. Von Seggern, and O'Connor, Glidden & Burgoyne, for plaintiff in error.

Charles Evans, for defendant in error.

DOWER.

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[Hamilton Common Pleas Court, 1882.]

†CATHERINE CORRY v. ELIZABETH LAMB et al.

A devise to a wife will be, in the absence of contrary showing, presumed to be in lieu of dower. This need not be expressly stated in the will, and if the widow elects to take under the will, she can not claim dower on real estate sold on foreclosure during his lifetime.

MAXWELL, J.

The plaintiff is the widow of James A. Corry, deceased, to whom she was married January 14, 1841, and who died July 25, 1881, testate. In his will he provided, first, that his just debts should be paid; secondly, he gave to a family servant one hundred dollars; thirdly, he devised to his son, James F. Corry, a lot of land in Cincinnati; fourthly, he gave and devised to his wife, the plaintiff, all the residue of his real and personal property, except some live stock, the form of the devise being: "All the real estate and personal property, wherever situate, by me owned at the time of my death, including the growing crops on my farm, to be hers absolutely, and to her heirs, excepting therefrom only the property mentioned in items 1, 2 and 3, of this will, and excepting therefrom also my horse stock at J. C. Allen's, Greene county, Ohio, and one six-year-old gray mare on my place in Butler county, Ohio, where I now reside, the horse stock at J. C. Allen's, in Greene county, Ohio; and the gray mare six years of age on my place. I now bequeath to my said son, James Franklin Corry."

This will was admitted to probate in Butler county, Ohio, August 1, 1881, and on the same day the plaintiff appeared in open court, and in due form, as provided by the statute, elected to take under the will of her deceased husband.

James A. Corry, in his lifetime, about the year 1856, made a mortgage on a large tract of land in Avondale, in this county, which he owned, in which mortgage the plaintiff did not join. The mortgage was foreclosed, and about the year 1866, the property was sold under judicial proceedings. The plaintiff now brings her action against the defendants above named, and a large number of others, for an assignment of dower in the tract of land sold as aforesaid.

The defense is, that her husband having made the foregoing provision for her in his will, and she having elected to take under the will, she is barred of her dower, not only in the lands of which her husband was seized at the time of his death, but as well of lands which he had conveyed away during coverture.

Section 5963, Revised Statutes, reads as follows: "If any provision be made for a widow in the will of her husband, it shall be the duty of the probate judge to issue a citation to said widow to appear and make her election whether she will take such provision, or be endowed of the lands of her said husband, and take her distributive share of his personal estate, * * * but she shall not be entitled to both, unless it plainly appears by the will to have been the intention that she should have such provision in addition to her dower and distributive share;" and section 5964 provides, that—"if she elect to take under the will she shall be barred of her dower, * * * and take under the will alone."

Section 5963 was passed April 2, 1858, (55 O. L., 36, par. 43.) and section 5964 was passed March 10, 1860, (57 O. L., 30, par. 44.) and both these are the same, so far as they apply to this case, as sections 43 and 44 of the wills act passed May 3, 1852, and these again are the same in substance as sections 45 and 46 of the wills act passed March 23, 1840, (38 O. L., 126.) and section 45 of this last act is an exact copy of the provisions of the wills act in Maine and Massachusetts, reading as follows: "If any provision be made for a widow in the will of her husband, she shall * * * make her election whether she will take such provision, or be endowed of his land; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such provision in addition to her dower." Mass. R. St., 1836, p. 410; Me. R. St., 1840, p. 392.

Our wills act of March 23, 1840, amended and repealed the wills act of February 18, 1831, in which it was provided that the dower of the widow should not be prejudiced by a bequest to her—"unless any legacy or devise to such widow, in the will contained, shall be expressly specified to be in lieu of dower."

†This judgment was affirmed by the supreme court. See opinion, 45 O. S., 208.

It will be observed that, whereas under the act of February 18, 1831, in order to bar the widow of her dower it was necessary that the testator should expressly specify that the gift or devise was in lieu of her dower, thus following the common law rule, by the act of March 23, 1840, the provisions of which are now in force, the provision was to be in bar of dower unless it appeared clearly that the testator intended it should not be, thus reversing the policy of the law, and shifting the burden of proof. It is important to keep this change in mind in examining the will of the plaintiff's testator, and the decisions of the different states, some of which still follow the common law rule.

The question arising in this case has not, as far as I can learn, been before our supreme court, but the superior court of Cincinnati, in general term, has passed upon it in the case of *Moore v. Stiedel*, 1 Disney, 281. The syllabus of that case is as follows: "When a testator, who died in 1854, devised real estate to his widow, a part of which, subsequent to the date of his will, but previous to his decease, was sold on execution as his property, and the widow, in conformity with the law, elected to take under the provisions the will, she is barred of dower in the lands sold on execution." In that case it was contended by counsel for the widow that it must clearly appear from the will, that the testator intended the provision made to be in lieu of dower—following the common law rule—but the court held the contrary.

As has been said, the section governing this case was copied into the wills act of March 23, 1840, from the statutes of Maine and Massachusetts. The supreme courts of both those states have construed those statutes, and in the absence of a decision by our own supreme court, they may be accepted as authority.

In *Allen v. Bray*, 12 Me., 138, it was held: "The acceptance by a widow of the provisions made for her in the will of her husband constitutes a bar to her claim for dower in lands aliened by him during coverture." See also *Perkins v. Little*, 1 Greenleaf, 148. In *Hastings v. Clifford*, 32 Me., 132, it was held: "A widow who elects to take the provision made for her in her husband's will, has no right also to dower in his estate unless it plainly appears by the will to have been testator's intention that she should have both." See also *Bubier v. Roberts*, 49 Me., 460. In *Reed v. Dickerman*, 12 Pick., 146, where the testator had devised to his wife real and personal property, which, after his death, without any formal election, she had accepted and used, she was held barred of her dower. See also *Kempton*, appellant, 23 Pick., 163; *Delay v. Vinal*, 1 Met., 57; *Adams v. Adams*, 5 Met., 277; *Pratt v. Felton*, 4 Bush., 174. In the late case of *Buffington v. Fall River National Bank*, 113 Mass., 245, it was held: "A widow who does not waive the provisions made for her in her husband's will, when it does not plainly appear by it that he intended she should have such provision in addition to dower, is barred from claiming dower in lands aliened in his lifetime."

I am of the opinion that under our statute, the burden of the proof is on the plaintiff to show that her testator, by his will, intended the provision therein contained to be in addition to her dower; that plainly the terms of the will cannot be so construed, and that, having elected to take under the will, she is barred of her dower in the lands sought to be charged with dower in this case.

Isaac J. Miller, for plaintiff.

Simeon M. Johnson, for defendant.

PARTITION.

[Cuyahoga District Court, 1892.]

SARAH DELANEY v. THOS. McFADDEN.

Where plaintiff brought a suit asking only for partition, and alleging that the land described descended to herself and her brother, as tenants in common of undivided halves, and that they conveyed to defendant, but that she was then under age, and now disaffirms such conveyance of her share, and the answer denied her interest and minority: Held, partition under the statute cannot be asked where the title is in controversy, but the title must be first established at law.

ERROR to the court of Common Pleas.

DOYLE, J.

A petition was filed in the court of common pleas for partition. It alleges that plaintiff has a legal title to, and is seized in fee-simple of the undivided one-half of a lot of land described; that defendant is the owner of the other undivided half, and is a tenant in common with her therein; that the whole of said lot came to plaintiff and her sister by deed; that on April 6, 1878, plaintiff and her said sister united in a conveyance of said lot to the defendant, since which time he, the defendant, has occupied and still occupies said lot exclusively; that the consideration for such conveyance was another piece of land which defendant conveyed to plaintiff's mother, who conveyed to plaintiff and her sister; that plaintiff was born November 6, 1860, and consequently she was under the age of 18 years of age when she made the conveyance to defendant; that she is now of age, and being dissatisfied with her conveyance to defendant, disaffirms the same; that she has tendered a conveyance to defendant of the undivided one-half of the land received of him, and demanded a re-conveyance of the undivided one-half of the lot; that defendant refuses to convey to her, or to receive the conveyance tendered by her of the property received in exchange, and that she now disaffirms her conveyance to defendant. It prays "that partition may be made of said lands, or, if the same cannot be done without manifest injury, that such proceedings may be had in the premises as are authorized by law."

The petition is entitled as in a civil action, is styled "petition for partition," is sworn to, and a summons was issued and served on defendant. The defendant answers, denying that the plaintiff is seized of any interest in the premises; that she was a minor when she made the conveyance to defendant; that she tendered a deed, or demanded a re-conveyance, alleging that defendant is the sole owner of the property, and praying that the petition may be dismissed.

The case being called for trial, the plaintiff offered herself and Mary Tobin as witnesses, and offered to prove by them, if permitted to testify, that plaintiff was under age at the time she made the conveyance to defendant; that on arriving at the age of majority, she at once tendered a deed to defendant of the property received in exchange, demanded a re-conveyance to her of the lot, and disaffirmed her deed made to defendant; but the court refused to hear such evidence, and no further evidence being offered, dismissed the petition. In this it is alleged the court erred, and to reverse that action of the court this proceeding is prosecuted.

It will be observed, there was no offer to prove any actual possession in the plaintiff, or any fact which would establish a constructive possession, unless what is already recited would do so.

This offer of proof must be considered in connection with the allegations in the pleadings, which show that the defendant is in the exclusive possession of the property under a claim of title, and holding adversely to the plaintiff.

The question is, under these circumstances, can the court proceed to determine the question of title and order partition, in this proceeding, without requiring the plaintiff first to establish her title, and possession, in an action at law? There is no prayer in this petition for equitable or other relief beyond the partition of the lands. The answer asks for no other relief than the dismissal of the petition. It sufficiently appears from the pleadings that the defendant was placed in the possession of the whole property by the plaintiff and her sister, under circumstances which pre-

clude any idea of a common possession, active or constructive, with the plaintiff. While in the ordinary action under the code, for partition, it would and in the proceeding under the statute, it might be error in the court to refuse to receive proof, because of a mere denial that plaintiff was seized, can the court, where the pleadings admit what is here admitted, or where, if not admitted, the proof shows what is here shown, correct the action into one for the recovery of the possession of real property provided for by section 5781, in the Revised Statutes; and, if not, is there anything for the court to do but to dismiss the petition?

Upon both principle and authority, the appellant for partition must not be disseized. "Proceedings for partition were not designed as an alternative remedy with the action of ejectment. It was always necessary at common law, and is still essential under most of the American Statutes, that the appellant for partition be actually or constructively in the possession of the real property sought to be divided. If it be held adversely to the applicant, he must first establish his right by action to recover possession." Freeman on Partition, section 447, and cases cited in note 3; see also Allnott on Partition, 53; Co. Litt., 167, a.

This rule is said by some courts, to be subject to a distinction between a mere possession of the plaintiff's share by defendant, and a legal disseizin. In cases where privity has existed between the parties, as in cases of joint tenants, or tenants in common, and one tenant ousts his co-tenant, by taking all the profits to himself, denying his co-tenant's right, such a possession may be treated as a disseizin for the purpose of bringing ejectment, or plaintiff may elect to treat such possession of his co-tenant as his possession, and maintain a petition for partition. See Brock v. Eastman, 28 Vt., 660. This distinction is denied by many text writers and courts. See Freeman, section 447; 14 N. Y., 238; 24 Conn., 235; and cases there collected.

In the case at bar, however, there never was such privity. The co-tenancy, if it exists at all, does so by virtue of the alleged disaffirmance by plaintiff of her conveyance to defendant, which, without such disaffirmance, would be valid. A deed which transmitted the title, and until some act of disaffirmance, continued it in defendant. 4 O., 252. It is said that the filing of this petition is of itself a disaffirmance of the deed, and I am inclined to think that if the action was proper, that would be true. It would follow, however, that the very act which was designed only to sever the co-tenancy, would in that case, have to be relied upon to create it, which would be grossly inconsistent.

This general rule existing at common law and under the statutes, exists also in equity, except in cases where that rule must give way to the more general and a paramount rule of equity, that "where jurisdiction having once rightfully attached, it shall be made effectual for complete relief." As in the case of an action to construe a will, where the defendants were in possession claiming under the will, it is held that the court having jurisdiction for one purpose will compel an accounting for rents and profits and partition. Scott v. Guernsey, 60 Barb., 178. Freeman on Partition, 449.

In a partition in chancery, if the title in dispute be an equitable one, the court will settle it. If legal or involved in doubt, and there are not other matters which make it necessary to retain the bill, it will dismiss it; —or if retained, require the parties to settle the controversy at law before a decree of partition will be entered. If there are other issues of an equit-

able nature to be determined, and the question of title arises, the court may, in aid of complete justice, determine it, usually, however, if it be of a legal nature, by an issue out of chancery.

We do not understand that the case of *Perry v. Richardson*, 27 O. S., 110, 120, which is relied upon by plaintiff's counsel, establishes any different rule in Ohio.

That was an action under the code for partition and an account for rents and profits, an end usually sought by bill in chancery. The answer set up an equitable title, and prayed for equitable relief; it was held that the action was in equity, and the court having equitable jurisdiction, might well proceed to determine the rights of all the parties, that relating to title as well as others that may arise. The judge delivering the opinion in that case, after stating the rule at law and in equity substantially as we have given it says: "Under the code, however, as we apprehend, the same difficulties do not arise. The civil action is comprehensive in its nature and when it is used for the partition of lands, it is at least, fully as effective as the former equitable proceeding." * * * "It is not necessary for us to settle now what might be done or what might not be done under a strict statutory partition." *Perry v. Richardson*, *supra*.

In the legal or statutory partition, the parties have no right to recover for rents and profits; no right to a reformation of deeds, specific performance of contract, compensation for improvements, or any of the many other things in the way of equitable relief which might be obtained in the equitable suit or the action under the code; but if they are tenants in common, they may have partition under given circumstances, an appraisal, election to take, or sale, and that only. But if a plaintiff chooses to draft his petition according to the forms of the code by entitling it, swearing to it and causing a summons to be issued, but praying for no relief, beyond those cognizable by law courts and given by the statute, does the action thereby change from a legal to an equitable one? It is claimed here that such is the effect of the language quoted from 27 O. S., *supra*. If so the Code has accomplished a result we have not heretofore attributed to it. A civil action under the Code is legal or equitable in its nature according to the facts alleged and the relief sought, tested by established rules of law and equity.

The effect of that case, as well as the case *Stableton v. Ellison*, 21 O. S., 527, and *Byers v. Wackman*, 16 O. S., 443, is, that under the statute relief of a purely equitable nature cannot be obtained, and if sought, it must be under the Code; when brought under the Code it is a civil action and appealable, a thing unknown to the statutory proceeding before the present Revised Statutes, however it may be now.

See *Deery v. McClintock*, 31 Wis., 200, where it is held: "Although the distinctions between actions at law and suits in equity and the forms of such actions are abolished, yet this does not affect or touch the inherent qualities or differences between such actions, which from the nature of things are unchanged and unchangeable, and that an action for partition is not the place to try the question of title."

Some language of the judge delivering the opinion in *Tabler v. Wiseman*, 2 O. S., 208, is relied upon as sustaining the position of plaintiff here. That language, concerning a principle not at all involved in the case decided, is as follows:

"It is also held in many of the states that an actual seiz'n of the tenant is necessary, and that the proceeding cannot be maintained, when the land

is adversely occupied. * * * But in others, and undoubtedly in this, a right of entry is sufficient. If the tenant is not prevented by an intervening estate, from recovering possession in an action at law, he ought not, and I think would not be, disabled to prosecute his writ of partition."

The overwhelming weight of authority is against the broad assertion that a partition proceeding or suit may be maintained on any right that will sustain ejectment, and we know of no case in Ohio which so holds. Such a rule is established in some states, as in California, by statute. See 32 California, 289; 33 Cal., 259; 36 Cal., 112. Under our statute the parties, applicant, must be tenants in common before they can compel partition, and tenants in common are such as hold by several and distinct titles, *but by unity of possession*, because none knoweth his own severalty, and, therefore, they all occupy promiscuously." 2nd Blackstone's Commentaries. It is true that in some states it is held that a title with an immediate right of possession is sufficient to sustain a compulsory partition. This rule had its origin in the case of *Barnard v. Pope*, 14 Mass., 434, decided in 1817. In that case (as in the case of *Marshall v. Crehore*, 13 Metc., 464, which follows it) there was a conveyance by one cotenant of the whole land to a stranger who took possession under the deed. It is there said by the court "Every dispossession does not amount to a disseizin, especially of tenants in common, for the possession of one is the possession of all, unless by an actual ouster, or an exclusive taking of the profits against the will of others, one shall manifest the intention to hold by wrong rather than the common title. But without such overt acts, or a sole or exclusive possession for more than 20 years, so that the right of entry shall be gone, a disseizin is not to be presumed. In this case there has been a sole possession for only 10 years; there has been no actual ouster, nor any refusal to account for the rents and profits; the right of entry remained at the time of filing the petition. Under these circumstances we are clear that there is a sufficient seizin to maintain the process." But see 13 Pick., 251.

For the purposes of this case, the authorities following *Barnard v. Pope*, *supra*, need not be questioned. But, it is said, this proceeding does not decide title or create any new title; it merely dissolves the tenancy in common, locating such rights as the parties may have in distinct parcels and extinguishing it in all others, leaving the title as it was; that plaintiff would have to bring ejectment after partition, and for that reason that the court should have heard the case and awarded partition. The cases in *Railroad v. Pontius*, 19 O., 221; *McBain v. McBain*, 15 O. S., 337, and *Tabler v. Wiseman*, 2 O. S., 207, do hold that no new title is created by the partition. Whether the decree would establish title by estoppel is not necessary to determine; but we fail to see the force or pertinency of th's argument. Under the statute the land, if it cannot be divided, is to be sold, and where, as in this case, the parties to the proceeding, whether plaintiff and defendant, or defendant alone, hold the whole title, we presume a purchaser at the sale would get the whole title. It would be a poor satisfaction to defendant after his property was sold, to have a determination in an action at law about the purchase money, that the plaintiff had no title upon which to obtain his partition. The opinion of the court in *Tabler v. Wiseman*, *supra*, contains a very appropriate answer to this claim.

"The result of the adjudged cases, as well as the purposes of the statute, and the object of the whole proceeding seem to be to secure to the tenant an exclusive possession of his share of the joint property.

Where no such possession can follow the judgment, no reason is shown for invoking the aid of the law, or for calling the other owners into court and subjecting them to the expenses incident to the proceeding, much less to compel them to submit to a forced sale of their interests, under the circumstances which can hardly fail to result in sacrifice. Before this can be done he must show that he is submitting to the inconvenience of a joint possession. * * * Until this is shown there is no joint possession to sever, and consequently nothing upon which the judgment of the court can legitimately operate."

Whether, under the Code, an action for possession and also for partition can be united is not necessary to determine, but whether we treat this case as a purely statutory proceeding for partition (which it is), or a civil action under the Code, and hence as comprehensive as the equitable partition, to hold that in it the question presented by these pleadings can be tried by the court, withholding the right to a jury, would place this state in conflict with the overwhelming weight of authority.

28 Vt., 658; 43 Vt., 89; 35 Mo., 326; 58 Mo., 326; 58 Mo., 448; 38 Mo., 239; 2 Watts, 371; 35 Wis., 141; 53 Ill., 233; 26 Ill., 472; 22 Mich., 59; 1 Johns. Ch., 111; 3 *Id.*, 302; 3 Paige's Ch., 242; 5 Denio., 385; 9 Cowen, 530; 9 Md., 500; 24 Conn., 230; 26 Mo., 471; 12 N. J. Eq., 423; 13 *Id.*, 271; 17 *Id.*, 277; 17 *Id.*, 215; 33 Miss., 149; 19 Wend., 367; 29 Ala., 478; 13 N. H., 326; 3 Humph., (Tenn.) 435; 46 N. Y., 182.

Judgment affirmed.

J. E. Ingersoll, for plaintiff.

W. B. Saunders, for defendant.

COURT STENOGRAPHERS.

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[Superior Court of Cincinnati, 1882.]

W. H. SAUNDERS v. A. KINCHLER.

Section 481, Revised Statutes, authorizes stenographers appointed thereunder to take depositions in shorthand and transcribe them into longhand, and have the witnesses sign them. The section does not merely add stenographers to the list of officers authorized to take depositions, leaving them to be taken in the old way, and their ever having been taken in longhand was not in consequence of the statute, but of the state of writing.

HARMON, J.

Defendant's exceptions to certain depositions for plaintiff raise the question, whether the official stenographers of the court are authorized by law to take depositions in short hand? It appears by the certificates that the stenographer correctly took down the testimony in short-hand, then correctly transcribed it in long hand, read it over to the witnesses, and had them sign it in his presence.

Section 481, Revised Statutes, provides that "stenographers appointed under the provisions of this chapter shall," *inter alia*, "have power to swear witnesses and take and certify depositions in any of the courts in this state."

It is contended that the effect of this law is merely to add stenographers to the list of officers authorized to take depositions, leaving the work of taking them just as it was before. Even if this be true the exceptions are not well taken. It is not the statute which caused depositions to be taken in long hand. It was the state of the art of writing. The statute

(Rev. Stat., sections 5275, 5280) does not require depositions to be written out in long hand in presence of the witness. There was no other way of doing when long hand was the only mode of writing. The statute only requires that "the depositions be reduced to writing by some proper person," and be "written and subscribed (by the witness) in the presence of the officers certifying thereto."

I do not put my decision upon this ground, however, because I do not wish to be understood as passing upon any question but that before me, viz: whether the official stenographers of the court may take depositions as this was taken. It is sufficient to say as to them, that the intention of the legislature to authorize them to employ the art of short-hand writing in depositions is manifest, and by a well known rule of construction every necessary incident of the power is implied. If any modification of the general laws relating to depositions were required, it has been made by implication.

Exception overruled.

Jos. G. Gibbons, for the exceptions.

Jas. R. Challen, *contra*.

USURY.

[Hamilton Common Pleas Court, 1882.]

ADAM BOTTENHORN, Treas., v. HENRY GROTENKEMPER and J. H. TEMMEN.

Where money is loaned at usurious interest, and the interest is added to the principal for several years, and notes for the aggregate given bearing interest at eight per cent., the balance of the principal of such notes, after deducting the usurious part, does not bear eight per cent. interest, but only six per cent. can be recovered.

MAXWELL, J.

The plaintiff brings this action against the defendant Grotenkemper, as maker, and the defendant Temmen, as indorser of certain promissory notes.

In January, 1871, Temmen was appointed treasurer of the plaintiff's church, and arranged with Grotenkemper to loan or deposit with him the money of the church, Grotenkemper to pay 10 per cent. interest thereon. An account was kept, in which the money received by Grotenkemper from Temmen, and by Temmen from Grotenkemper, was entered, and at the end of each year the interest was computed on the average balance in favor of the church, at the rate of 10 per cent., and entered in the account as if it had been a separate item of deposit or loan. This course of dealing continued for three years, at the end of which time Temmen went out of office, and a new treasurer went in. The balance in favor of the church was then found to be, including all the usurious interest, \$16,265.94. For this amount Grotenkemper gave thirty-two notes of \$500 each, bearing 8 per cent. interest, with Temmen as endorser, and paid the balance, \$265.94 in cash. Part of these notes have been paid.

The defense now made is, that the usury accrued on the loan account between Grotenkemper and Temmen, admitted to be about \$800, having been incorporated into the notes, the notes are thereby tainted with usury, are void, and the plaintiff can only recover the principal legally due at the time the notes were made, with 6 per cent. interest thereon until paid.

The plaintiff on the other hand contends that even if the \$800 should be deducted from the notes, still a recovery should be had for the balance of the principal, with 8 per cent. interest thereon until paid.

The statute and decisions thereon in our state may be formulated as follows: Two rates of interest are provided for: 1st, the legal rate, or that which the law affixes where parties have made no contract, namely, 6 per cent. per annum. 2nd, the conventional rate, or the highest rate for which parties may agree, namely, 8 per cent. per annum. Where parties attempt, either directly or indirectly, by any shift of devise, to agree for, or secure, more than the conventional, or highest rate, namely 8 per cent. per annum, the agreement will be null and void, and then, there being no agreement, the law steps in and affixes the legal rate, namely, 6 per cent. per annum.

In applying this rule, courts will always scrutinize the contracts of parties in regard to interest closely, and as our statute is not penal in its nature and effect, will carry out the spirit of the law and see to it that by no form of transaction shall more than 8 per cent. per annum, on the sum actually advanced or loaned, be paid or received.

Let us apply the principle laid down in the manner stated to the subject matter of this suit. There can be no serious question but that this was one and the same transaction throughout. There were no new parties, no new consideration, from the beginning to the end. There was at one time a change of form from an open account to notes, but it was well settled at an early date that we can go behind these and inquire as to their consideration.

Baggs v. Loudenback, 12 O., 153. It is said, however, that the notes sued on in this case were not usurious, because they only provided for 8 per cent. interest per annum.

This position, so far as one class of notes are considered, has been fully examined and passed upon.

In *Claypool v. Sturges*, 10 O. S., 440, Claypool borrowed of Sturges \$4,700, and gave Sturges his note for \$5,000, at three months, which was 24 per cent. on the \$5,000. The court held that Sturges was entitled to the \$4,700, with 6 per cent. thereon from the date of the note.

See also, *Bunn v. Kinney*, 15 O. S., 40; *West v. Meddock*, 16 O. S., 418; *Metzger, Admr., v. Wiechers*, ante 642, 549; *Wilder v. Huff*, 6 Rec. R., 772, s. c. 8 Am. Law Rec., 27; *The Ohio Ins. Co. v. Shott*, 6 Dec. R., 813; s. c. 8 Am. Law Rec., 321.

The cases cited above were all cases where the usury was deducted or kept back from the principal, and the note on its face bore only the legal interest. In the case at bar the old usury was added into and became a part of the consideration of the note. Now that does not differ in principle from the cases cited. The usury incorporated in the notes was illegal consideration, and therefore no consideration, and the agreement really was to pay \$1,208 per annum on \$15,400, or more than the highest legal rate, and therefore illegal and void. As the court say in *Bunn v. Kinney*, 15 O. S., 40: "It needs no argument to prove that a contract to pay 10 per cent. on a sum greater than the indebtedness arising from the loan, is in substance and effect a contract to pay more than 10 per cent. on the real principal.

I am of the opinion that the case of *the Bank v. Slemmons*, 34 O. S., 142, decides the case. In that case it is held: "In renewing judgment on a promissory note given to a national bank in renewal, into which note illegal interest on the original note was incorporated, the whole interest on

both notes will be disallowed." The principle being that the incorporation of the old usury into the new note makes the new note void.

The judgment will be for the plaintiff *for* the sums actually loaned the defendant, Grotenkemper, with 6 per cent. interest thereon, after crediting the amount paid.

APPROPRIATION OF PROPERTY.

[Hamilton Common Pleas Court, 1882.]

TRUSTEES OF CINCINNATI SOUTHERN RY. v. GARRARD et al.

Rules as to estimating the value and damage in appropriation proceedings for railroad purposes.

AVERY, J.

Gentlemen of the Jury: The object of your inquiry is to assess compensation for the taking by the public of private property. The fair market value at this time of the portions of the several parcels that are actually to be taken, together with the damages from such taking to the portions of each parcel left, will be the measure of compensation, without deduction for benefits to the respective owners.

The market value of real estate, or of anything else, is only to be determined from sales; only buyers and sellers can make a market. But the sales themselves are not put in evidence, only opinions of value based upon such sales. The reason is that sales at different times, and of different parcels, involve details of comparison which it requires experience to make, and the result of which must be left to be testified as the conclusion of the mind of the witness; in other words, the opinion.

The weight of these opinions, like that of all other testimony, is to be judged by the jury. Between witnesses equally credible, and free from interested motives, it will be in proportion to their apparent experience and knowledge of values, and soundness of the reasoning with which conclusions are drawn. That the extent of this knowledge and experience may be known, each has first been inquired of upon examination, and afterward subjected to cross-examination, in which further inquiry has been permitted into the particular sales within their knowledge, and into all other circumstances and considerations that have been taken into account. Thus opportunity is afforded to the jury of testing the correctness of the conclusions by looking into the truth of the facts, as well as into whether circumstances and considerations have been taken into account which should have been omitted, or others omitted, which should have been taken into account.

For example, McLean avenue, a public street, filled and graded one hundred feet wide, lies along the front of the property; there are cross streets on the north and south of the several blocks, and Horne street is in the rear, but these are not filled or graded. Upon the other hand, the property is at a level which is below the grade of McLean avenue by just the depth of that fill, and there are tracks and other structures of a railway in the avenue. If these considerations, upon the one side, or the other, would affect value, whether of what is actually to be taken, or of the portions to be left, as to which it must be committed to the jury to judge, they should be taken into account, and so far as not fairly estimated by any witness, the weight of the opinion of that witness would be lessened or impaired. In like manner as to any other considerations, affecting

value, whatever they may be, of which the jury will be left to judge, whether it will be the location of the property; its dimensions; advantages for use; the relation of part as compared to the whole; or circumstances not incidental to any particular property, but general, such as the condition of the real estate market at large. The result, therefore, will depend not upon the inquiry what are the opinions, but what is the weight of them. This will be determined by the jury, exercising their own reason and judgment, and applying to the inquiry their own general knowledge and experience.

Each of the three blocks, of which portions are proposed to be taken, is owned as a whole, the other two are subdivided. The market value of each of the three, as it will be affected by the taking, which is proposed, of a part, will fix what should be paid to the respective owners. If affected as a whole, only to the extent of taking away the value of the frontage and depth of the part, the amount will be determined by the market value, considered separately, of that depth and frontage. But if the market value as a whole, from any convenience of access, or use, or other reason, be greater than when considered in parts, the difference should be added in making up the compensation. That is to say, the market value of the one hundred feet strip off the front of each of the blocks, considered separately, will fix the amount, except the market value of the block, as a whole, be greater than when taken in the two parts, in which case the difference, as a loss caused by the separation, is to be added. This, of course, only applies to three of the blocks, since the other two are not owned as a whole, and the parts, which it is proposed to take, are already separated, leaving, therefore, merely the question of the separate value of such parts.

In connection with the effect of the taking of part, upon the market value of the whole, aside from the abstract value of the part, the uses for which it is proposed to take the part, are to be considered. The uses proposed are, "for the Cincinnati Southern Railway, and the purposes of terminal facilities and rights of way there." "Terminal facilities" may be an elastic expression, that will cover more or less; but, in substance, it means whatever is necessary for accommodation of the business of the road, at its terminus, such as depots, buildings, yards and the like. In what manner these uses proposed, of the parts which are to be taken, will affect, if at all, the market value of what may be left, is a proper subject of inquiry. That is to say, whether, besides the mere cutting off of so much of the frontage, there will be an additional effect upon the value of the residue, by reason of the proposed use, other than it would be if the part cut off, although access were excluded, lay idle. But any occupation of the cross-streets for the use of a railway, must be considered out of the case, as that is not proposed in this proceeding. The plat leaves the streets open, and for all the purposes of the inquiry by the jury, they are to be regarded as left open.

The general considerations that might be expected, as between sellers and buyers, to influence the question of value, are to be applied by the jury. But it must be as between willing sellers and buyers. Market value is not what a thing may be bought at, by taking advantage of the necessities of the buyer. Neither forced sales upon the one hand, nor upon the other, forced purchases, that is, such as the peculiar situation of the buyer makes indispensable, can be regarded as the standard. For similar reasons the unwillingness of the owners to sell, or that the property is necessary for the railway, must be left out of the calculation. This is a

compulsory proceeding, but for all that the owners are not to be paid more than if they were willing to sell; and the property may be indispensable for the purpose of terminal facilities for the Southern Railway, but the market value is not to be made higher on that account. Neither the character of the proceeding, as compulsory upon the owners, nor that the trustees of the railway have the option to take the property or not, will affect the question. To fix the price with any view to such option of the trustees, would be determining it by their necessities.

The value of property is in the uses to which it may be put; what is of no use may be said to be of no value. But, in respect to the uses to which real estate may be put, what is to be considered in that connection, is the question of demand. Real estate, being immovable, cannot be taken to market; the market must be taken to it; and therefore the question is not, merely, fitness for use, but taking it where it is, the probabilities of its being wanted. Being a question of present value, the wants to be considered are those of the present; the probabilities of the future are not to be taken into account, except as they would affect the present. Being the value as between seller and buyer to-day, it is to be viewed in its condition and surroundings to-day, the same as it would be by buyers and sellers. This involves the consideration of McLean avenue as it is, with whatever tracks or railway structures are upon it, and the cross streets and Horne street, in the rear, as they are, to the same extent, that such considerations might be expected to influence sellers and buyers in respect to the value of the ground, to the depth proposed to be taken off the frontage, and where consequences to the remainder are concerned, the effect upon the value of the residue. Where comparisons are made, as for instance between the residue as it would be left, and as it would be with a new street 100 feet back from the avenue laid out there, the value of the space to be given up by the owners for such street, with the cost of making it, are considerations to be taken into account upon the side of the owner; but upon the other side, any increase of value to the ground in the rear, by bringing it that much nearer to a street front, will likewise be taken into account. Such comparison, if gone into upon the one side, necessarily requires inquiry into the question of increase of value upon the other; to the extent that it might be expected as between sellers and buyers the question would be taken into account.

Summing up, then, gentlemen, whatever considerations may affect value, they will all be regarded by you. The result must be determined by the careful exercise of your reason and judgment. Where testimony conflicts as to facts, it is expected from you that the truth will be ascertained; where opinions differ, the difference will be adjusted upon the principles that govern all trials. Upon the question of value, the burden of proof is upon the owners who are claiming to recover value. The weight of the evidence, that is to say, the preponderance, will direct you.

RELEASE OF PROPERTY.

[Superior Court of Cincinnati, 1882.]

H. H. PENTERMAN v. E. DORMAN and LOUIS FISHER.

The mere payment of interest in advance does not imply an agreement to extend the time for payment of the principal as matter of law. The enquiry is always one of fact, and such payment may or may not be evidence of such agreement according to the circumstances.

HARMON, J.

The action is brought upon a note against the maker and Fisher, whose name appears upon the back, he being a stranger. The maker makes no defense, and Fisher makes two:

First, that there was no demand and notice to him when the note fell due, and that he is therefore discharged; and

Second, that the time of payment of the note was extended without his knowledge and consent, by arrangement between plaintiff and Dorman, the maker.

There is no question in my mind as to the first defense. Where a stranger's name appears on the back of a promissory note he is *prima facie* a guarantor. When it is made to appear, however, that he put his name there before the delivery of the note to the payee, then he is a joint maker. That appears in this case. Dorman wanted the money and offered Fisher as security. The plaintiff said he would take him, and Dorman went and got Fisher's name on the back of the note, handed over the note and got the money. So that no demand or notice was necessary. Although he in fact endorsed the note, Fisher did not in law become an endorser.

A very troublesome question, however, arises on the second defense. The note was for one year. When it became due the interest was paid for one year. The plaintiff did not press for his money. Nothing took place except non-action, and at the end of another year Dorman came and paid a year's interest, saying that he had no more to pay, and the plaintiff took it; but it is not claimed that anything was said or any act done from which it could be implied that at that time there was any thought or contract with relation to extension. But a few days before the next year expired Dorman, the maker, came to the plaintiff and handed him one year's interest. Nothing was said about extending the note or about not extending the note; nothing was said at all; and the simple question is whether the mere fact of such payment establishes an extension of the note from the time the money was paid until the year was up—for those few days, in other words. The defendant claims that the receipt of interest for a year a few days before the year was up implies or establishes a contract to extend the time of the note until the year was up, and the plaintiff claims it does not.

A great many authorities have been cited, some of them, like *Blake v. White*, 1 *Younge & Coll.*, 420, going almost to the point of saying that the receipt of interest in advance, as a matter of law, implies an extension; others holding that the mere receipt of interest in advance does not prove or imply anything, like *Bank v. Rollins*, 13 *Me.*, 202; and others, occupying the middle ground, that the receipt of interest in advance is *prima facie* evidence of an agreement to extend the note for the time for which the interest is taken. *Brandt on Suretyship*, section 305, and note.

The true rule, after reviewing all the authorities, it seems to me, is that payment of interest in advance does not imply a contract of extension, and is not necessarily, but may be, and generally is *prima facie* evidence of such contract, whether it is or not depending upon the circumstances in each case.

In *Hubbard v. Olden*, 22 *Kan.*, 363, the court say that *generally* the receipt of interest in advance is *prima facie* evidence of an agreement to extend the time. So, in *People's Bank v. Pierson*, 30 *Vt.*, 711, cited in *Jones v. Brown*, 11 *O. S.*, 251; see also *Vore v. Woodford*, 29 *O. S.*, 245.

In the case of *McLemore v. Powell*, 12 Wheat., the court said the question was whether there was an agreement as a matter of fact to extend, the payment of interest in advance being one of the circumstances; and in the case of *Shaw v. Leigh*, 39 Penn. St., 226, where a note was given payable at a future day, the court said that the mere giving of the note payable at a future day did not, as a matter of law, imply an agreement to wait. Whether there was any such agreement was a subject of inquiry as a matter of fact, and it must be made to appear from the circumstances that the note was received as such and not as a mere collateral security.

Adopting this as the best rule, both upon authority and principle, the question in this case is simply one of fact, *i. e.*, under all circumstances, was there an extension?

An extension can only take place by an agreement. The original debt is created and the time is fixed for its payment by an agreement—by the minds of the parties acting upon the matter. The fixing of a new time of payment must be in the same way, and the thing, after all, to be discovered is the fact whether or not the parties here made such an agreement. The length of time for which payment is extended makes no difference. If it is extended for a day it is as sufficient to discharge a surety as though it is extended for a year, when the agreement to extend is once made out; but it seems to me clear that, in seeking from the mere acts of the parties in paying and receiving interest an answer to the question whether they agreed upon an extension of time, the length of time for which interest is paid in advance is a very important circumstance. If a party were to pay interest for a year in advance, or for six months in advance, or for three months in advance, or for one month in advance, and nothing else appeared, the conclusion would seem reasonable, the more reasonable the longer the time, that the only possible explanation of the payment of the interest in advance is that the parties had agreed, or intended thereby to agree, the one to give and the other to secure further time. But in this case, nothing was said about an extension, and I am unable to find from the mere fact that the interest for one year was handed over a few days before the year was up, that the parties made a contract for extension. I am perfectly satisfied neither of the parties here had any idea of extension. The few days were too insignificant under the circumstances to raise any presumption that they were the subject of agreement. I do not think the parties to a note can extend it without knowing it. If it is an agreement which they are to make, to say that the mere receipt of the interest in advance necessarily implies one, is to say that as a matter of law the presumption arises, which none of the authorities hold quite so strongly as that. In other words, it is very reasonable to my mind to hold that it was simply a matter of convenience that this interest was paid then rather than on the exact day when the year expired, and that its payment by Gorman and its receipt by Penterman were at least equally consistent with the mere fact that Penterman knew he would probably not press the payment of the note for those few days, and that Gorman did not expect him to, as it is with the supposition that the parties intended to make an agreement, a binding agreement, that it should not be done.

Although the payment of interest in advance is a good consideration for an agreement to extend, and ordinarily may be said to be *prima facie* evidence of an agreement to extend, yet as in connection with other circumstances, it may not be any evidence of such an agreement, I cannot

logically come to the conclusion reached by counsel for defendant, that the only way to rebut the *prima facie* evidence from the payment of the interest in advance is to prove that the parties affirmatively said that there should not be an extension. In this case there was nothing to rebut, because the presumption did not arise.

While the law is very strict to protect sureties, I do not think they can complain when the court looks in the light of experience of the way people do such things at what takes place between the principal and the creditor; and looking at this case in that way, it seems to me that no reasonable man could reach the conclusion that any such idea of extension, of Gorman getting time by an agreement which secured it, or of Penterman tying his hands up so that he could not proceed if he wished, was in the minds of either of them. It was simply a matter of convenience. If we are to say that handing a year's interest over, a few days before the year was up, would have this effect, we would have to say that the handing it over the evening before would have the same effect; which only illustrates what I said about the difference between the time as part of a proved agreement to extend, of which the shortness makes no difference, and time in connection with other circumstances in ascertaining whether there was an agreement to extend. While I am by no means free from doubt as to the exact rule of law to be deduced from the decisions, I am clear upon principle, and the best reasons lead me to the conclusion that in this case there was no agreement to extend the time, and the plaintiff is entitled to a judgment.

Von Seggern, Phares & Dewald, for plaintiff.
Ambrose Temple, for Fisher.

LOST CHECKS.

283

[Hamilton Common Pleas Court, 1882.]

†J. BOWDEN v. THE THIRD NATIONAL BANK OF CINCINNATI.

Where a bank check is made payable to the drawer himself without the words "order" or "bearer," and is indorsed by him in blank, and stolen, and, on presentation to the bank, is paid, the bank will be protected in the payment.

MOORE, J.

From the testimony submitted in this case it appears that the plaintiff drew a check payable to himself, without adding the words "or order," "or bearer," and endorsed the same. The check, it seems, was stolen, and, on presentation to the bank on which it was drawn by a party unknown to the plaintiff, was cashed, and this suit was brought to recover from the bank on the ground that the check was non-negotiable. The following is the opinion of the court:

"No doubt it was the intention of Bowden to draw a non-negotiable check. It was a matter of caution with him. It was his original intention to assign the right to collect the amount of the check to the Fourth National Bank and to no other person; but he erased the words, 'Pay to the Fourth National Bank,' leaving the check with a blank endorsement, the effect of which was to direct the bank of deposit to pay the holder.

"Leaving the check in this shape, and carelessly affording 'any person' the opportunity of becoming the holder, Bowden cannot complain if the bank recognized his endorsement as an order or assignment of his personal right to collect the amount of the check. His indorsement on the back of the check (a non-negotiable check) in blank made him a guarantor of its quality, as an order to pay. The bank (the defendant) was the agent of Bowden, in charge of his deposits; this check was

†This judgment was affirmed by the district court. See opinion, *post* 12 B., 184.

an order to pay, or an assignment of so much of his deposits—first, by the words on its face to himself; secondly, by the words on the back to the Fourth National Bank; thirdly, by erasing the name of the bank, to any person, the bearer, who may be a person receiving it by delivery, or a person getting possession of it through the carelessness of the drawer, giving rise to an estoppel or denial of the claim of drawer of non-delivery."

Judgment for defendant.

Sayler & Sayler, for plaintiff.

Storer & Harrison, for defendant.

EXTENSION OF RAILWAY SIDE TRACKS.

[Ross Common Pleas Court, 1882.]

CINCINNATI STOCK-YARDS CO. et al. v. UNITED RAILROAD STOCK-YARDS CO. et al.

On petition of receivers of a railroad for instructions as to whether they should lay a side-track 800 feet long to the yard of a stock-yard company, the railroad having already connections with one stock-yard in the same city, but not by a contract excluding the right to connect with another stock-yard, it appearing that the engineering difficulties of making such connection are not great, and that the charges will in time pay the cost, the court, although the receivers believe such connection is of doubtful advisability, may, in view of the interest of the public in having competition between stock-yards, the court being bound to consider public interest as well as that of the parties, order such connection to be made. The order of the court in such case may prevent preferences between the stock-yards and prevent a stockholder in one company being an officer of the other, and may order that the stock-yard company shall protect the railroad in its charges for freight on the stock, and may reserve the right to regulate the charges, so as to prevent the stock-yard companies from combining or pooling their earnings, so as to destroy the competition. But the order will not outlast the receivership.

On the petition of the receivers for instructions relating to extension of side track in front of the premises of the Cincinnati Stock-Yards Company.

MINSHALL, J.

The receivers state that the Cincinnati Stock-Yards Company, being engaged in building stock-yards in the immediate vicinity of the United Railroads Stock-Yards in Cincinnati, has requested them to lay a side track in front of its grounds for a distance of about eight hundred feet, so as to afford its yards, when completed, facilities for loading and unloading live stock, the cost of which is estimated at \$1,300.

They have declined to do so without the instructions of the court, for a number of reasons stated in the petition: The existence of certain contracts to which the road in one case, and the receivers in another, are parties; and the opinion that the interests of the Marietta and Cincinnati Railroad Company will be best subserved by having but one stock depot in Cincinnati, and which it was thought to possess under an agreement between it and the United Railroads Stock-Yards Company entered into on the 1st of May, 1872.

The whole matter is, however, referred to the court with a willingness cheerfully to obey any order which it may make in relation thereto.

Both Stock-Yard Companies have answered, setting up their respective claims, as has also William G. McCoy, lessee of the yards of the new company.

The United Railroads Stock-Yards Company relies upon its contract with the Marietta and Cincinnati Railroad Company as reorganized, whereby the latter agreed to make the yards of said company the stock depot of its road for the period of ten years; the adequacy of its facilities for that purpose; the large investment it has made upon the faith of the contract; and the claim that the new company can, without embarrassment or inconvenience, carry on a stock-yard business, by receiving and delivering stock at the yards of the defendant, and which, as it claims, constitute the stock-depot of the Marietta & Cincinnati Railroad Company as reorganized.

The new company claims that it, too, has made large investments and expenditures with the view of devoting its property to the stock-yards business; that it can and will afford increased facilities to the railroad and the public in carrying on the live-stock business; that it has made these investments, and also an extensive fill on the roadway and property of the M. & C. R. R., under an understanding with the former receiver and his agents that such a connection would be made as soon as the company was ready to do business; that it is the duty of the railroad to act impartially in such matters and treat all alike; that it will afford a healthy competition in the stock-yard business, beneficial alike to the road and the public; and it of right demands that the connection be ordered made.

The answer of the lessee, McCoy, presents no new facts that need be considered in disposing of the case.

Some of the questions argued at the hearing are not of the easiest solution. The character of property devoted to the uses of public transportation, owned by a company possessed of the right of eminent domain, derived from the state upon consideration of public utility; the apparent, if not conceded right, of a railroad to determine the location of its own depots, and to own and operate a stock-yards, or stock-depot, at any point where the necessity exists, and there transact all the business of that kind, whether it be receiving or delivering stock; or instead of owning and operating it, to rent the necessary facilities of others, and employ the owner to act as its agent at such depot; and the claim that, under the agreement with the U. R. Stock-Yards Company, the M. & C. Railroad Company had secured and owned such a stock-yard depot, and cannot be compelled against its wishes to establish another depot of the same kind at the same place, are all questions of some magnitude, and no little interest to the public, as well as the immediate parties to the litigation.

And if we were a court of last resort, a decision should have been preceded by more time and consideration than we have been able to devote to them.

That a railroad company, organized and doing business as a common carrier under the laws of this state, is required to observe perfect impartiality as between shippers and passengers, is too clear for argument. As early as 1855 the law on this subject was clearly and sturdily announced by the supreme court of Pennsylvania, in the case of *Sanford v. Railroad Company* doing business in that state. 24 Penn. St., 378. It was a suit in equity for a decree declaring certain privileges that had been granted by the road to the International Express Company null and void. The following is a part of the language employed by the court in disposing of the case:

"The answer and the evidence show that the railroad company is willing to carry the express matter of Howard & Co. in their freight trains, but that its purpose is to give to the International Express Company the exclusive privilege of transportation in their passenger trains. The railroad corporation has no right to do so. * * * Competition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly of any branch of business. It cannot be done except by the clearly expressed will of the legislative power. Limited means may perhaps limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating all its energies to any particular individuals. If it is possessed of this power, it might build up one set of men and destroy others; advance one kind of business and break down another. * * * Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control. Like the customers of a grist-mill they have a right to be served, all other things being equal, in the order of their application. A regulation to be valid, must operate on all alike. If it deprives any person of the benefits of the road, or grants exclusive privileges to others, it is against law, and void."

There seems to be no dissent to the doctrine of this case in any of the courts in this country.

2 Potter on Corporations, section 477, and note 3. N. E. Express Company v. Railroad Company, 2 Am. R., 31; McDuffee v. Railroad Company, 12 Am. R., 72, and authorities cited in each case. Coe v. Railroad Company, 3 Fed. Rep., 775.

The other question, and those which arise out of it, are of more difficulty. And if they were presented in a case against a railroad under the control of its own president and directors, and not in the hands of a receiver, and it were a party to a subsisting contract, such as that which subsisted between the Marietta and Cincinnati Railroad Company and the United Railroad Stock-Yards Company prior to its expiration, we should very much doubt the power of the court to compel it by injunction or otherwise, to receive or deliver live stock at any other place in the vicinity of which it had thus constituted its stock depot. Such a contract is not the creation of a preference to one person over another, in the performance of its duties as common carrier. It is simply a choice of agencies in the performance of these duties; no discriminations are made thereby in carrying the live stock of one in preference to that of another. All in this regard are served alike. The impartiality required of railroad companies engaged in the business of common carriers does not certainly extend to all its dealings with third persons. It will not be contended that by employing A, as an engineer, it is required to give the same employment to B, if he desires it; nor that, if at a certain place in the line of its road, it rents the property of C, for a depot and employs him to act as its agent, it must do likewise with D, if he requires it. And to my mind, on a careful consideration of the contract between the Marietta and Cincinnati Railroad and the United Railroad Stock-Yards Company, it would, on principle, be difficult to discriminate the due arrangement from the other.

The Stock-Yards Company agreed to devote its property, with the necessary structures and facilities for a stock-yards, to the use of the railroad company; to act as, and perform all the duties of an agent for it at that place, including the collection of its freights on live stock, and to account for the same, and to be liable for all escapes, etc., in consideration,

among other things, of the agreement of the railroad company to make the yards of the Stock-Yards Company its stock depot.

There is much force in the argument that by this contract the company did no more than secure for itself a stock depot at Cincinnati, and the employment of an agent to superintend the same; and that it possessed the right to do so, as an incident to the business in which it was lawfully engaged; and that so far as the public is concerned, the result was the same as if it had leased the premises as a stock depot, and employed the lessor to act as agent thereat. If the provisions by which the railroad company stipulated to deliver or receive stock only at that place was invalid, and we think it was, *Railroad Company v. The People*, 56 Ill., 365, this would not affect the validity of the other provisions.

Ut res magis valeat quam pereat.

So long as it continued under the contract to make the yards of the Stock-Yards Company its stock depot, it could not be compelled to receive or deliver such freight at any other point in Cincinnati any more than it could be compelled to deliver inanimate freight at any other point in the city, than at its depot or depots designated for such purposes.

None of the cases that we have examined seem to militate against this view. They all proceed on the principle that a railroad company cannot, in the performance of its duties as a common carrier—the transportation of freight and passengers—confer favors on one that are denied to another.

The case of *Coe v. Railroad Company*, 10 O. S., 372, only decides that where a railroad company has continued for a long time to do business with a Stock-Yards Company owning property devoted to such use, and connected with the road of the railroad company, the latter cannot arbitrarily discontinue the delivery of stock consigned to it at its place of business. The case, we should say, was rightly decided. Under the circumstances stated in the report of the case, a contract on the part of the railroad to continue the connection as long as the Stock-Yards Company saw fit to devote its property to such uses, and the railroad continued to carry live stock, might well have been inferred. The language employed by the judge in deciding the case should be applied to the facts of it.

But the Marietta and Cincinnati Railroad Company as reorganized is not in its own hands, nor under its own control. It has become insolvent, and at the suit of its mortgage creditors has been placed by the court in the hands of receivers, who are required to run and operate the road until it can be sold or reorganized under the laws of this state.

The contract with the United Railroads Stock-Yards Company, to which the Marietta and Cincinnati Railroad Company was a party, has expired by limitation, and can in no way influence the determination of the matter at this time.

The power of the president and directors of the company to determine what should be done in the premises has been displaced by the appointment of receivers by the court, whose duty it is, not merely to preserve the interests of the stockholders and creditors of the road, but also the rights of the public. *The State ex rel. v. Railroad Company*, 35 O. S., 154.

The question then is, not what the court might do in a similar suit against a company in the possession and control of its own road, but what the court ought to do in directing the management of this road.

We are fully impressed with the importance of observing all contracts to which the railroad company may have become a party before the

appointment of a receiver, or which have been entered into by the receiver, under the approval and direction of the court. Power to contract is of great usefulness in enabling railroad companies to accomplish the purposes of their creation; if it were otherwise all of the many arrangements entered into between different companies, of the greatest importance to themselves and the public, would simply rest upon the obligations of honor, which are seldom sufficient to withstand the seductions of interest.

The only subsisting contract to which our attention has been called by the receivers, that should be considered in connection with the prayer of the Cincinnati Stock-Yards Company, is the one entered into by the former receiver on the 18th of July, 1879, with the United R. R. Stock-Yards Company and others, whereby the track of the M. & C. Railroad has been connected with that of the Cincinnati Southern Railroad near Liberty street, in Cincinnati, so as to permit the transfer of cars from and to said railroad, to and from said stock-yards, and the slaughtering, packing and warehouses adjacent thereto.

We do not see that granting the prayer of the new company would in any way necessarily infringe the provisions of this contract. Under it the receivers obtained a loan of money, used in the construction of the track, with the right to make payment by the application of the transfer charges of the railroad in the use of the connection so made.

The making of such transfer to and from the Cincinnati Stock-Yards, under the same regulations, and upon the same terms such transfers are made to the other parties, will not, as it appears to us, interfere with this contract. Charges on cars transferred to and from the yards of that company can be applied in payment of the loan from the United Railroad Stock-Yards Company as in similar cases. If the connection is made, it should be admitted to the same advantages in the transaction of its business, and be subjected to the same liabilities that others are in like cases. And we have no doubt it will be the pleasure as well as the duty of the receivers to so manage the trust placed in their hands, if the court should order the connection to be made.

We have no doubt that to make the connection will involve some engineering difficulties, but we are satisfied that they are not of an insuperable nature, and that they can readily be overcome by a skillful engineer, such as the road possesses. It is a trite, but true saying, where there is a will there is a way.

It will, also, doubtless, to some extent interfere with the management of the company's general freight-yard, but not so, as we think, to materially impair its usefulness. There is always more or less trouble and expense connected with adaptation of a railroad to its business, so as to make it useful to the public as well as profitable to itself; and the freights it is permitted to charge those who do business as shippers upon its road are in part allowed it as a compensation for this trouble and expense. The additional expense that may attend affording conveniences to shippers is not sufficient reason for declining to afford them when such conveniences are required of the company in performance of its duties to the public. *C. & N. Railroad Company v. The People*, 13 Am. R., 690.

There being no legal hindrances, nor insuperable engineering difficulties or embarrassments to the operation of the road in the way, the question still recurs, should the order be made as requested by the Cincinnati Stock-Yards Company? The pecuniary interests and conveniences of the road, the rights of the public, its creditors and the individual

should be justly balanced. And after having done this, we are of the opinion that the connection should be made as asked.

The carrying of live stock is a part of the business of the road, and one of the sources of its earnings; it has no stock depot of its own, nor arrangements secured by contract with others, as formerly, on which it can rely for such facilities; and it must now make such arrangements or else construct yards of its own, at a very considerable expense, and this, although the receivership is at this time largely in arrears to its creditors; or else, confining itself to the business of a common carrier, leave the business of stock yards to be carried on and the facilities supplied to it, by those who will, for the gain incident to yarding, feeding and watering stock, and such like services, voluntarily enter into the business, upon connections being permitted with the road. And as removing any risk incident to this course, and persuading its adoption, we have the fact that the stock yards of the company, which heretofore afforded the road those facilities, remain devoted to the same uses, and the owners of the Cincinnati stock yards, possessed of an extensive property fitted up and prepared by them to be devoted to such uses, are applicants for the privilege. The persuasions of interest may well be relied on as an assurance that the old company will not withdraw its property from a lucrative business, and abandon the use to which it has heretofore devoted it, or hesitate to enter into competition with the new company, upon terms of equality, so far as the railroad is concerned.

In the view we take of the matter, granting the request of the new company enables the receivers to continue the business of carrying live stock upon terms much more favorable to the interests of the road than were possessed under the contract with the old Company. From statements and propositions made at the hearing, we are warranted in assuming that the business can be carried on without any charges being made to the Railroad Company for services rendered it by the Stock-Yards Company, or may at any rate at much reduced charges; that the gains arising from yarding, feeding, watering and like services rendered the shippers of live stock are sufficiently lucrative to tempt the investment of capital in it; and that where the opportunities are afforded such will be the result. If any principle of political economy is better established than another, it is, that competition is the life of business. It increases production by stimulating exertion and the investment of capital, and diffuses to all classes the benefits of industrial pursuits by moderating prices. As *apropos* to the subject, we will quote a few sentences from Mill's Political Economy:

"Those who feel assured of a fair average proportion in the general business are seldom eager to get a larger share by foregoing a share of their profits. * * * When relieved from the immediate stimulus of competition, producers and dealers grow indifferent to the dictates of their ultimate pecuniary interests; preferring to the most hopeful prospects, the present ease of adhering to routine. A person who is already thriving, seldom puts himself out of that way to commence even a lucrative improvement, unless urged by the additional motive of fear, lest some rival should supplant him by getting possession of it before him." B. V., Ch. X., section 4.

In this case we are persuaded that the benefits of competition will be extended alike to the railroad and stock-yards companies and the general public.

We have by no means lightly regarded the opinion of the receivers in this matter. They are men of known ability and integrity, and possess great experience in operating railroads. And if it were a question concerning simply the road and its management, we should without much hesitation follow their judgment on this subject. But, as indicated, we think it extends much further, and involves the performance of duties which they may have overlooked, or not duly considered. It is not unnatural for those who operate a railroad to look mostly on the side of pecuniary interests; and, by becoming identified with it, forget the obligations imposed by its public duties. It is, however, the imperative duty of a court not to do so. *State ex rel. v. Railroad Co.*, 35 O. S., 154.

The following order is made:

1. The facilities asked by the Cincinnati Stock-Yards Company for receiving and delivering stock from and to the Marietta and Cincinnati Railroad will be afforded it by extending a side-track along and in front of its premises, the extension to be made under the direction of John Waddle, engineer of the Marietta and Cincinnati Railroad, and, as he directs, at the expense of the said Stock-Yard Company. All charges made by the railroad company for delivering or receiving stock to or from said stock yards shall be such as are usual in like cases, and the same as are or may be demanded of the United Railroads Stock-Yards Company for such services, or of other yards of the same kind that may be hereafter located in the same vicinity.

No preferences will be shown either of the companies engaged in the stock yards business at this point, or its vicinity, by the receivers or their agents in the transaction of the business of the railroad as a common carrier of live stock; and the temporary arrangements heretofore entered into with the United Railroads Stock-Yards Company inconsistent with this instruction will be discontinued.

In order to secure to the public and the railroad the benefits that should arise from competition in the stock-yards business, it is ordered that during the existence of the receivership of the Marietta and Cincinnati Railroad in this court, no one who is interested, directly or indirectly, as a stockholder in one of said companies shall be a director or officer of the other.

And, inasmuch as there may be some question whether the railroad company, by delivering stock to either of said companies, as required by this order, may or may not lose its common law lien thereon for freight, no stock shall be delivered to either of said companies from and after this time until the one to whom the delivery is to be made shall have agreed to be liable to the railroad company, or its receivers, for all legal freights and charges upon the stock so delivered it, due the railroad as a common carrier thereof.

As to the following provision of the order, the court said it had not been considered by him and his associate, and he had some hesitation about making it. He had expected that Judge Huggins would be present at this time, but he has been unavoidably prevented from coming. The court concluded, however, to insert it in the order, on the ground that if it did no good it could certainly do no harm, to-wit:

"And in case complaint should be made by that part of the public engaged in the live stock business that the charges made by said companies for their services and the use of their facilities are excessive, and that

the same results from directors or agents of the one being interested as stockholders in the other, or that said companies have combined for the purpose of arbitrarily fixing their rates or charges, or have agreed to pool their earnings, the court reserves the power to fix a rate of charges by which said companies must be governed—to be such as may be fixed by the Board of Trade and Commerce of Cincinnati, or a committee appointed by it and approved by the court, if said board will undertake to do the same; and in case the said board declines to act in the premises, the court will, on such complaint being made, hear evidence and fix the rate itself. The right of either of said companies to the facilities of the road for receiving and delivering stock shall depend upon its willingness to be bound by all the provisions of this order so long as the Marietta and Cincinnati Railroad, as reorganized, remains in the hands of the receivers of this court. All the provisions of this order are limited to the continuance of the receivership of this court, and are not intended to create rights that may outlast the same.

Each party to this petition of the receivers for instructions will pay his own costs.

William M. Ramsey, Isaac M. Jordan and Judge Alfred Yapel, for the Cincinnati Stock-Yards.

Judge Hoadly, E. W. Kittredge, John W. Warrington and F. M. McClintick, for the United Railroads Stock-Yards Company.

FORECLOSURE OF MORTGAGES.

301

[Hamilton Common Pleas Court, 1882.]

ALLEMANIA LOAN AND BUILDING CO. v. MUELLER et al.

In foreclosure suits, claims may be filed at any time up to the time of distribution. Where a petition for sale of property avers that a defendant claims an interest, and a decree for sale is had, finding such defendant to be in default, and finding that he has no interest, and afterward, at the same term, he is allowed to file a cross-petition, the finding that he had no interest is surplusage and uncalled for, and the allowance of the filing of the cross-petition is, in effect, a modification of it, and on motion at a subsequent term, a formal modification of the former order of sale may be made, without filing a petition for the purpose, so as to admit the interest of such defendant.

CONNER, J.

On the 8th of February, 1882, being in the January term, a decree for sale was entered, finding among other things, that Andrew Glaser et al. are in default for answer and demurrer, and that the allegations of the petition are confessed by them to be true, and that said defendants, who are in default, have no interest in or lien upon the real estate described in the petition.

On the 8th of April, 1882, in the January term, an entry was made, the court granting leave to said Andrew Glaser to file his answer and cross-petition, and on the same day he filed the same.

On the 29th of April, 1882, in the January term, a motion was filed to strike this answer and cross-petition from the files, on the ground that it was setting up a claim which was barred by the finding of the court on February 8, 1882, and which claim had been forfeited, so far as these proceedings are concerned, by the laches or negligence of said Glaser and his attorney.

The finding of said decree of February 8, 1882, that Glaser had no interest or claim on the property was simply surplusage, having nothing to base it on, the allegation in the petition being that Glaser had or claimed some interest in or lien upon the premises described in the petition. And the court could not, without some showing, find that a party who was in default simply, had no interest or claim on the property.

But if there was anything upon which that finding could be based, the entry of April 8, in the same term, allowing the answer and cross-petition to be filed, may be fairly considered as modifying the decree of sale, so far as it made a finding as to Glaser's interest or claim.

It is also a well settled rule of practice, that in foreclosure suits claims may be brought in or filed up to the time of distribution, and may share in the proceeds according to priority.

The motion to strike the answer and cross-petition from the files will, therefore, be overruled.

As to the motion to modify the decree for sale, I have already said that the entry allowing the filing of the answer and cross-petition was substantially a modification of the decree for sale, so far as it passed upon or affected Glaser's claim or interest in the property.

And as the finding of the court upon his interest or claim in the decree was mere surplusage, and without authority or basis, it can now be modified formally, although in a different term, without filing a petition for the purpose.

The motion to modify the decree will be granted.

PLEADING.

[Hamilton Common Pleas Court, 1882.]

WEBER & CO. v. KEMPER BROS.

Where an original petition set up a special partnership for certain designated purposes between the parties, and asked an account, an amended petition setting up a general partnership is not to be disallowed on the ground that it states a different cause of action; although the contracts are different, the transaction referred to and the relief asked is the same, and if the causes of action are different, the amended petition would be allowed to prevent multiplicity of suits and amounting merely to beginning a new case.

CONNER, J.

The original petition alleged a contract of special partnership for the working up of the goods of a bankrupt carriage factory, the appointment of an agent for plaintiffs and defendants to manage the business, with authority to make purchases and dispose of the manufactured articles on the joint account; the incurring of debts by him in excess of the profits, of which \$1,585.57 was due for purchases made from plaintiffs, and \$427.95 from defendants. And the prayer is for an account between the parties, and payment of such balance as may be found due thereon by defendants to plaintiffs.

The amended petition sets forth a written agreement of general partnership, for at least a limited time, and the other allegations and prayer are substantially the same as in the petition.

The defendants claim that the amended petition is based upon an entirely new and different cause of action, to-wit, a contract of general

and not special partnership, and that it should therefore be stricken from the files.

The plaintiffs claim that it is not a different cause of action, and if so, it should still be allowed to remain on the files, under section 5111 of the Code, it having been filed before any answer had been filed by defendants. Although there is a clear difference in the contracts set up in these pleadings, I am of the opinion that the substantial claim in both petitions is the same, namely the recovery of a balance claimed to be due upon a contract of partnership between the plaintiffs and defendants, and that the precise manner, in which the balance became due, whether by operations under a special or general contract of partnership is of secondary importance. In this opinion, I am, I think, but following the ruling in *Spice & Son v. Steinruck*, 14 O. S., 216.

But if the causes of action and claims thereon are different, it is claimed by the plaintiffs that they would be entitled to file this amended petition by virtue of section 11 of the Code, which authorizes the plaintiff, at any time, before answer, without leave, to file an amendment to his petition. Amendments are so allowed by virtue of that section, but they must be such amendments as would be allowed, after answer, by leave of court, and not entirely different claims or causes of action.

But if I was not satisfied that the claims in these two pleadings were substantially the same, yet I would be inclined to permit the amended petition to remain on the files to prevent the multiplicity of suits, if for no other reason, the defendant not having thereby been put to any loss or inconvenience; and the result of granting the motion being simply to cause the beginning of a new case, and the payment of costs.

Motion overruled.

STATUTE OF FRAUDS.

302

[Hamilton Common Pleas Court, 1882.]

KOEHLER v. HUNT.

A contract not for sale of land, but for services as agent in selling land need not be in writing, if the performance of it may be completed within a year.

CONNER, J.

The cause of action as shown by the petition is not a contract for sale of land, but a contract for services as agent in sale of land.

Not being a contract for sale of land, it does not require to be in writing, unless it is an agreement that is not to be performed within a year. But if the performance may be completed within a year, and such performance is entirely in accordance with the intention and understanding of the parties, such contract is not within the statute, and need not be in writing, in order to maintain an action upon it. *Blakeney v. Goode*, 30 O. S., 350.

Much more would this doctrine apply in a case like the present, when the performance took place within a month after the alleged contract.

Demurrer overruled.

DIVORCE.

[Hamilton Common Pleas Court, 1882.]

JANE FERREE v. HENRY FERREE.

1. Mere failure of husband to provide for his family is not gross neglect of duty, the wife having her own means of support; nor is failure to support after separation, with the wife's consent.
2. Wilful absence as a ground of divorce must be without the consent and against the will of the plaintiff; mutual separation is not sufficient.

AVERY, J.

The parties were married 35 years ago. The petition is for divorce on the ground of wilful absence for more than three years, and gross neglect of duty. The plaintiff testifies: "Am not now living with my husband. Have not been for little over 8 years. Forget where he was when I last heard of him. He did but very little for my support while we were living together. He was a teamster. Were living in Cincinnati when we separated. He hasn't supported me for many years; have supported myself. He did nothing; was drinking all the time. Told him I couldn't stand that cutting up, he must do different. He told me to go to h—l, and went out. Never saw him since except once, when he came into my son's house as I went out. Never sent for him since he left; don't want to live with him; glad he went away."

Their daughter, a grown woman, testifies: "There was no particular quarrel at the time of the separation. Father had been drinking for the last fifteen years, and we were keeping boarders, and he became so disagreeable that mother said he would have to go away or quit drinking, and so he went. Has been stopping with me at times since."

The only other witness, a neighbor, says he was a drunkard and abused his family; whenever he would get whisky he would drink.

Mere separation does not give cause for divorce; absence, to be a cause, must be wilful. This is not to be inferred from the mere fact that the parties do not live together. 1 Bishop Marriage and Divorce, section 783. It must be absence of the party's own accord, without the consent and against the will of the other. *Brainard v. Brainard*, Wright, 354; *Van Voorhies v. Van Voorhies*, Wright, 636; *Jennings v. Jennings*, 2 Beasley, 38; *Moores v. Moores*, 1 C. E. Green, 275. The absence and cessation of cohabitation must be in spite of the wish of the deserted party, the person deserted must not be a consenting party. *Thompson v. Thompson*, 1 Sw. & Tr., 231. So far from the absence here being in spite of the wishes of the wife, she is "glad he went away, never sent for him since he left and don't want to live with him." She told him "he would have to go away or quit drinking," and now seeks a divorce for his going. Whether there was a cause for divorce at that time, because of his drinking, it was made merely the occasion of a mutual separation, and mutual separation is an insuperable bar to a complaint of wilful absence. *Barnes v. Barnes*, Wright, 475; *Mansfield v. Mansfield*, Wright, 284; *Kestler v. Kestler*, 31 N. J. Eq., 197; *Bailey v. Bailey*, 21 Gratt., 43; *Cox v. Cox*, 35 Mich., 461; *Laing v. Laing*, 6 C. E. Green, 248; *Taylor v. Taylor*, 21 N. J. Eq., 207. As to gross neglect of duty, the witness who says he was a drunkard and abused his family, does not say in what or how, and leaves only the inference, confirmed by the omission of

the wife and daughter to say anything of personal abuse, that it was by not providing for their support. But mere failure to provide is not gross neglect of duty. *Smith v. Smith*, 22 Kan., 699.

The petition is dismissed.

DIVORCE.

303

[Hamilton Common Pleas Court, 1882.]

ELIZA JANE MURPHY v. JAMES MURPHY.

1. Mere failure of a husband to provide for his family is not gross neglect of duty, the wife having her own means of support; nor is failure to support after separation, with the wife's consent.
2. Willful absence as a ground of divorce must be without the consent and against the will of the plaintiff; mutual separation is not sufficient.

AVERY, J.

The charge is wilful absence and gross neglect of duty. The plaintiff, a woman of mature years, married the defendant in 1873, as her second husband. A neighbor who lived near by them, testifies that the husband's habits were bad, that he didn't have any property, while she had two lots in Cumminsville, and that he spoke of wanting to sell her property and go off. After living together four or five months, they went, as witness understood, to Toledo, were away two or three months, and she came back without him. She has been working out at service as a nurse ever since. Witness saw the husband three or four years ago, and had heard, at the same time, or before, that he was at Cumminsville. At that time he said he didn't want to be called a married man, and didn't want to see his wife. The daughter of plaintiff by her first marriage testifies, that her mother and the defendant, after marriage, lived in the house of witness at Cumminsville, and then went to Toledo, and from there to Michigan. That she came back alone, and went over the river to work as nurse, and afterwards went to Walnut Hills, where she is employed. That he came back to Cumminsville right after she did, but did not stay long. The plaintiff herself is the only other witness; she says: We moved to Toledo because he said he would like it better. He said he didn't want to support my boy, and I told him I would support the boy. Then we moved to Grand Rapids, Mich., and he threw a knife at my boy, and the next day I brought the boy to an uncle at College Hill, and went back to Grand Rapids. Then at the depot there he said he wouldn't support me, and if I wouldn't sell my property he wouldn't pay my board, and he left me. Then I took a place as a waiting girl at a hotel there, and after two or three weeks came back to Cumminsville. He came to Cumminsville three days after I got back; when I heard he was there, I left; didn't want to see him. About six years ago he came over the river where I was working, and wanted me to go and live with him. Told him if he would give me horses and carriages, and servants, and everything, I would not live with him.

This is the whole case. Clearly the absence of the husband has not been "in spite of the wishes of the wife." He left her at the depot in Grand Rapids—this is her unsupported testimony—but he came right back after she returned to Cumminsville, and she left because she didn't want to see him. When he found her over the river, he wanted her to go and live with him, but she refused. Her reasons for refusing may have been good

enough; it may be he only married her for her property; but the law does not allow divorces on that account. That was six years ago, and three years may have passed since she had seen him, but it was not three years of wilful absence, for he had almost immediately come back, and she had left, not wanting to see him. As to gross neglect of duty, this would not consist in mere failure to support—the wife having her own means of support. Besides the only charge is gross neglect in not contributing to her support since his leaving her, which in any point of view would be disposed of, by her disposition no longer to live with him. That he didn't want to be called a married man, and didn't want to see his wife, was after she had given her very decided refusal to his propositions. It indicates acquiescence, but nothing more, and does not help plaintiff in her complaint of wilful absence. The authorities cited in *Ferree v. Ferree*, above, apply here.

The petition is dismissed.

DIVORCE.

304

[Hamilton Common Pleas Court, 1882.]

MOLLIE O. FENGER v. GEO. FENGER.

Although adultery may be presumed from a married man and a woman occupying the same room during a night, yet the fact of their coming from the house in the morning and requesting the witness to say nothing, does not warrant the inference of their having been in the same room so as to justify an inference of adultery. Presumptions of fact from presumptions are not allowed.

AVERY, J.

The parties were married in October, 1879. The wife was not of age, and was living with her mother, who did not know of the marriage, she testifies, until the ceremony was over. She then refused them admittance to her house, and they went to live in rooms elsewhere, but after a somewhat brief interval, the wife leaving her husband, was taken back by her mother. After this, husband and wife went to live together again, in a house upon Elm street, Walnut Hills. How long they lived there is not distinctly stated, but the wife went back to her mother again. The length of time she remained on this occasion, or whether it has been ever since, without interval, is immaterial. She was living there, however, last October, the mother having apartments in the Normandy Building, and it would seem the husband was also living there. In October he went east on business, and when he returned to his wife, was refused admittance. The mother testifies, she refused him, because he didn't or couldn't support her daughter, which was likely, at least as to the "couldn't," seeing that, according to the wife's testimony, his earnings, when she married him, were only eight dollars a week. The wife is still living with her mother. From her testimony, she and her husband have separated no less than three times since marriage. They have a child born in August, 1880.

This petition was filed January 20, 1882. The charge is adultery on the 16th of January, 1882, at No. 82 John street, with Agnes Leslie. A single witness is produced, who testifies that she keeps a boarding house at No. 82 John street, and that on New Year's Eve a lady, giving her name as Agnes Leslie, and saying her husband was a travelling man, came to board there, and that one morning two weeks afterward, the witness met

the defendant going out of the house in the hall; that she knew both plaintiff and defendant, having lived next neighbor to them on Walnut Hills up to the 15th of July previous, and when she met defendant in the hall told him "that woman" was not his wife, and he told her to say nothing; that she ordered him out of her house, and then ordered the woman out.

Adultery, although a criminal fact, may be inferred from circumstances, but the circumstances themselves must be proved. For a man to pass the night, alone, with a woman in her room, would warrant the inference, but that circumstance, itself, is not also to be left to be inferred. That the defendant was met in the hall in the morning, whether early or not does not appear, and that he told the witness to say nothing, are the facts testified, from which the inference sought is that he passed the night in the room of Agnes Leslie, and from that inference the other, that he committed adultery. But no conclusion is reliable, drawn from premises that are uncertain; the law does not allow presumptions of fact from presumptions. Neither is the manner of the testimony any more convincing than the substance. How he came to go there, when he and his wedded wife, were, as the witness testifies, so well known to her, and how the fact, which she comes forward to prove, was so immediately disclosed as to be charged in the petition for divorce, filed four days afterward, when she told nobody but her husband, and had been too close a neighbor on Walnut Hills to be upon visiting terms with the plaintiff, is inexplicable. To this class of cases, of all others, the remark applies, that "the court must examine the conduct of the parties in the light of ordinary experience, with caution enough to be misled by false appearances, and with discernment sufficient not to be duped."

The petition is dismissed.

[Hamilton District Court, 1892.]

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L. H. McCAMMON v. WHEELER AND WILSON MANUFACTURING CO.

For opinion in this case see 6 Dec. R., 1155; (s. c. 10 Am. Law Rec., 688.)

APPEALS.

322

[Hamilton Common Pleas Court, 1882.]

FISHER v. TREVOR.

An appeal from a justice will not be dismissed for want of a seal opposite the party's signature to the undertaking for appeal. A seal is not necessary.

Motion to dismiss appeal, on the ground that there is no seal opposite the signature of the party signing the undertaking for appeal.

CONNER, J.

It is claimed by the counsel for plaintiff, that the word "undertaking," in section 6584, of the Revised Statutes, for the appeal of cases from magistrates, is synonymous with "bond" in other sections of the Revised Statutes, and that a seal is essential to the validity of such undertaking.

In support of this proposition he cites the language of various sections of the statutes which tend to show that the terms are used interchangeably and synonymously. He also cites the case of Stevens v. All-

men, 19 O. S., 485. This was a suit on the official bond of a justice of the peace, where he had refused to pay over money received in his official character, and the syllabus is as follows:

"Where a justice of the peace refuses, on demand, to pay over moneys which have come into his hands by virtue of his office; and thereupon * * * the sureties on his official bond notify the township trustees that they are unwilling longer to continue to be such sureties, and they notify the justice that further security was required; and thereupon the justice procures other persons to subscribe their names to his official bond, *but with no seals attached*, and without their names being inserted in the body of the instrument. *Held*, that this is not giving other security, and the obligation of the original sureties remains in full force against them."

A careful examination of the opinion in this case shows that the original sureties were not released because there were no *seals* attached to the new signatures on the bond, and that therefore a new bond had not been given, but because the names of the new parties were not inserted in the body of the instrument, and therefore there were "no words of obligation to bind them" and their signatures were "of no significance whatever."

In addition to this the original sureties took no steps to have the township trustees declare the office vacant, as they should have done. And however necessary seals might have been to the signatures on that bond, since it was an official bond, yet that defect, if it was one, was not the point upon which the case was decided.

In this case, however, counsel for the defendant claims that no seal is necessary to an appeal undertaking, and cites in support thereof, the fact that most, if not all of the undertakings on appeal from justices of the peace in this county, and the further fact that Swan in his treatise of the practice before magistrates, in the forms of undertaking for appeal, shows no seal. He also quotes from Nash in his Pleadings and Practice, vol. 2, p. 808, where, in referring to the undertaking to be given in arrest he says, "*it need not be under seal.*"

He also cites the case of Herig v. Nougaret, 7 O. S., 480; Gaylor v. Hunt, 23 O. S., 255; Ford v. Albright, 31 O. S., 33.

In all of these cases the decision turned upon the question of the sufficiency of the undertaking; the undertaking in the first two cases being for the stay of execution, and in the last case upon an appeal. In none of those cases was there any claim of insufficiency by reason of there being no seal, and it can fairly be inferred there was none on the undertakings in the first two cases, while it is manifest there was none in the last case, since the undertaking is there set out in full, and no seal is shown.

From the fact that the custom has been and is almost universal in this county for such undertakings to be without seals, from the fact that so eminent pleaders and writers as Swan and Nash, in preparing their forms should have left them out, and from the silence of the supreme courts, especially in the case of Ford v. Albright, 31 O. S., 33, as to the necessity of such seals, when passing directly upon the sufficiency of such undertakings, I am of the opinion that a seal is not essential to the validity of an undertaking on an appeal from the judgment of a justice of the peace.

I am also inclined to this opinion, irrespective of the reasons above given, because I think the class of sealed instruments should be narrowed as closely as possible, that we should rather eliminate from than add to that class, and that the policy of the law should be to take away from writ-

ings any peculiar advantage or importance from the imposition or addition of an emblem, originally imposed as evidence of the lack of education of the signer.

The motion to dismiss will be overruled, and ten days time granted plaintiff to file petition.

MEMBERS OF CHAMBER OF COMMERCE.

327

[Superior Court of Cincinnati, 1882.]

†ADORE BLUMENTHAL v. CINCINNATI CHAMBER OF COMMERCE.

Where a firm is a member of a chamber of commerce, whereby the members of the firm have the rights of members of the chamber, and charges of unmercantile conduct are preferred against the firm, the chamber has jurisdiction thereby to try the member of the firm who has been guilty of the conduct complained of, and exclude him from the chamber.

HARMON, J.

The first question presented by the motion made at the close of the plaintiff's testimony to arrest this case from the jury and enter judgment for the defendant, is whether any action at law can be maintained against an association, not for profit, by one of its members for his wrongful suspension or expulsion. The argument is, that the books show no case of the sort; that all of the cases upon the subject are cases of mandamus, and that mandamus is only allowed where there is no adequate remedy at law. *Shelby v. Hoffman*, 7 O. S., 450. The exact effect of *The State v. Lipa*, 28 O. S., 665, upon the question, is difficult to determine, but the maxim is "*boni judicis est jurisdictionem ampliari*," it is the part of a good judge to extend his jurisdiction, and in case of any doubt, I think that the court ought to afford a remedy if a case of invaded right is made out. I am not prepared to say that there is no case in which a member of such an association may have a suit for damages against it, for his expulsion or suspension. The question therefore in this case is, do the allegations of the petition and the proof offered under them, tend to establish the facts necessary to maintain such an action?

The petition charges that the defendant, The Cincinnati Chamber of Commerce and Merchants' Exchange, on the 31st day of May, 1881, without notice to this plaintiff that charges had been preferred against him, and there being in fact no charges of unmercantile conduct or other charges made or existing against him, and without a trial of this plaintiff on the charge of unmercantile conduct or other charges, and without any proof against him of any unmercantile or other improper conduct, by and through its duly appointed and authorized board of officers, wilfully and maliciously found this plaintiff guilty of unmercantile conduct, and wilfully and maliciously sentenced him to be indefinitely suspended from membership in the defendant, and from all rights and privileges thereof during such indefinite suspension, and proclaimed such sentence publicly on the floor of the Chamber of Commerce.

A good deal of the time which counsel have taken in argument has been devoted to the question whether the board of officers of the defendant had authority to act in the matter of charges against members and their suspension or expulsion thereunder. It is claimed upon the authority of the case against the Milwaukee Chamber of Commerce, 20 Wis., 72, that

†This judgment was affirmed by the district court. See opinion, *post*, 9 B., 76.

while, without its express conferment, every corporation has the right to suspend or expel members, that right being incidental to its very existence, and necessary to its self-preservation, the right is one which must be exercised by the association itself, and cannot, by by-law or otherwise, be delegated to any of its officers or any portion of its members, unless it be expressly authorized to so delegate it by its charter or the law. That case certainly does seem to decide the proposition squarely, and the principle seems to have been affirmed in the case of the same Chamber of Commerce, 47 Wis., 670, and there is nothing in the charter of this defendant, or in the statutes of Ohio which expressly authorizes it to confer this power upon the board of officers. So that unless in one of two ways this plaintiff is prevented from raising this question, it would have to be held, if the decisions correctly state the law, that the board of officers had no power. The first of those is, that when he became a member of the association there was in force, and he subscribed thereto by becoming a member, a section of the constitution providing that the board of officers should exercise this power. It is true that a member is not always bound by a by-law which the corporation or association to which he belongs sees fit to pass. The question is, did he assent to it. Of course, the question of his assent would never arise with reference to a by-law which the board plainly had power to pass, and which was reasonable, because it would not make any difference whether he consented to such a by-law or not. The question of consent could only arise as to a by-law which the corporation had no right to make, and I am unable to see any reason why, where a by-law is not contrary to public policy, where it is not in positive contravention of law, where it is not immoral, a member may not consent to that as well as consent to anything, the question being always whether he does consent; and it seems to me manifest that there is a distinction between by-laws passed after he becomes a member, by which, if passed without authority, and he do not consent, he is not bound, and those which are in existence when he comes in, which he takes as he finds them, by subscribing to them, and becoming a member. But even if this be not true, and I will not put the decision upon that ground, the petition in this case proceeds expressly upon the theory that the board of officers of the defendant "*fully authorized*" to act for the defendant in the matter, did suspend him, and that that suspension, so far as authorization from the defendant is concerned, was valid. The object of the action is to charge the chamber of commerce with the act of this board as its act; nor is the allegation of the petition that the chamber of commerce has ratified the unauthorized act of the board; it is distinctly charged as the act of the defendant, by its authority. It is true, the petition says, that the sentence was proclaimed publicly on the floor of the chamber. It does not allege, however, that it was proclaimed at one of the business meetings provided for in the constitution; it does not aver that it was published in the presence of a quorum of the Chamber of Commerce; it does not aver any act on the part of the defendant as a corporation, ratifying the act; but it charges the act of the board of directors to have been the act of the defendant. So it seems to me that in this case we must assume that the defendant is responsible for the act of this board, because this board acted for it by its authority in this matter, and therefore consider the case just as though the defendant, instead of the board, had done what the board did. I am unable, after repeatedly reading the petition, to come to any other conclusion. I therefore consider the case as though, instead of the

board of officers, the chamber of commerce, as a corporation and association, had done what is done here, and the question is, does what was done here, or what was not done, make out the case for the plaintiff?

It will be observed, too, in that connection, that the plaintiff does not sue for any physical act for any invasion by act of his rights. He does not sue on the theory that the defendant, without right, has trespassed against him; and by that I don't mean taking him by the collar and putting him out; but he does not sue for being physically kept out, in which case it would not be necessary for him to show anything but that he was physically unable to go in; that he could not go in; he would not have to go there and actually put it to test, but he sues, in other words, because of the alleged validity, so far as the defendant can make it valid, of an adjudication of suspension. He could not sue for the loss of his membership if the adjudication were void. His remedy would then clearly be to enforce by mandamus a right he still has, not to get damages for its loss. In the case of a magistrate, who is responsible if he acts without jurisdiction, nobody could sue him merely because his judgment is void. It is only where he does something on the faith of it, like attaching property, or issuing an execution against property, that he is liable. Now, in this case, it is simply claimed that an adjudication, taking from him temporarily and indefinitely his right to go in there was made by the defendant, and it is the legal effect upon his right, as taking it away, that is complained of as unlawful.

Then considering the case as though defendant had done all that was done or omitted to be done here, does it make out a case?

But another matter discussed before coming to the merits of the case was whether the defendant is liable for its board of officers in a case where malice is charged. Without reviewing the various authorities or going into the various distinctions sought to be drawn, it seems very clear to my mind that the true distinction between cases in which a corporation is liable for malice on the part of its officer or agent, and those where it is not, is this: Where an agent or officer is authorized to do an act which does not involve the exercise of the qualities of head and heart, a physical act, as in the Wetmore case, 19 O. S., 110, the checking of baggage, an act such as to be in itself incapable of moral aspect, of malice or the want of it, there, if the agent sees fit to go into a melee and hurt somebody, the principle is not liable. But where the act which the officer or agent is authorized to do, is an act which requires the exercise of good faith, the exercise of judgment, the exercise of discretion, such an act, in other words, as in the doing of it he is capable of malice or the want of it, there the principal is responsible if in so carrying out its business, its officer or agent is guilty of malice. Where for instance, the officer of a corporation being authorized on its behalf to investigate the alleged embezzlement by a clerk looks into the evidence, examines the case, and has the clerk arrested, who being acquitted, brings suit for malicious prosecution, certainly the corporation is liable, because good faith, or the want of it, was an essential element of the business entrusted to the officer.

Coming now to the merits of the case, and considering the defendant itself having done all that the board did, is the case made out? The averment is that, wrongfully, or maliciously, or wilfully, without reason, the right of plaintiff was invaded by defendant. Now, what was the right? It is manifestly a different right from the neutral and inalienable rights of men. A man's right to life, to liberty, to property, to personal security, is an

absolute right. It is not a right conditional on anybody's right to take it from him, except that of the law for an offense. This right is what? It is a right to be a member and enjoy the privileges of a member of the defendant. Absolutely? No, because a condition of his right expressed, and to be implied if not expressed, was, that it might be taken from him on certain conditions. And, as in this case, the condition was that it might be taken from him by the defendant for certain things involving a trial, such as charges of unmercantile conduct expressly referred to by article 6 of the constitution. So the condition of the right was that it might be taken away if certain persons designated to inquire into the matter should honestly and fairly come to the conclusion that he was guilty. Therefore the petition must be held to allege that this right, not an absolute right to be a member, but a right with this qualification, has been invaded; in other words, that his right to be a member of the chamber has been taken away for something else than the things that it was provided in the constitution it might be taken away for; something which nobody could try him or suspend him for, or that it has been taken away by the persons who had a right to try him, without notice to him, so that they had no right to proceed in his particular case, although they had the general right; or that they, having got jurisdiction of his case by notice, and having general jurisdiction over that subject, proceeded in a wrong manner, either wilfully, without cause or reason, or maliciously.

That is what the plaintiff says his case is, in his petition; that is what the issue is made upon; and I am unable to see any other theory upon which the plaintiff could make a case, conceding his right to bring a suit at law for damages. He cannot sue because he has been suspended as having been found guilty of certain charges, because by subscribing the constitution he has expressly said that he may be suspended if he is found guilty of certain things. Therefore he must go further, and say that his expulsion was without any reason, was in bad faith. The question, therefore, resolves itself into this: Is there any evidence from which the jury might, in any possible view of it, infer such conduct on the part of the defendant? I say, any possible view of it. Without stopping to cite the decisions, the rules of law are well settled that what is meant thereby is not whether a man by the nice process of casuistry might possibly reach a conclusion that there was something wrong; not whether by straining the facts and looking at them from a very remote standpoint it might be by some person of peculiar intellect concluded that there was something wrong; but is the evidence such that, considering it in its strongest tendency for the party offering it, it can be supposed by the jury acting with common sense, in the light of common human experience, as it is their duty to act, in other words, could possibly come in the conclusion that there was malice. If there is any such evidence, if two men looking at the circumstances in the same way might come to different conclusions, then it must go to the jury under the Ohio rule, and the court has nothing to do with it; the court can only take it from the jury if the court cannot see how any reasonable man could possibly come to the conclusion that the board acted in bad faith.

In the first place it is certainly fair to say, that beyond any question, there is no evidence before the jury of any express malice; we may as well exclude that. Malice is a matter which all courts say is not to be presumed; while it is not a crime, yet it is a quasi crime. Malice cannot be evolved from the inner consciousness; it cannot be merely suspected;

there must be some substantial predicate for it. Now it appears in this case that there is nothing from which a man could suspect express malice. The defendant's officers, none of them, appear to have been in relations of friendship with the complainant at this trial, or of hostility towards the defendant. They do not appear to have been even engaged in the same business; they do not appear to have said anything indicating aught but a desire, with such intelligence and experience as they had, to reach the truth, so far as their conscious intent was concerned. I don't know exactly how malice on the part of a board is to be made out, but I have assumed that it may be done. A board is a board. Do you show malice by showing that each individual independently had malice? Do you show malice by showing that they had combined together and agreed on an illegal course?

There being no evidence of any express malice, is there anything in the proceedings before this board from which a reasonable man could infer a want of disregard of the plaintiff's rights, that they acted without any right to act in this particular case, and, as the learned counsel for plaintiff puts it, wrongfully expelled him, which I can conceive may be the case without reaching exactly to the point of malice in law, although probably in closely analyzing the two, they would be found the same, because malice, implied malice, is simply the inference which the law makes from the wilful doing without excuse of a wrongful act; so if they wrongfully, in the wilful sense of the word, expelled him, they would be held, in an action where malice was necessary, to have had it. Now, in the first place, it is claimed that the record here does not show the jurisdictional facts necessary to authorize this board to proceed with the trial of the charges; that it does not show that a ye and nay vote was taken on the question of arrangement as provided in section 1, of article 6. In the first place, I do not understand that that ye and nay vote upon arrangement is jurisdictional. Nor do I understand the law to be as claimed that where it is provided that a majority of the board of officers may suspend it may not proceed, unless there is some thing in the law to indicate it, as was the case in the board of equalization case referred to in argument, without every member being present. The intent is what is to be looked at; was it the intent of the persons who adopted this constitution and by-laws, to provide that they should be present? A careful reading of it fails to satisfy my mind of that fact.

Again, it is claimed that they had no jurisdiction because the record does not show the notice, and because there was no notice to the plaintiff. It appears that the plaintiff simply had rights as a member of this chamber of commerce because he was a member of a firm, Samuel Hill & Co., which held membership, individual members of such firms having all the rights of members of the chamber on paying a certain amount as yearly dues, but being ineligible to individual membership, that is, to any additional membership. It appears that the charges made upon which this trial was had were charges against the firm, and the contention is that they were not charges against Mr. Blumenthal, the plaintiff; that notice to Samuel Hill & Co. of the charges was notice to him; and that although the record shows that he appeared, it simply shows that he appeared to answer charges against the firm. Now while many ingenious arguments have been made upon that point, it seems to me too plain for argument that calling the firm a member of the chamber of commerce was only another way of calling its members members of the chamber of commerce. The

chamber of commerce is a place where individuals go to transact business. A firm can only go there through its individual members. No ideal creature like a corporation or a partnership can be guilty of unmercantile conduct, or of anything else which would meet the reprobation of this constitution. Now, when the firm of Samuel Hill & Co. was charged with unmercantile conduct in a particular transaction, it could not mean by any torturing of human language or human sense, anything except that some or all of the members, the individuals who composed that firm, had done something wrong. The idea of saying that the firm had done something wrong, but none of its members had done anything wrong, is, it seems to me ridiculous. It cannot be. Now, whether notice to a firm that is charged with unmercantile conduct, is notice to an individual member of it to whom it is sought to be brought home, depends upon circumstances, and I understand in all these matters of notice, that the notice which is necessary is not a particular sort of notice, even if a statute says he shall have such notice; although the statute says a man shall have a summons from the sheriff when he has been sued, yet if he comes in and stands in the court room while the court passes on his case, that is a good substitute. Notice in such cases is fair information of what the party is charged with in time to give him an opportunity to present what he has to say in his defense, and that notice may be given by one method, and it may be given by another. It may be given in writing formally; it may be given by telephone; it may be given by telegraph; it may be given by the man happening to be present; the question is did he know it? Now in this case, let the technicality of the firm, of the partnership, go, and the question is, did Mr. Blumenthal know that he was charged and what it was he was charged with, in time to be there and have his side heard? If he did, he had notice. We cannot apply to the acts of inferior tribunals like this board, the rules which are applied to a court of record in reviewing a criminal case, where a man's life or liberty is at stake. They are bodies invested with these powers for their own purposes, and they are left largely to settle their affairs in their own way, so long as they do substantially right, and their acts are to be looked at with a lenient rather than a technical eye. Although jurisdiction of plaintiff depended upon notice, the form of notice was not essential. Now can there be any doubt upon this testimony that Mr. Blumenthal knew that he was the man that was charged with having sold this meat or sent this meat south at a false weight? If notice, signed by the board of officers, was necessary, he did not get that. If the bringing home to his mind of the fact of the charge against him was notice, there is no doubt that he had it, because he was there, and he instructed his counsel right at the start to object to the transaction on the ground that it was not Laidley & Co.'s business, because they were not injured, but it was somebody's down south who got the meat, and he had the correspondence there, and he produced it; he did not say he would like to have more time to produce some more, but he was there and he was heard, and there was evidence including his own of the respective shares of himself and his partner in this transaction, from which he knew that they were individually on trial, yet did not object. Now he cannot say that he did not have notice. And right here, as to the question of the board not having jurisdiction because the injured party, if anybody was injured, was somebody down south and not a member of the chamber, I am unable to agree with the learned counsel who presented the side of Mr. Blumenthal on the trial. The constitution which

these gentlemen have adopted for their guidance, provides that the board of officers shall have power to examine charges of misconduct in business matters preferred against any member of the chamber, when made to the president or secretary in writing by a member of the chamber of commerce. "And if the party charged shall be found guilty of a violation of this constitution," etc. (the court here read the constitution down to the words "the board shall have power to reprimand, suspend or expel.>"). There is not a word to the effect that the wrongful act must be committed towards a fellow member; it simply says the charge must be made by a fellow member. Now when the supreme power of the state permitted these gentlemen to associate themselves together, its avowed object was to enable them to have a supervision over the morals of members in mercantile matters; and to say the intention of the legislature was to permit them to punish their own members for misconduct towards each other, and leave them free to prey upon the outside world as they please, is a reflection upon the legislature; and to say that these gentlemen, when they passed this section of the constitution, although they did not say they meant that, must be assumed to have meant it, is a reflection upon them. And certainly the tendency of courts ought to be, when now the power of these chambers over mercantile matters is more and more increasing, not by implication to say such a thing as that, but to say rather that a chamber of commerce that would wink at a wrong done by a member to an outsider, ought to cease to be a chamber of commerce. The only requirement that can fairly be said to be made is that the charge must be important enough to lead a member to take it up, for every member of the chamber is wronged if another member is guilty of anything which a merchant should not do. And now to say that there is no jurisdiction on that question, is to say something with which I am unable to agree.

Therefore, the board being assumed now to have the right to do what the chamber might do in the matter, it appearing that Hill & Co. were notified, and by that notice Mr. Blumenthal was informed of what he had to meet, and was there to meet it, appeared in person and by attorney, the sole remaining question is: Was the action of the board upon what was presented to it such that any reasonable man could say that they were acting maliciously, or wantonly, or in wilful disregard, or without any reasonable or probable cause, in doing what they did? And right here it is well to observe that the question is not whether I, or any of the learned counsel, or the jury if they had been trying that case on the same evidence presented to this board, would have suspended Mr. Blumenthal or not. That is not the question. By this constitution Mr. Blumenthal agreed with his fellow members and with the Chamber of Commerce, not that he might be suspended or expelled if I, or you, or this jury should say that he was guilty of unmercantile conduct; but he agreed that he might be suspended if the board of officers should so decide. So if the board of officers, in good faith, seeking honestly to reach the truth, with sufficient cause to exercise judgment upon, came to a conclusion, although it be in our judgment a wrong one, we cannot interfere. Now what was the evidence there? In the first place, as was decided by Sir George Jessee Bissell, in *Dawkins v. Autrobus*, 21 Alb. Law Jour., 63, see same case on appeal, 24 Alb. Law Jour., 158, it is not to be expected that bodies like these are to be governed by the technical rules of evidence adopted for courts of law. Courts did not adopt these rules for anybody but themselves, and save in so far as

they are consistent with natural common sense and human reason; they are not binding upon anybody else. These gentlemen did adopt into their constitution a provision that there should not be any hearsay evidence. I do not understand, however, that the proper construction is that the rules relating to hearsay evidence in courts of justice should apply there; but what they mean to say is that Mr. Jones shall not come in and say that Mr. Smith told him so and so; Mr. Smith must come in. Defendant has no power to take depositions, and therefore to say that they cannot introduce business correspondence as part of a transaction, business correspondence which would not be a part of the *res gesta* in the legal sense, is simply to say they cannot try any case unless everybody connected with it is in Cincinnati, which could not have been the intention.

This board had before it all the correspondence and the statements of the parties. And if they had nothing more, they had the admission of Mr. Blumenthal that he had billed these goods to his agent in Atlanta and Macon at a greater weight than the true one. La'dley & Co. claimed and had evidence at least tending to show, that Mr. Blumenthal did that for an unmercantile reason; that he was trying to get more money than he was entitled to. Mr. Blumenthal denied it, and said it was a mistake. Now although I may think it was a mistake, and you may think it was a mistake, can anybody say, under the circumstances presented to those gentlemen, that they were acting maliciously or wantonly, or without reason, in thinking otherwise? I cannot see that any reasonable person could say so. And I cannot let the consequences to a member of the chamber of commerce, which, as shown in argument and in evidence are very serious, interfere with the rules of justice which I am bound to administer. He said: "If these gentlemen, acting in good faith, even though they make an honest mistake, see fit to suspend me, they may do it." I see no evidence here from which I can believe that anybody on the jury, in any view of it, in the strongest view of it, could say that these gentlemen acted in any other way. And seeing that, I simply have one duty, and that is to say that there is nothing for the jury to try, and my duty is performed with the more readiness because this is in some respects a remarkable case. I have thought about it a great deal, and studied it as much as I have had time to do, and yet I realize the fact that these questions upon which I have had to pass with less preparation than I would like to have, are new questions which will probably be reviewed; and as, feeling as I do, I could not let a verdict stand against the defendants, certainly the best way to present these questions is in this way, and the motion will therefore be granted, plaintiff's exception noted, and judgment rendered for the defendant.

O'Connor, Glidden & Burgoyne, for plaintiff.

Hoadly, Johnson & Colston, for defendant.

SALES--AGENCY.

333

[Hamilton Common Pleas Court, 1882.]

WILKERSON v. VORHEES.

No question of law is decided in this case.

CONNER, J.

This is an action for the recovery of \$78.59 and interest, for a lot of twenty-two hogs, alleged to have been sold by plaintiff to defendant, on October 28, 1878. The defense is a denial of the sale and delivery of the hogs, and denial of all indebtedness.

The case turns simply upon the question of agency of one Morrow, a member of the firm of Allen, Hodson & Co., to act for the defendant; for the impression of J. H. Wilkerson, the seller, that Vorhees was present with Morrow when the hogs were sold, is met with the positive denial of defendant, and the direct purchase by the defendant is thus clearly not made out.

Allen, Hodson & Co., were live stock brokers, doing a business of buying and selling all kinds of live stock on commission, and occasionally making small purchases on their own account.

Morrow was the member of the firm that gave particular attention to the buying and selling of hogs; and it is clearly established by the testimony that he sold hogs to, and bought hogs for the defendant at various times during the fall and winter of 1878, but the defendant alleges that he never gave any order to buy hogs until after November 10, 1878, and this statement of the defendant is uncontradicted by any direct testimony, and the other testimony can be fairly reconciled with it. The defendant also states that all the purchases of hogs made by him prior to November 10, with which Morrow or Allen, Hodson & Co., had anything to do, were purchases from Morrow of hogs held by Allen, Hodson & Co., on commission, or hogs that Morrow had weighed to defendant, without defendant's knowledge, but with the thought on Morrow's part that he would get Vorhees to take them, Vorhees being a purchaser for small lots. It is also evident from the testimony that while it is the custom at the stock yards to have the stock weighed directly to the purchaser, yet that this is by no means always the case; and that it was occasionally directed by Morrow (and his instructions were carried out by the weigh-master), that hogs should be weighed to Vorhees or other parties, when they were only the parties to whom Morrow hoped to sell them; and that this was done to save yardage charges. And while the weigh-ticket usually shows the name of the purchaser, yet the party whose name may be in the column of purchaser, may not in fact be the purchaser, the purchaser being the stock-broker, or the firm he represents.

As to the manner in which the business of Allen, Hodson & Co., was done it is clear from the testimony of Morrow, who was called by the defendant, and Stanhope, the book-keeper of Allen, Hodson & Co., called by the plaintiff, that the firm purchased hogs and settled with the seller, holding themselves as responsible for them, and that their customers, whether they were direct purchasers from Allen, Hodson & Co., or the principals for whom Allen, Hodson & Co. bought on commission, had nothing to do with the seller in the way of settlement or accountability, unless it was so understood at the time of the sale between the seller and Allen, Hodson & Co. This is borne out by the testimony of J. H. Wilkerson, the agent

of the plaintiff, who says he does not recollect of ever collecting from Vorhees, and thinks he has collected from Allen, Hodson & Co., and that he looked to the commission man for the pay, unless directed to the purchaser; also by the fact that most of the bills of plaintiff, for hogs sold and delivered to defendant, through Allen, Hodson & Co., were presented by the plaintiff to Allen, Hodson & Co., and settled by them, and that the bill for the hogs in controversy was originally presented to them, and the original entry of the sale on the memorandum book of plaintiff, in his handwriting, was "Allen, Hodson & Co., for Vorhees." This is also borne out by the testimony of the defendant, that he always settled for his purchases with Allen, Hodson & Co., and by all the testimony in the case bearing on the point, that defendant was a prompt paying man.

Now, in the light of this testimony as to the manner in which Allen, Hodson & Co., did their business, and which was evidently known to plaintiff, from his own business transactions with them for hogs delivered by Allen, Hodson & Co. to Vorhees or other customers, or purchased on their own account, as well as from the general manner of doing business by commission men engaged in a general business of buying and selling on commission, whose consignors, partners and customers are more or less numerous; it is clear that the plaintiff cannot recover in this action, not being able to show that the purchase was directly made by the defendant, unless Morrow or the firm of Allen, Hodson & Co. were then the recognized agents of the defendant, and that the plaintiff had a right to infer and presume that the purchase was made on behalf of the defendant.

The burden of proof is upon the plaintiff to show this, and to do so he offers the statement of J. H. Wilkerson and Morrow that they did not know of any one else purchasing hogs for defendant that fall other than Morrow, and that defendant was sometimes present when Morrow purchased hogs for him. Opposed to this is the positive and uncontradicted statement of defendant, that he gave Morrow no orders to buy hogs for him until November 10, or two weeks after the transaction in question; the fact that Vorhees sometimes made purchases of hogs himself and without the presence of Morrow; and the further fact that Allen, Hodson & Co., sometimes purchased hogs from plaintiff on their own account; and the fact that Allen, Hodson & Co., and Morrow as their buyer, were purchasing hogs from other parties than the defendant, in fact were doing a general commission business, and were not simply or chiefly engaged in business in purchasing for the defendant, whose purchases of hogs were but trifling compared with the amount of business done by Allen, Hodson & Co.

From all these circumstances and facts, I think the plaintiff has failed to show agency on the part of Morrow so as to bind the defendant.

The testimony discloses that the firm of Allen, Hodson & Co., sold to Vorhees, a lot of 29 hogs on October 28, and that he paid them for the same on the same day, paying them the price of \$290, which is alleged to be the selling price of the 22 hogs in question in this case, and it is quite possible, if not probable, that these twenty-two hogs were included in those twenty-nine; but if they were, they were sold to Allen, Hodson & Co., and not to Morrow, as agent of the defendant.

Judgment will therefore be entered for the defendant.

Wm. H. Mackoy, for plaintiff.

Edward Colston, for defendant.

ATTACHMENT.

334

[Hamilton Common Pleas Court, 1882.]

JACOB SCHATZMAN v. THOS. J. STUMP.

Where an affidavit for an attachment is defective because stating several grounds of attachment in the alternative or disjunctive, although it is not assigned on a motion to dissolve the attachment as a ground, leave will be given to amend the motion by adding this ground, and it will then be granted.

Motion to dissolve attachment on the ground of uncertainty in the grounds for attachment in affidavit.

CONNER, J.

Various grounds are alleged for the dissolving of the attachment, among others that the defendant "was not guilty of fraudulent acts and deeds and intentions therein charged, or of any other frauds in the premises." The other grounds mentioned, refer to the levy by the sheriff on property belonging to others than defendant or his wife, and to the reasons why the property, which came to the defendant from his father's estate, was placed in the name of the wife and transferred to her.

The affidavit in attachment, after setting forth the bringing of the action, the claim it is based on, the amount due plaintiff, and what he ought to recover from defendant, closes with the following language, viz: "And affiant further saith, that said Thomas J. Stump has disposed of or assigned, or is about to dispose of or assign, his property, with intent to defraud his creditors, and said debt was fraudulently contracted, for which this suit has been brought."

This affidavit states four grounds of attachment, namely, that defendant has, first, disposed of his property; second, assigned his property; third, is about to dispose of his property; fourth, is about to assign his property; and all with intent to defraud his creditors. All of these grounds are stated in the disjunctive or alternative, and neither can stand, because of uncertainty, nothing being positively charged. *Rogers v. Ellis*, 1 Handy, 48; *Hamilton common pleas court*, in case 54326, *Stevens & Osborne v. Stuart & Williams*; *Drake on Attachment*, section 101, and cases cited thereunder.

The affidavit therefore is fatally defective, on this ground of uncertainty of the act charged, if in no other respect, and leave will be given to amend the motion by adding this as an additional ground, and the motion will then be granted. But irrespective of this ground, I should be inclined to grant the motion on the ground that no fraudulent intent on the part of the defendant is shown, in the light thrown by the affidavits filed on either side. But it is unnecessary to pass upon this point, having already disposed of the motion upon the other ground.

Motion to dissolve attachment as amended granted.

341 **• SERVICE ON FOREIGN CORPORATIONS.**

[Superior Court of Cincinnati 1882.]

†**MOHR & MOHR DISTILLING CO. v. LAMAR INSURANCE CO.**

1. The courts of Ohio are open to the suits of non-residents against non-residents who may be reached by their process.
2. Jurisdiction of a cause against a foreign insurance company will be acquired by service on a resident agent, the chief officer of the agency in the jurisdiction, no chief officer of the company being within reach of process. The special modes of service on insurance companies provided by statute are cumulative, and not exclusive.

Motion to set aside service of summons.

This cause came on to be heard with a number of other cases, all involving the same principle, differing only in details of service.

FORCE, J.

The case presents a question of jurisdiction. Both parties are foreign corporations. This court has by statute jurisdiction over an action against a foreign corporation when such corporation can be found anywhere within the city. A corporation can be found where it can be served with a summons according to law. A foreign corporation can be served with summons according to law, by service upon a managing agent. The service in this case was upon "John P. Whiteman, agent of said Lamar Insurance Company, and the chief officer of its agency in the city of Cincinnati. No chief officer of said company found." Such service is service upon a managing agent. *American Express Co. v. Johnson*, 17 O. S., 641. This court therefore has jurisdiction of the action, and the service of summons is according to the law.

It is true that there are special modes of service upon insurance companies provided by statute; but it has been expressly decided that such special modes are not exclusive, but cumulative. *Handy v. Aetna Insurance Co.*, 37 O. S., 366.

It is urged that courts of the state cannot, or at least, should not, hear causes between non-residents; that there is enough litigation to which citizens of the state are parties, to fill all the sessions of court. But the courts cannot refuse to hear causes that have a right to be heard, and it is impossible to contend that non-residents have not a right to sue non-residents in the courts of the state. The law makes no distinction between natural and artificial persons as to their right to sue or their liability to be sued. By the comity of all the states foreign corporations can sue in their courts.

Since the decision in *Bank of Augusta v. Earle*, 13 Pet., 519, it has not been questioned that a corporation can do business in states other than that in which it is chartered. By repeated decisions of the supreme court of the United States, it is settled that a corporation can do business in such other state only by permission of such other state, and upon the conditions such state may prescribe. Where a state by general law provides for a mode of service upon foreign corporations doing business within the state, such law is a condition upon which a foreign corporation can do business within the state; *Paul v. Virginia*, 8 Wall., 168; and, by doing business in this state, a foreign corporation assents to such condition. *Lafayette Insurance Co. v. French*, 18 How., 404.

The courts of Ohio are open for any non-resident, whether a natural or an artificial person, to sue any other non-resident, whether a natural or an artificial person, upon complying with the requirements of the statute. "Non-residents of the state and foreign corporations are as much subject to its jurisdiction as are residents and domestic corporations. Except in the actions of a local nature, our courts are open to all who may seek relief therein against any one who may be reached by its process." *Handy v. Aetna Insurance Co.*, supra.

If it is suggested that the national courts are the proper forum in actions between non-resident corporations, it is held otherwise. In the reports of the supreme court of the United States, corporations are always termed citizens of the state by which they are chartered. As such, they are held included in the word "citizens" in the constitution of the United States and in the removal acts. The

†This decision was reversed by the district court, see opinion 6 Dec. R., 1180; (s. c. 12 Am. Law Rec. 168.)

act of 1875 for removal of causes from state to national courts, expressly recognizes the jurisdiction of state courts over actions between non-resident citizens. The same express recognition is made by the supreme court of the United States. *Barney v. Latham*, 103 U. S., 205.

Motion overruled.

Moulton, Johnson & Levi, for plaintiffs.

Follett, Hyman & Dawson, for defendant.

FIRE INSURANCE.

342

[Superior Court of Cincinnati, 1882.]

CINCINNATI COFFIN CO. v. HOME INSURANCE CO.

A clause in a policy of insurance that no action should be brought until the amount of loss or damage should have been appraised, is valid to fix the amount of loss, but not to fix the liability, but is wholly abrogated where there is but one policy of insurance, by Revised Statutes, sec. 3643, known as the Howland law. But the further provision of that section that in case of two or more policies each shall contribute to the loss in proportion to the amount of each, prevents such clause in policy being abrogated, when there is more than one policy.

HARMON, J.

In this case on a policy of a fire insurance, the defense was that the policy contained a clause providing that the company or the insured at any time after filing his claim might have the value and amount of loss and damage submitted to appraisers, to be selected in a designated way, and no suit or action at law or equity should be instituted or maintained against the company until an appraisal and award as to the loss and damage should have been had and the amount thereof determined. The answer alleges that nothing has taken place to waive that clause, and there is no reply. Therefore, if the clause is binding, it being admitted that nothing has taken place to waive it, the defense is made out; otherwise, not.

The contention is for the plaintiff, that the act known as the Howland law, section 3643, Revised Statutes, has abrogated the effect of this provision even if it would otherwise be binding.

I am satisfied, from the authorities, from the case of *Scott v. Avery*, 5 H. L. cases, 811, which is discussed by Prof. Langdell, in the Summary of the Law on Contracts, through the subsequent cases, *Elliott v. Ins. Co.*, L. R. 2 Ex., 237; *Fox v. R. R. Co.*, 3 Wall., Jr. 243; *Youmans v. Ins. Co.*, 5 Ins. L. J., 858; *Flaherty v. Ins. Co.*, 7 Ins. L. J., 226; *Lovejoy v. Ins. Co.*, 11 Ins. L. J., 193, that a provision of this kind is valid where it simply provides for an arbitration as to the amount of loss, although it would be invalid if it provided for an arbitration of the liability, as well; so that the only question is, is the effect of this provision annulled by the passage of this act.

It provides that the insurer shall cause the building or structure insured to be examined by an agent of the insurer, and a full description thereof to be made and the insurable value fixed by the agent, and, in case of total loss, the whole amount mentioned in the policy of renewal upon which the insurers receive a premium shall be paid.

If this policy were the only policy upon the building destroyed, there could be no question but that the clause would be entirely abrogated by the law, the intent of which is to dispense with all question as to the amount of loss in case of total loss, making the sum named in the policy conclusive.

The act further provides that, "in case there are two or more policies

upon the property, each policy shall contribute to the payment of the whole, or the partial loss, in proportion to the amount of insurance mentioned in each policy, but in no case shall the insurer be required to pay more than the amount mentioned in its policy."

This last clause reads somewhat like a riddle, because it does not say what the proportion shall be determined by; but that each policy shall contribute to the payment of the whole or partial loss in proportion to the amount of insurance mentioned in each policy. The proportion of the amount of insurance in each policy to what? But upon a careful examination it seems to the court that the fair intent of that language can only be that in case there are more than one policy upon the property, each policy shall contribute to the payment of the loss, the actual loss, in the proportion which the amount of its policy bears to the entire amount of insurance. To say that it means to contribute to the payment of the loss considering it as fixed by the entire amount of insurance, in the proportion of the amount of its insurance to all the insurance, is simply a round about way of saying that it must pay the entire amount of its policy, no matter how many policies there may be, because the proportion of its policy to all the insurance will always be the amount of its policy; the legislature must have meant something by inserting this clause; and I am unable to see any other meaning to it than that it was not intended to provide that where there is more than one policy, each company shall pay the entire amount mentioned in its policy; in other words that where there is more than one policy, the amount named in each is not made conclusive. And that being the case, it follows, upon the state of the pleadings, it being admitted by no reply being filed to the answer, that this clause has never been waived, and it being valid, because it provides only for an appraisement of the amount of loss and not of the question of liability, that the action was prematurely brought, and the motion for the new trial will have to be granted, the verdict set aside, and the petition dismissed.

Wm. Ramsey, for plaintiff.

J. Wm. Johnson, for defendant.

JURISDICTION—APPEALS.

[Hamilton Common Pleas Court, 1882.]

†BISHOP v. BASCOE et al.

1. In a petition on appeal from a justice, judgment being asked for more than was asked below, and more than the justice had jurisdiction over, this will be reached by demurrer to the answer, on the ground that it searches the record, but leave to amend will be given.
2. An injunction bond in a suit to prevent one from prosecuting forcible entry and detainer against plaintiff before a justice, or in any one interfering with his possession, may be sued upon, although the magistrate would have no jurisdiction of the forcible entry proceedings; for the further prevention of in any way interfering with the possession, may constitute an independent suspension of the rights of the party enjoined.

†See decision in *Krug v. Bishop*, 44 O. S., 221.

CONNER, J.

This suit was brought upon an injunction bond given in case 61,658, Hamilton common pleas, wherein the defendant Bascoe was the plaintiff, and the plaintiffs in this case, the Bishops, in connection with other parties were defendants, said suit being for the declaration of an alleged deed to be a mortgage, injunction, and other relief, and in which an injunction was issued, whereby, as alleged in the petition in this case, the present plaintiffs were enjoined from prosecuting an action in forcible detainer of certain premises then pending against the defendant Bascoe before a magistrate; and enjoining and restraining the plaintiffs in the present action from in any way disturbing the possession of said Bascoe to said premises until the final termination of said action 61,658 by the court of common pleas; and that the defendants in this action, Krug & Bruner, were the sureties upon said bond.

That subsequently a motion to dissolve said injunction was filed, testimony heard, and argued by counsel, and that the court overruled the same. And that subsequently thereto, and about a year after the restraining order was issued, the court dismissed said action, thereby dissolving said injunction, such dismissal being at the costs of the plaintiff therein, Bascoe, and being ordered by reason of the unreasonable neglect of the plaintiff in making service upon the defendant therein, other than the Bishops who are plaintiffs in the present action.

The defendants, Krug & Bruner, have filed a joint amended answer, and the defendant Bascoe has filed her separate amended answer, and the grounds of defense stated in these answers are substantially the same. The first ground of defense in the amended answer of Krug & Bruner is a denial of the execution "of an undertaking in said case No. 61,658, or any undertaking whereby they become bound to said plaintiffs, or either of them, in the sum of two hundred and fifty dollars, or in any sum or amount whatsoever." This is a mere statement of a conclusion of law, and is bad pleading; and is especially so when in a subsequent defense they directly and specifically admit that they executed the bond in question.

The demurrer to this ground of defense will therefore be sustained.

The grounds of defense numbered as the second, third and sixth of the amended answer of Krug & Bruner, and the fourth of the amended answer of Bascoe, are substantially but one, namely, that the action 61,658 was never prosecuted to final hearing, but being dismissed, without any finding of the court as to the merits of the action and claims of the parties, the plaintiffs are not entitled therefore to recover any damages upon the bond.

The liability upon the injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction; but the only damages that can be recovered are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit, independent of the injunction.

High on Injunction, section 1663.

In the absence of malice in suing out the injunction, vindictive or punitive damages should not be allowed upon dissolution, but the recovery should be measured by simple compensation for the actual loss sustained. But defendant who is injured by an injunction which is afterward dissolved, is entitled, on his action upon the bond, to compensation for all

loss and injury naturally and fairly referable to the wrongful act of the obligor in obtaining the injunction; and the decree dissolving the injunction is, until reversed, conclusive that it was wrongfully obtained.

High on Injunction, section 1665.

The payment of damages is considered as a penalty for failure to sustain an injunction, and it is held that *the order of dissolution necessarily imports that the damages are to be paid*, unless it expressly remits them. And where the bond is conditioned for the payment of such damages as the court may award, and the court simply dissolves the injunction and dismisses the bill without decreeing as to damages, *the order of dissolution necessarily implies that the damage must be paid*.

High on Injunction, section 1669.

Such being the law with respect to the damages recoverable upon injunction bonds, I can see no reason why the doctrine should simply be confined to cases where the right to injunction has been fully discussed and passed upon, and not to cases where the injunction has been allowed, and then dissolved without inquiry as to the merits of the action and grounds for the issuing of the injunction, whether this dissolution is brought about by an agreement among the parties or by neglect in prosecuting the action; and I can find no authorities so limiting the rule. The case of *Roberts v. Dust*, 4 O. S., 502, relied upon by counsel for plaintiff, as showing that damages are recoverable where the action in which the injunction was issued, was dismissed, is not entirely applicable to the case at bar, because in the case of *Roberts v. Dust*, *supra*, it is evident there was a full hearing of the merits of the case and the rights of the parties, and the case was dismissed only upon final hearing; and the only matter there unheard and undisposed of was the amount of damages that had arisen by reason of the injunction.

Nor is it necessary that a party should be served with process to entitle him to recover damages on the bond upon dissolution of the injunction; it is sufficient that he has rendered himself obedient to the injunction, although the writ may not have been served upon him.

High on Injunction, section 1677.

The demurrers therefore to the second, third and seventh defenses of the amended answer of Krug & Bruner, and the fourth defense of the amended answer of Bascoe, will be sustained.

As to the fifth defense in the amended answer of Krug & Bruner, it is there alleged that the magistrate had no jurisdiction in the forcible entry and detainer case, which was stopped by the injunction, the defendant Bascoe having been in continuous occupation of the premises for more than two years. If this is true, it would have been a good defense in that case, and the injunction in stopping the progress of that case could have done the plaintiff herein no injury, and they are not entitled to recover damages for such stoppage of the case, for as I have before remarked "the liability upon the injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction;" and if there was no jurisdiction in the magistrate, there was no suspension of vested legal rights, and this is rather a benefit to the plaintiffs in that suit in saving them costs.

The injunction, however, also prevented the plaintiffs in this action from in any way disturbing the possession of Bascoe to said premises until the final hearing of case 61,658, and it is possible the plaintiffs thereby suffered some damage. The demurrer therefore to the fifth defense of the amended answer of Krug & Bruner will be overruled.

But there is a defect in the petition which the demurrer of the plaintiff to the amended answer, by searching the whole record of the case, brings out; and that is the fact that before the magistrate the suit was for \$250, while in a petition on the appeal the claim is for \$336.66. As I have already decided to-day in the case of *Lang v. Kunz*, and as has been the uniform ruling in this court, the amount claimed on the appeal must not exceed that claimed before the magistrate, without a motion to the court, and leave obtained therefor, and in this case, there is an additional reason for limiting the amount claimed to \$250, as before the magistrate, as that is the amount fixed in the injunction bond sued on; and where the practice prevails of decreeing damages upon dissolution, it is held that the court can not go beyond the bond and award greater damages than the damages therein fixed.

High on Injunction, 1669.

Leave is therefore given to plaintiff to amend within three days their petition by reducing the amount claimed to that claimed before the magistrate; and upon doing so the demurrer to the first, second, third and sixth defenses of the amended answer of Krug & Bruner, and the fourth defense of the amended answer of Bascoe will be sustained, and overruled as to the sixth defense of the amended answer of Krug & Bruner, and leave is given to said defendants to file an amended answer within twenty days

PRINCIPAL AND SURETY.

345

[Hamilton Common Pleas Court, 1882.]

†MARSH v. BYRNES.

1. L. recovered a judgment before a justice of the peace against J. P. and S. P., who jointly appealed the action to the court of common pleas. Pike, as surety on the undertaking in appeal, in the undertaking, says: "I promise and undertake that the said appellants, if judgment be adjudged against them on the appeal, will satisfy such judgment and costs," etc. In the appellate court L. obtained a judgment against J. P. only. J. P. being insolvent, L. brought his action against Pike, surety on the undertaking in appeal. Held:
2. A surety, on an undertaking for an appeal from the judgment of a justice of the peace, taken in conformity to the statute, where the terms thereof are clear and certain, may stand upon the terms of his undertaking.
3. Pike is not liable on his undertaking as surety to satisfy a judgment against J. P. only.

†The case of *Lang v. Pike* relied upon as decisive of this case was overruled by the Supreme Court in *Alber v. Froehlich*, 39 O. S., 245.

CONNER, J.

This is an action to recover \$55.02 from a surety on an undertaking on appeal of a case before a magistrate.

The undertaking was given on behalf of three defendants, and upon the trial in the common pleas, two of these defendants were dismissed, and judgment rendered against the third. No execution was issued on this judgment, but the testimony discloses that the party against whom it was rendered, was insolvent, and that soon after the rendition of the judgment he left the city and has been absent ever since. Suit was brought upon the appeal undertaking against the defendant herein, and upon judgment being rendered against him, he appealed the case to this court.

The defenses claimed are two in number: First, that the plaintiff herein did not use diligence in attempting to collect his judgment from Knight, the judgment debtor, and failed to issue execution against him; second, that the undertaking signed by him was an agreement to pay any judgment rendered against all of the defendants, and that he is not bound for a judgment rendered against one.

The language of the undertaking, signed by the defendant, is as follows: "promise and undertake in the sum of * * * that the said appellants, if judgment be adjudged against them on appeal, will satisfy such judgment and costs."

The case of *Lang v. Pike*, 27 O. S. 498, is decisive of the second defense of the case at bar, and disposes of the whole matter.

In the appellate court L. obtained a judgment against J. P. only. J. P. being insolvent, L. brought his action against Pike, surety on the appeal undertaking.

In accordance with this decision, which is in strict conformity with the undertaking set up in the case at bar, the judgment will be for the defendant.

JUDGMENTS BY DEFAULT.

[Hamilton District Court, 1883.]

EVANS v. JONES.

A judgment by default being rendered against a married woman and her husband on a note, the record nowhere showing that the woman was a feme covert, she may file a petition in error to reverse the judgment. If she states the fact of coverture therein, this prevents the two year's bar of the statute of limitations, but such petition in error must be verified, and amendment verifying it forthwith will be allowed, and a motion to dismiss overruled, for whether the record contains errors will not be examined on motion.

JOHNSTON, J.

Defendant in error sued David Evans and Ann Evans in the common pleas court, the basis of the action being a promissory note made by them. The petition did not aver that they bore the relation to each other of husband and wife. She demurred. Her demurrer was overruled. Judgment by default was entered against her husband for the amount of the note. After more than two years have elapsed Ann Evans commenced proceeding to reverse this judgment. Jones asks by motion that it be dismissed, inasmuch as it appears upon the face of the record on file, that she and her husband have no right to prosecute the action by lapse of time, it appearing that she was a married woman when judgment was rendered and more than two years having elapsed since the judgment.

Whether anything appears upon the record that may authorize a reversal of the judgment cannot be determined, upon the motion to dismiss. The plaintiff in error may allege facts not appearing upon the face of the record. The allegations may give the party a right to a hearing—may give the court jurisdiction, although upon the final hearing, no error may be found to have occurred to her prejudice.

In this case Mrs. Evans avers that at the time the note was made and delivered to Jones, and ever since, she was and has been a married woman, of which facts Jones was at all times well advised. Under section 6723, Revised Statutes, Mrs. Evans is saved from the operation of the two years limitation applying to an unmarried woman. She has the right at least to file the petition and invoke a review of the record. The petition, however, containing allegations of fact, comes within section 5102, Revised Statutes, and must be verified. It presents an issuable fact, *Crawford v. Edison*, 45 O. S., 244 and 282.

Whether the record contains errors prejudicial to her and of which she may avail herself, cannot be determined upon the motion, but having the right to ask a review of the record by petition in error, the motion to dismiss is overruled, and leave is given to forthwith verify petition.

Hollister, Roberts & Hollister, for motion.

Jordan, Jordan & Williams, *contra*.

ACTION TO ESTABLISH HEIRSHIP.

[Hamilton Common Pleas Court, 1882.]

KENDALL v. KENDALL.

The presumption that a party is the parent of a child, arising from her acts, treatment and acknowledgment of a child, may be rebutted, as where the alleged parent had given birth to another child so near the date of the birth of the child as to make it a physical impossibility that she was the latter's mother.

Semle: Acts showing an adoption of a child, as, treating it as the parent's own, or acknowledging it, without statutory adoption, are not sufficient to constitute the child an heir, as against other children.

CONNER, J.

The plaintiff, Wm. Henry Kendall, who is admitted to be a son of one Mary Kendall, now deceased, brings an action to quiet his title to certain real estate in this city, to which he alleges the defendant, John Walter Kendall, claims an interest.

The defendant admitting the heirship of the plaintiff, and possession by him of the real estate in question, says that he also is a son of said Mary Kendall, and claims an undivided half of said real estate, and prays a finding of the court to that effect.

There is but one point at issue in the case, and that is whether or not the defendant is a son of Mary Kendall.

It is admitted that said Mary Kendall's maiden name was Mary O'Connor; that she was at one time known as Mary Prindel, that under said name of Prindel she was married to one Andrew J. Prindel, in this city, by F. H. Rowekamp, a magistrate, on the 31st of October, 1861, under a license taken out November 24, 1858; that the parties went through some kind of a marriage ceremony before a priest in Pensacola, Florida, in July 1859; that they had a child, a little girl named Mary, who died shortly after its birth, and was buried in St. Joseph's Cemetery, in this county; that they had another child; the plaintiff in this action, born in 1854; that Mrs. Kendall died in 1872, and that shortly thereafter this action was commenced to quiet the plaintiff's title as against the claim of the defendant, the action being brought by the guardian of the plaintiff

against the defendant and his guardian, and a decree was entered herein, April 14, 1873, quieting the title as against defendant's claim; that the defendant after attaining his majority, in case 61,219, instituted proceedings to set aside the finding of April 14, 1873, and for a rehearing, and that on the 21st of May, 1881, an order was made in said case 61,219, finding that the defendant herein had commenced said action within a year after attaining his majority, ordering the finding of April 14, 1873, to be set aside, and for a rehearing of the case.

There are certain other matters, which, while not admitted, are clearly established by the evidence, and which are important in determining the main point at issue in the case; and I find that the testimony clearly establishes that said Mary Kendall was for many years a resident of this city, and that from 1856 to 1866, at least, and possibly before and after these dates, she kept a house of ill-fame; that from about 1857 to 1865 she and Andrew J. Kendall lived together in the relationship of husband and wife, although not formally married, until 1861; that a license to marry was taken out in November, 1858, because she was about to give birth to the child subsequently born and known as Mary, and desired it to be legitimate; that the marriage was not consummated prior to the birth of this child, for some reason, and the child dying very soon thereafter, the marriage continued to be deferred, possibly because the apparent chief motive therefor had been removed; that this child Mary was born early in December, 1858, probably about the 6th of that month, died on or about December 22, and was buried in the lot of a family named Ganning, in St. Joseph's Cemetery, in this county, on December 23, 1858; that Andrew J. Kendall went to Pensacola, Florida, early in the spring of 1859; that Mrs. Kendall visited him there in July, 1859, brought with her there the defendant, who was then quite an infant; that on the 24th of November, 1859, Mr. Kendall caused the defendant to be baptized, the ceremony being performed by Father Driscoll at St. Xavier's Church in this city, the defendant being baptized, as the register of the church shows, as "John, son of Andrew Kendall and Mary Prindel, born April 1, 1859, Godmother, Margareth McCarthy;" that from early in the spring of 1859, down to the death of Mrs. Kendall, she provided for and maintained the defendant; that immediately after her death, the guardian of the plaintiff, Mr. Bell and Andrew J. Kendall, closed up the rooms formerly occupied by her, and the defendant was thrown out upon the world, and compelled to live as best he might upon charity, until a kind woman, Mrs. Applegate, took pity on him and took him to her own home, and has ever since given him a home, and treated him as though he was a son.

Now coming to the main question in the case, as to whether or not the defendant is the son of Mary Kendall.

The defendant has offered the evidence of Mrs. Elizabeth George, a woman who was cook for Mrs. Kendall in 1864, and worked for her occasionally off and on for two or three years and was with her when she died; of Mrs. Howard, a woman who did some washing for Mrs. Kendall and lived on Gano street near them; of Mrs. Ann Gibbs, a woman living on Gano street; of a Mrs. Krotte, a German woman living near them; of a Mrs. Conway with whom Mrs. Kendall was living for about a year previous to her death; of Mrs. Applegate, the woman with whom defendant is living; and the testimony of the defendant himself; the deposition of Father Driscoll was also offered. The plaintiff has offered the evidence of his father, Andrew J. Kendall; John W. Bell, his guardian; Jennie

Mason, the sister of Mrs. Kendall; John McDowell Kendall, his uncle; and his own testimony.

From the testimony of all these witnesses, both for the defendant and the plaintiff, it is clearly shown that Mrs. Kendall always treated the defendant kindly, clothed him well, took him with her on her trips to Washington and to Ireland when she was visiting her parents. Sent him to school, sent him to the country to board, paid all his expenses, and never made any outward difference between her treatment of him and of the plaintiff, and all of the witnesses for the defendant concur in the general remark that "she treated him as any mother would treat a child."

The defendant claims that he was born on or about April 1, 1859, as is shown by the date in the baptismal record, although counsel for defendant in his argument was inclined to argue that he might have been born in 1860, or at some time between April, 1859, and 1860, although he fixes no particular date, other than that shown in the baptismal register. When filing his original petition in case 61,219, the defendant alleged therein that he "arrived at full age on the—day of April, 1879," which would make the date of his birth in April, 1858. In his supplemental and amended petition filed in the same case he alleges he "arrived at full age on April 29, 1880, which would make the date of his birth, April 29, 1859; while the decree in the same case entered May 21, 1881, finds that "this proceeding was commenced within one year after said infant's becoming of age," and being commenced January 14, 1880, would make him of age sometime between January 14, 1879, and January 14, 1880, and would so far as this decree could have any weight fix the date of his birth in 1858 or in the early part of 1859.

The plaintiff claims that the defendant was a child taken by Mrs. Kendall to raise or care for after the death of her little daughter Mary; that it was obtained from Covington through a Mrs. Holden, that he was brought to her house early in the spring of 1859, and was then a child eight or nine months old, and just beginning to walk or stand.

The defendant claims that in addition to the manner of treatment of him by Mrs. Kendall, which I have already spoken of, that she made certain declarations admitting that he was her child.

The witness, Mrs. George testifies that when she was hired Mrs. Kendall "told me that was her little boy" (referring to the defendant) and that "she always told me he was her little boy; she never told me anything else." Mrs. Howard says "she used to bring him there a baby * * she always told me it was her baby, and I used to do up clothes for her when he was a baby, and she told me he was hers" * * that she "did not like anything said about that boy, said it was hers and did not like any body to say anything about it." * * "She said that that boy, (referring to defendant) was a good, faithful boy." She said, referring to the defendant and plaintiff, "these are my children, and I would like to see them, I would like to have them look nice."

Mrs. Gibbs says, "she told me they, (referring to the defendant and plaintiff) were hers. She told me they were her children, never heard anything else when she died. She always told me it (referring to defendant) was her child, and he was very delicate." Mrs. Conway, who knew her during the last year of her life, says "I heard her always say that Walter and Harry were both her children. She told me Walter was her son and she called him John Walter Kendall after her father in the old country."

And Mrs. Applegate who knew her for the last six months of her life, says, "She has often spoken to me about her trouble, saying what she thought when Walter was born and the doctor told her it was a boy. She said if he lived to be twelve years old, she would not ask anything of any man. He was a little fellow, and he was no good to her and she thought as he was that large he ought to be of more service."

As opposed to these declarations, the plaintiff offers the testimony of Mr. Kendall, his father, his aunt Mrs. Mason who was a sister of Mrs. Kendall, Mr. Bell, and John McDowell Kendall as to her declarations and explanations of getting the child through Mrs. Holden, her reason for getting it; and their statements as to its apparent age when she got it and the time she brought it to her home.

The testimony of Mrs. Mason as to her sister's declarations are statements about the child, and when and where she got it, given on page 130 of the printed evidence, is very important, and is very clear.

The defendant also claims that the crowning evidence of the allegation that he is the son of Mrs. Kendall is the fact that she had him baptized as her son, and gave him the name of her father.

It being an established fact as I have already found, that Mrs. Kendall gave birth to a child, Mary, on or about December 6, 1858, it is, of course, a physical impossibility for her to have given birth to the defendant on or about the 1st of April, 1859, as stated in the baptismal register and in his supplemental and amended answer in case 61,219; and there is no claim on the part of the defendant that he was born before the little girl, Mary. It is also equally impossible for Mrs. Kendall to have given birth to the defendant, after the birth of the daughter Mary, and that the defendant should have been eight or nine months old when first seen by the witnesses Bell, John McDowell Kendall and Jennie Mason, early in the spring of 1859, and a child just beginning to walk when the defendant was taken to Pensacola in July, 1859, as testified by Andrew J. Kendall; and the fact that he must have been that old in the spring of 1859, is borne out by the testimony of Mrs. George, one of his own witnesses, who in her deposition, says that when she went to work for Mrs. Kendall in 1854, (and it must have been in the fall, as it was before plaintiff was born), Walter, the defendant, was then going to school, and used to go to and from school by himself; it being hardly probable that a child less than six years of age would be attending school, and going backwards and forwards therefrom by himself.

But the defendant claims that it is a well settled rule of law, that the acts and declarations of a party, acting and speaking like a parent, raises the greatest of presumptions that such party is the parent so apparently held out. This is true, but such presumption can be rebutted.

It is rebutted here, and does the evidence in this case establish that the defendant is the son of Mary Kendall? To this inquiry the answer must be in the negative.

First—Because it is a physical impossibility for Mrs. Kendall to have given birth to a child on or about April, 1859, the date of defendant's birth given in the baptismal register, and in the pleadings in case 61,219, she having given birth to a child on or about December 6, 1858.

Second—Because the testimony establishes the fact that in the spring of 1859, the defendant must have been, at least, eight months old.

Third—Because the testimony clearly establishes that defendant was brought to the home of Mrs. Kendall in the spring of 1859 by a Mrs.

Holden, was then about eight months old, and was then taken by Mrs. Kendall to raise or be cared for, being taken to mitigate her grief at the loss of her child, Mary.

The facts and declarations of Mrs. Kendall with respect to the defendant can be reconciled with the finding that he was not her child, but simply taken by her out of charitable motives and as a relief from her own grief; and especially so as to declarations, when it is realized that so many years have elapsed, and witnesses may have unconsciously tinged their recollections, of the exact language or substance used by Mrs. Kendall by their own impressions or views. And the matter of his baptism can also be reconciled with this finding, when it was remembered that as a good catholic she was unwilling to have him encounter the perils of the European trip which they were just about to take, without his being shielded by that sacred rite which was essential to his salvation in case of death; that having treated him so long as a son she would naturally give the poor waif her own family name, when she felt towards him as she certainly did manifest by her kind acts to him and words about him, much of the love of a parent, and looked upon him as an adopted child. I therefore find that the defendant, John Walter Kendall, was not the son of Mary Kendall, whose maiden name was Mary O'Connor; that the plaintiff is entitled to have his title quieted as to the claim of the defendant, whose answer and cross-petition is dismissed at his costs.

W. H. Baldwin and Frank Burner, for plaintiff.

Hildebrant & Hildebrant, for defendant.

HUSBAND AND WIFE—BILLS AND NOTES.

4

[Hamilton Common Pleas Court, 1882.]

†CORWIN v. COOK et al.

1. A married woman having a separate estate, may charge the same in equity, by the execution of a promissory note as surety for the pre-existing debt of her husband or another.
2. Where there is an express declaration in the instrument of an intention to charge the separate estate of a married woman, the same cannot be contradicted or controverted in the absence of fraud or undue influence to obtain the wife's signature thereto.
3. Where there is such express declaration of the intention to charge such separate estate, it is not necessary to show that the debt was contracted for the wife's direct benefit, or the benefit of her separate property.

CONNER, J.

Plaintiff brings this action, based on a promissory note, in the following language and figures, viz.:

\$345.82.

Cincinnati, Jan. 22, 1878.

Ninety days after date, we, or either of us, promise to pay to the order of H. R. Corwin, the sum of three hundred and forty-five and 82-100 dollars. Value received. This note to be binding upon the separate property of Isabella C. Cook.

Signed:

M. H. COOK,

ISABELLA C. COOK.

And he alleges further in his petition that there are no credits or endorsements on said note; that said Isabella C. Cook is now, and was at the time of the execution of said note the owner of certain real estate as her separate property; that it was her intention in the making and delivery of the said note to charge the payment of it upon said real estate, and that it was upon the faith and credit of said separate

†This opinion was affirmed by the district court. See opinion, *post*, 12 B., 157.

property, that said note was given and accepted; that the amount of said note is wholly unpaid and ought to be declared and adjudged a lien upon said real estate; and he prays that the amount due upon said note may be declared a lien upon said separate estate of said Isabella C. Cook, that the same may be ordered to be sold, and the application of the proceeds to the payment of the same, and for a personal judgment against each of the defendants and signers of said note.

The defendant, Isabella C. Cook, in her amended answer, admits her signing of said note, and ownership of said real estate as her separate property; she also avers that her signature to said note was obtained by her husband, acting as the agent of the plaintiff, by the exercise of undue influence.

The testimony clearly establishes, that the plaintiff had had for several years dealings with the defendant M. H. Cook, selling him lumber for his business of manufacturing boxes; that he was slow in making payments, and the plaintiff would not give him very much credit; that one of his notes had matured and was unpaid; that M. H. Cook wished it extended; and wished to get some more lumber; that plaintiff would not extend the note, or sell any more lumber without he was furnished some security; that H. M. Cook, being unable to offer any other security, without any authority from his wife, offered to have her sign the note, it being known previously, or was then made known to the plaintiff, that she had a separate estate; that plaintiff agreed to accept said security, went to his attorney and had the note in question drawn with the express purpose of charging her separate estate, and then to deliver it to Mr. Cook to be signed by himself and his wife; that Mr. Cook presented it to his wife just as he was leaving the breakfast table to go to his business, no one else being present; that she then signed it, but was not aware until after this action was brought that there was a clause in it specially binding her separate estate for the payment of it; that by far the largest part of this note represented the principal and interest of the old note that was due and unpaid, and the remainder was for the small amount of lumber which was furnished at the time Mr. Cook agreed to get this note signed by his wife; that the plaintiff never met or had any dealings with Mrs. Cook directly; and that no part of this lumber, the value of which was included in the old note, or which was furnished when this note was agreed on between plaintiff and Mr. Cook, went into or was used for the benefit of Mrs. Cook's separate estate.

Such being the testimony, the question is squarely presented, whether or not a wife's separate estate is bound for the payment of a promissory note which she has signed simply and solely as a surety for her husband, and to pay a pre-existing debt of his extended by means of such a note, neither she nor her separate estate having received any direct benefit from the original indebtedness. No case exactly like it has been decided by our supreme court, all the cases heretofore passed by that court lacking the important feature of this case, namely, an express declaration in the instrument itself of an intention to charge her separate estate; and in all those cases the court had to infer or imply such an intention from the circumstances of the case, or the acts and declarations of the party whose property was sought to be charged, and to support such inference or implication, the court, in every instance, had to find that the contract sought to be enforced was for the benefit of the wife or her separate estate.

In the case at bar this intention being unequivocally expressed in the note itself, it cannot be contradicted by any testimony, because such testimony would contradict a written instrument, and because Mrs. Cook cannot testify as to her intention when signing the note, the only other person then present being her husband.

Nor can it be reasonably claimed, or if claimed, the testimony will not bear it out, that any fraud or imposition was practiced on Mrs. Cook by the plaintiff, or that Mr. Cook in getting her signature acted as the agent of the plaintiff, and not for himself. Mr. Corwin did only what any business man had a right to do, namely, demand security for the debt if it was to be extended, or more lumber sold, and, if satisfied with the signature of Mrs. Cook and the charging of her separate estate, when it was offered by her husband, even without her authority, he had a right to give the note to Mr. Cook to be signed, and to accept it when signed by him and Mrs. Cook. He was not bound to inquire what took place between her and her husband when she signed it, but he had a right to presume, when he saw her signature to it, that she knew what she was signing, and that she intended to and did charge her separate estate if she had power so to do.

And this brings us to the main question in the case, namely, had she, a married woman, the power to charge her separate estate as surety for her husband for the payment of his pre-existing debt?

The case of *Williams v. Urmston*, 35 O. S., 296, is nearest the case at bar of any decision I have seen, and is, I think, decisive of it, the only points of difference between the cases being, that in *Williams v. Urmston* there was no declaration of an intention to charge the separate estate of the wife, while there is such a declaration here; and in *Williams v. Urmston* there is testimony tending to show that the credit was partly given on the faith of the wife's estate for the goods charged on the account which was subsequently extended by the note given by the husband and wife, and that the wife derived some immediate benefit from the goods purchased; while in the case at bar, there is no question but that the credit of the wife's estate was not relied on when the lumber was sold, nor did she derive any direct benefit from the credit given her husband in payment thereof, nor in the use of the lumber, but the extension of the payment of the old note was made solely on the faith of her separate estate.

The syllabus of *Williams v. Urmston* is as follows:

"1. A married woman having separate estate, may charge the same in equity, by execution of a promissory note as surety for her husband or another.

"2. Where a married woman, having a separate estate, executes a promissory note as surety for the principal maker, a presumption arises, that she thereby intends to charge her separate estate with its payment. And a court of equity will carry such intention into effect by subjecting such estate to the payment of the debt, in the mode prescribed by the statute."

Judge Boynton, in his decision, says: "The power of a married woman to bind her separate estate, in equity, for the payment of a promissory note, on which she becomes surety, although denied in *Perkins v. Elliott*, 23 N. J. Eq., 526, is sustained by a great weight of authority. It rests on the principle, now well settled in courts of equity, that as respects her separate estate, she is to be treated as feme sole to the extent of her power of disposition over the same, and as fully capable of binding it by engagements entered into in respect to it as if the common law disability of coverture were removed. * * * Any engagement that she could enter into, were she sui juris, and by which she could create a debt, binding at law, she may in equity charge upon her separate estate, unless in so doing she exceeds the limitation, if any there be, upon the *jus disponendi*. Pollock on Principles of Contracts, 73. * * * But when she executes a note, either as principal maker or surety, and has not been deceived in so doing, nor subjected to any undue influence, we think a just inference arises that she thereby intended to deal on account of her estate, and to bind the same in payment of the note, and that as the necessary result, a court of equity will give effect to such intention by subjecting the estate to the payment of the note in the mode prescribed by the statute for enforcing claims against the estate of a married woman. Her liability, or rather that of her estate, does not depend on whether or not the debt incurred on its account is beneficial to her or otherwise. If made, and no fraud or imposition is shown, the court cannot refuse relief from the mere fact that the engagement entered into proves unprofitable and injurious.

From this decision and the authorities therein cited, it clearly follows that Mrs. Cook had the right to charge her separate estate, by signing as surety for her husband, a note given for a pre-existing debt. And from the fact that her intention to charge the separate estate is distinctly declared in the note, and that no fraud was practiced upon her, it must be conclusively presumed that such was her intention. And the note being unpaid, the plaintiff is entitled to have the same declared a lien upon such separate estate and have the same sold for its payment; and he is also entitled to personal judgments against both Mr. and Mrs. Cook.

The decree will be prepared accordingly.

DEVISE WITH POWER OF SALE.

6

[Hamilton Common Pleas Court, 1882.]

†SARGENT, Executor, v. SIBLEY.

1. Under an authority in a will to executor to invest, manage and control the estate as in his judgment will be best calculated to combine safety with productiveness, the executor may make contracts for the sale of unproductive property.
2. A petition in a suit to enforce such a contract must allege, that plaintiff could deliver possession at the time of tendering deed.

†For decision of district court dismissing petition in this case, see 6 Dec. R., 1219; (s. c. 13 Am. Law Rec., 33.)

Demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action.

The petition alleges that plaintiff is the executor of the estate of Daniel B. Sargent, who died seized of certain real estate on College Hill, in this county: "that by said will the said Daniel B. Sargent gave and devised to plaintiff and his heirs all his property, real and personal, in trust for diverse purposes, and after providing for the payment of debts, funeral expenses and costs of administration, the said will vested in plaintiff full power and authority to invest, manage and control the residue of said estate in such manner as may in his (plaintiff's) judgment be best calculated to combine safety with productiveness;" that said real estate described in the petition is unimproved and unproductive, and that, in plaintiff's judgment, it became advisable to sell the same and invest the proceeds thereof, said course being best calculated to combine safety with productiveness in the management of said estate and of his trust. That in pursuance thereof he entered into a written agreement with the defendant to sell him said property for \$6,000; and that subsequently to the making of said agreement, he applied to the probate court for leave to sell said property, and that thereupon the court ordered such sale for a sum not less than \$5,000; that on the following day he tendered the defendant a deed therefor, and demanded payment in accordance with the terms of their said agreement, but that the defendant refused to accept the same or make payment for said land, and he has ever since so refused, and he prays for specific performance of said agreement.

The defendant demurs to the petition on the ground that it does not state facts sufficient to constitute a cause of action.

The points raised on the demurrer by counsel for defendant are:

1. That the plaintiff has no right to sell, by virtue of the terms of the will, and can only sell, as an ordinary executor, to pay debts, and that it is admitted this sale is not made for the purpose of paying debts, but simply for re-investment of the proceeds.

2. That, as the written agreement of sale provided for payment only on delivery of possession of said land, it is necessary that the plaintiff should show he had possession, and actually gave or tendered it before demanding the purchase money.

Counsel for plaintiff maintain that the executor, as trustee, had full power to sell under the language of the will, and that if he had not such power, he was authorized to do so by the proceedings in the probate court; and that by the tender of the deed, he tendered possession, and that no allegation is necessary that he was then in possession.

It seems to me that a fair and reasonable construction upon the language of the petition which I take to be the language of the will vesting in the plaintiff "full power and authority to invest, manage and control the residue of said estate in such manner as may in his judgment be best calculated to combine safety with productiveness," would imply a power of sale, whenever and upon such terms as to the trustee seemed best; and that such must have been the intention of the testator. This construction is also rendered more reasonable by the fact that the property in question is unimproved and unproductive, and must be sold in order "best to combine safety with productiveness."

While there are numerous authorities sustaining the construction I have given, the case of *Livingston v. Murray*, 39 How. Prac. (N. J.), 102, is specially in point.

But if there was no authority under the will to make the sale, such defect was cured by the proceedings in the probate court; and I am of opinion that such sale would not necessarily have to be confirmed by the court.

As to the second ground claimed by counsel for defendant, that there should be an allegation of ownership and possession at the time of tendering the deed and demanding the purchase money, it is well taken; as it is shown by the petition that said agreement was made on the 18th of March, 1882; that the authority to sell from the probate court was obtained on the 12th of April, which was to sell at not less than \$5,000, and that the tender of the deed and demand on the defendant was made on the 13th of April, and it by no means follows that the court and the defendant are bound to assume that plaintiff did not, between the 18th of March, and the 13th of April, make some sale or contract with respect to said land which did or might affect his title to or possession of said land, and which would interfere with his power to deliver possession to the defendant under said agreement.

The demurrer will therefore be sustained with leave to file amended petition within twenty days.

FRAUDULENT CONVEYANCE.

7

[Hamilton Common Pleas Court, 1882.]

GEORGE MASON v. PETER EICHELS AND WIFE.

When property is purchased and paid for by a husband, but conveyed to wife, to defraud creditors, it is not such a transfer or conveyance as is "utterly void and of no effect," under section 4196, Revised Statutes; nor is the remedy to be sought under 6344, Revised Statutes, regulating assignments for the benefit of creditors; but by action in the nature of creditor's bill.

CONNOR, J.

Demurrer to petition on the ground that same does not state facts sufficient to constitute cause of action.

The petition alleges the recovery of a judgment by the plaintiff against the defendant, Peter Eichels; that the same is unsatisfied and unreversed; that an execution thereon was levied on certain real estate, standing in the name of his wife; that said Peter Eichels is insolvent and has no property liable to execution, whereof plaintiff can make the amount of his judgment; that said Peter Eichels purchased the real estate levied on, paid the consideration therefor, "but, with the intent and for the purpose, as the said A. M. Eichels then well knew, (and without consideration from her), of delaying, hindering and defrauding this plaintiff out of his claim, and others, the creditors of said Peter Eichels, out of their just demands and claims against him, caused the title to said real estate to be conveyed to said A. M. Eichels.

Wherefore plaintiff prays, said deed * * to said A. M. Eichels be declared null and void, and be wholly set aside, and said real estate ordered and adjudged to be appraised, advertised and sold, and the proceeds be applied to the payment of plaintiff's judgment.

The defendant's counsel, in their brief, seem to claim that the petition is defective, because the sheriff has not levied on the property, standing as it did, in the name of Mrs. Eichels; and because there is an inconsistency between the allegation, that Peter Eichels was insolvent and had no property subject to execution, and the allegation that this real estate really belonged to him. Ordinarily, of course, the sheriff can only levy an execution upon property standing in the name of the judgment debtor, but in the case at bar this levy is not such an invalid act as would make the petition herein defective, for the reason hereinafter stated. As to the alleged inconsistency of the allegations of Peter Eichel's insolvency and his ownership of real estate in question, it is sufficient to say that both can be construed together as being a statement that he had no other property than that standing in his wife's name, (but which is claimed to be really his), which was subject to execution, and without his ownership in that he would be wholly insolvent.

But an inspection of the petition shows that it is defective, because of the remedy sought. It is evident that the pleader must have deemed such a case of alleged fraud in the taking the property in his wife's name to be one that came under section 4196 Revised Statutes, (Section 2 of the Statute of Frauds), and whose remedy was to be sought in setting aside the deed as being made to defraud creditors, and which remedy is to be sought under section 6344 Revised Statutes. (Section 17 of the old act regulating assignments for the benefit of creditors.)

But it was decided in the case of *Shorten v. Woodrow*, 34 O. S., 645, that said section 17 of the Assignment act did not "enlarge the class of

transfers or conveyances, which section 2 of the Statute of Frauds declares "shall be deemed utterly void and of no effect." Its purpose was to supply a new remedy to creditors, by authorizing the fraudulent conveyance or transfer to be converted into an assignment at the suit of a creditor, and the fund to be distributed if the creditors so elect, in the same manner as if the debtor had formally assigned the property conveyed for the equal benefit of all his creditors. But the conveyance which lays at the foundation of the proceeding, and upon which alone the statute was designed to operate, is the fraudulent conveyance of the debtor himself."

But the court there held that neither statute applied to a case where the property was transferred by the orders of the husband to a third party and by him to the wife; and, of course, would have no application to a case like the one at bar, where the transfer is alleged to have been made by order of the husband from the party of whom the purchase was made, directly to the wife.

In that case it was also held that where a creditor had levied on the property as that of the husband, such levy should not be disturbed, since it tended to give priority; so it will not be disturbed in the case at bar.

While the facts set out in the case of *Combs v. Watson*, 32 O. S., 228, would tend to show that the views of the supreme court were then different on this question from the ruling established in *Shorten v. Woodrow*, supra, yet it is sufficient to say that *Combs v. Watson*, supra, went off on another point, and if at all decisive on the question at issue here, was overruled by *Shorten v. Woodrow*.

Applying the principle established in *Shorten v. Woodrow*, it is evident that the pleader has asked in the petition for a remedy, when he asks the deed to Mr. Eichels to "be declared null and void and be wholly set aside," that he does not really wish, as the result of his prayer, if it was granted, would be to put the property back in Thornbury and wife, and where the creditors of Eichels could not get at it. His petition should be in the nature of a creditor's bill, setting up substantially the facts already alleged, and asking that Mrs. Eichels be held to hold the property in trust for Eichels, and subject to the payment of his debts, and praying for a sale of it, and the application of the proceeds so far as may be necessary to the payment of plaintiff's judgment, etc.

The demurrer will therefore be sustained, and twenty days will be allowed to file amended petition.

8

ATTACHMENT.

[Hamilton Common Pleas Court, 1882.]

BUCHANAN et al. v. MITCHELL et al.

1. Indebtedness due a co-partnership cannot be garnished to pay the separate debt of either partner, nor the debt of another firm of which a member of the first co-partnership is also a member.
2. Answer of garnishee will be held conclusive in absence of objection within reasonable time, and in such case if no indebtedness is shown by said answer, attachment may be dismissed and garnishees discharged upon motion of the defendant.

CONNOR, J.

Motion to dismiss attachment and discharge the garnishee.

This action was brought by the members of a late firm against the members of another firm that had been dissolved, for a balance due on

an account for grain and other merchandise, and money in the hands of a third firm was garnisheed, on the ground that one of the defendants was a non-resident of Ohio, and that he was a member of the firm to whom the garnishees were indebted.

The grounds of the motion to dismiss the attachment and discharge the garnishees, are three in number, viz:

1. "That the claim sued for is a joint liability of defendants," and that therefore the separate property of one of the defendants cannot be attached, nor an indebtedness to him be garnisheed.

2. "One of the defendants is not a non-resident of Ohio, and was not when the attachment was issued;" and the indebtedness sued on being a joint obligation the non-residence of one of the defendants will not authorize the issuing of an attachment, but all must be non-residents to authorize such action.

3. "That the garnishees do not owe either of the defendants a separate debt, due to either separately, or both jointly;" and that therefore the amount due by the garnishees cannot be taken and applied to the payment of plaintiff's claim.

The answer of the garnishees discloses that they are indebted neither to F. J. Mitchell nor R. T. Sandusky directly, the defendants in this action, but are indebted to the firm of J. B. Sandusky & Co., in the sum of \$378.87, of which firm it is claimed R. T. Sandusky is a member.

As to the third ground of the motion the supreme court, in the case of Myers v. Smith, 29 O. S., 120, held that

"An indebtedness due to a co-partnership cannot be garnisheed in the hands of the debtor to pay the separate debt of one of the partners."

And therefore, in the case at bar, the indebtedness being shown by the answer of the garnishees to be due not to R. T. Sandusky, but to J. B. Sandusky & Co., it cannot be garnisheed to pay either the separate debt of R. T. Sandusky, whether or not he be a member of the firm of J. B. Sandusky & Co., nor the indebtedness of F. J. Mitchell & Co., of which firm he was a member, and the attachment should be dismissed and the garnishee discharged, if the allegations of the answer of the garnishee are uncontradicted. While it is settled by the decisions in Railroad v. Peoples, 31 O. S., 537; Myers v. Smith, 29 O. S., 120, that the plaintiff is not bound by the answer of the garnishee that he has no property of, nor is indebted to the defendant, but if not satisfied with the answer, may proceed against the garnishee by action, and while it is so settled by these cases that an attachment will not be discharged simply on the ground of such an answer of the garnishees; yet, as the answer of the garnishees is said to have been prepared by the attorneys of the plaintiff and with their full knowledge of its contents, (and, as this answer is in the same handwriting as the petition, the claim seems to be well founded), and as no objection to said answer nor action based upon it has been taken by the plaintiffs, I think it is safe to assume that the plaintiffs do not dispute the statements of said answer, and its statements may be taken as correct, and the attachments should be dismissed and garnishees discharged under the authority above cited.

As the attachment is to be dismissed and garnishees discharged by reason of the third ground mentioned in the motion, it is unnecessary to pass on the other grounds.

Motion to dismiss attachment and dismiss garnishees granted, and thirty days allowed plaintiff to file petition in error.

COUNTY COMMISSIONERS—ROADS.

[Superior Court of Cincinnati, 1882.]

†AMZI MCGILL v. COMMISSIONERS OF HAMILTON CO.

1. The act of April 20, 1881, (78 O. L., 403,) authorizing the commissioners of Hamilton county to construct a road, is not unconstitutional, as a special act conferring corporate powers.
2. Notwithstanding that the law makes it conditional to the exercise by the commissioners, of the authority granted, that a petition must be filed signed by a majority of the freeholders along the road, the commissioners have the authority to proceed, upon a petition not so signed.

HARMON, J.

An injunction was allowed in April against the county commissioners to prevent them from proceeding to establish, lay out and construct a county road under a special act, 78 O. L., 403. A motion has been made to dissolve the injunction, and evidence has been offered, consisting of the records of the county commissioners, and affidavits. The two grounds upon which the restraining order was asked for originally, and upon which it was granted, were that while the law makes conditional to the exercise of the authority therein granted to the county commissioners the filing of a petition signed by a majority of the tax payers along the line of the road, the Board was acting upon a petition which was not so signed; second, that the act itself is unconstitutional, because it is a special act and confers corporate power. By a supplemental petition it has been averred that since the allowing of the former restraining order, a new petition has been presented to the county commissioners, which, it is now conceded, does contain the names of a majority of all the property holders, but certain informalities and defects in the proceedings are set up, and furthermore the fact that the act is unconstitutional for the additional reason that it appropriates money raised for one purpose to another.

In the first place, as to the contention that acts of this sort are to be strictly construed. It is undoubtedly true that all acts which purport to give power against the citizen, to take his property, directly or indirectly, by levying an assessment upon it, are to be strictly construed, but I think that the same reason does not apply to a law whereby the supreme authority of the State directs one of its own agencies to execute its will without interfering with private property directly or indirectly. The county commissioners compose a body, created by the state for the purpose of its own convenience, and as between it and the state when no individual's rights are affected, the authority conferred ought to have the same construction which the authority of any principal to his agent is to have. Of course it must fairly appear that the authority is given. But there is no reason why the extreme strictness, which has sometimes been applied when a corporation or some public authority is proceeding to invade the rights of the citizens, should be applied where the state directs its own agent to proceed with some public work.

The law is certainly not unconstitutional on the ground that it confers corporate power, because, as suggested by Judge Brinkerhoff in *State v. Cincinnati*, 20 O. S., 18, bodies like defendant are not corporations; for some purposes they are considered as quasi corporations, but not in this regard. Counties and townships are not the subject of treatment in the chapter of the constitution in which the inhibition against conferring corporate power by special act is found, and I am unable to come to the conclusion that the use of the money in the road fund to build one road, although it may be a road not in contemplation at the time the tax is levied, is a violation of the constitution. The constitution provides that every law levying a tax shall state the purpose for which it is levied, and that the money shall not be applied to any other, but when taxes are levied for road purposes, that does not mean that they must be expended upon roads in existence at the time. New roads may be petitioned for under the general law; new roads may be authorized under special laws; and I cannot see as the state is to pay the expenses of such roads from some fund, what fund it could pay it from except the road fund. The right to make a special law of this sort must be conceded, it seems to me, from an examination of the history of our legislature and the constitution. To say the money from the road fund cannot be used, is to say there is none which can.

Now, those grounds having failed, it is sufficient to say, as to these other matters, that I do not think that a court should interfere with public officers on the ground

†For district court opinion denying injunction, see *post*, 457. A different conclusion was arrived at in this case, by the supreme court. See opinion, 39 O. S., 58.

of mere informality. They are not required to have viewers to make this road, because the county commissioners are themselves, in a sense, the viewers according to the act, and if the condition of the law has been complied with, and the law itself is valid, the statute authorizing the tax payers to maintain such suits does not authorize them to proceed on the ground of mere informality in the proceeding. Revised Statutes, sections 1277-78.

I see nothing in the evidence to lead me to the conclusion that the county commissioners have violated the restraining order because, as I have said on a former hearing, the fair construction of it was that it stopped the proceeding in which they were then engaged. But, even although it may be a violent presumption in some cases, as it is contended by one side of the case, yet we must always presume that the legislature is acting for the public interest in passing the law, and that the county commissioners are so acting in proceeding under it. When the legislature says to them: "You may have authority to build that road," solely on the condition that a majority sign a petition and may pay for it out of the road fund, there is no authority in the court to go behind their action and inquire what the motive may be, directly or indirectly, or seek some pretext, some informality of the proceedings upon which to enjoin them. If the commissioners have the authority, and the conditions are complied with, unless it appears that they are going unlawfully to do something, which may be made hereafter to appear, they should no longer be restrained.

What I have said will apply to the allegation that they have not got the right of way, because the Kirby heirs have not signed. It is easy to see from the plat, which is not the one the surveyor has been authorized to make, but the old one which has been abandoned, that that difficulty can be easily obviated. It does not appear that they are going to build the road from that old plat; it is only a matter of changing the point of divergence of the road from the line of the Badgely road a few feet to avoid that. If they do that, no objection can be made: if they do not, if that is ground for injunction, when it appears that they are about to act, it is time enough to consider it.

Now, as to the termini. The county commissioners, through their public authority, by virtue of this act, are authorized to build a road from the corporation line, where the Kirby road ends up to some point in Mt. Airy. It is claimed that instead of building a new road between these termini, the county commissioners propose to use, for a short distance, a county road known as the Badgely road. Well, that road is already in the control of the commissioners; it is the county's road, and when the legislature has plainly shown its intent to limit the expense of opening this road, it would be a very strict construction to say the county commissioners could not use their own road, or a portion of it, under the general grant. The legislature must be presumed to have known that road was there. When they authorized the defendants to build a road from one point to another, it seems to me that the power is clear. While the main object is to build the road between two points, by the route they find the "shortest and best," it seems to me a very strict construction that the county cannot use a portion of its own road, if, in making the survey which the legislature authorizes, it is found necessary to the "shortest and best" route. It is not an abandonment or an improvement of that old road. It is a mere incident of the new one.

After a careful examination of this case, while counsel have certainly been ingenious in finding defects and objections to the proceedings, I do not find anything at this stage of the case to justify me in stopping the preliminary steps toward this work, which, as I have said, must be presumed to be for the public good. Whatever the private interests may be, which are seeking to hasten or to prevent the enterprise, my duty is clear. If the law is constitutional, and the conditions have been complied with, I see no reason why the county commissioners should be further restrained. If, when this survey, which has already been ordered, is made, it should appear that they are about to use some money for right of way, if it should appear that they are going to do anything else wrong, certainly another injunction may be had, but I think that the restraining order ought to be dissolved to permit them to go on, that all may see what it is they are going to do. Let this engineer make his report, and let the other proceedings be taken, and then before the bids are received, or any money is taken out of the treasury to build this road, a further application may be made if there be grounds for complaint by relators.

Motion to dissolve temporary restraining order granted.

O'Connor, Glidden & Burgoyne and E. H. Kleinschmidt, attorneys for plaintiffs.

Chas. Evans, Storer & Harrison, Ward & McMakin, attorneys for defendants.

SHERIFF'S RETURN OF SUMMONS.

[Superior Court of Cincinnati, 1882.]

M. F. GOODRICH v. T. J. HAMER et al.

1. A motion to set aside a sheriff's return, attacks the truth of the facts stated in the return, and not their sufficiency; and if they are not shown to be untrue the motion will not be granted.
2. A motion to quash the service attacks the sufficiency of the return and calls for a decision as to whether, admitting the return to be true, the defendant has been legally served.
3. Where the return of the sheriff states that he has served the defendant with a true copy of the writ, it is equivalent to a return of service by a copy "with the endorsements thereon."

WORTHINGTON, J.

This action is submitted upon a motion to set aside the return of the sheriff of the service of summons and to quash said service for the reason that said return does not show that a copy of said summons with the endorsements thereon was served on the defendant. The return made by the sheriff as endorsed on the summons is: "1882, May 18, served the within named" defendants, "each personally with a true copy of this writ." The writ is the ordinary summons, with an endorsement, stating that it is an action for the recovery of money only, and naming the amount claimed.

It will be observed that the motion is two-fold: (1.) To set aside the return; and (2), to quash the service.

The return of a sheriff is a statement of facts. A motion to set aside the return attacks the truth of the facts stated in the return, and not their sufficiency. In the absence of anything showing the return to be untrue it will not be set aside. No such showing is made in this case, so this branch of the motion is not well taken.

The motion to quash the service, however, does attack the sufficiency of the return and calls for a decision as to whether the defendant has been legally served, admitting the return of the sheriff to be true.

The action is one for money only. In such case there must be endorsed upon the summons the amount claimed, Revised Statutes, section 5037; and a copy of such summons and endorsement must be served on the defendant, Revised Statutes, section 5042. If it appears affirmatively that the endorsement is lacking either upon the summons or upon the copy served upon the defendant, no judgment can be rendered against the defendant, unless he appears in the action; *Finckh v. Evers*, 25 O. S., 82; *Hamilton v. Miller*, 31 O. S., 87. Consequently in such case it would be proper to quash the service at any time before appearance entered; for though a service in name, it is none in law, and quashing the service is merely declaring its legal effect.

In the present case, however, neither of these facts affirmatively appears. The summons has upon it the endorsement required by the Revised Statutes, section 5037. The only evidence before me as to the contents of the copy given to the defendant, is contained in the return of the sheriff. This return says that the defendants were served "personally with a true copy of this writ." The writ alluded to is the writ of summons contained in the above endorsement. The endorsement is as much a part of the writ as the summons itself because it is something which the law requires to be placed upon the writ. Therefore it was that under the original code the copy served upon the defendant must contain the en-

dorsement, as held in the case above cited; and this, although section 62 of the code only required the service to "be by delivering a copy of the summons." The interpolation in the revision of this section of the words "with the endorsement thereon," after the word "summons," Revised Statutes, section 5042, may require hereafter a more restricted meaning to be given to the word "summons," but the writ commanding summons to be made remains the same; it consists in actions for money only, now as before, of two parts. (1) The summons strictly so called, being a command to the sheriff to notify the defendant that he has been sued, and must answer at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; and (2,) the endorsement of the amount claimed, Revised Statutes, section 5037. And when the sheriff returns that he has served the defendant personally with a true copy of the writ, he returns that he has served him with a true "copy of the summons, with the endorsements thereon."

This is all that the defendant claims the return, under Revised Statutes, sections 5041 and 5042, must show; and as this appears, the motion to quash the service must be overruled.

MUNICIPAL CORPORATIONS—RAILROADS.

15

[Hamilton District Court, 1882.]

Johnston, Smith and Moore, JJ.

CLEMENT L. ENGLISH v. TRUSTEES OF CINCINNATI SOUTHERN.
R. R. et al.

1. The City of Cincinnati is the proper party to sue, for injury to abutting property, caused by the laying down of the track of the Cincinnati Southern Railway through its streets and avenues.
2. It is not sufficient to bar recovery that the abutting lot owner has left direct access to the street immediately in front of his property; if the public travel has been excluded therefrom by the act of the defendant in constructing or suffering an obstruction to be constructed thereon. He is entitled to direct unimpaired access from his lot to the portion of the street in front in use by the general public.
3. If, in order to reach that portion of the street in use by the general public, he is compelled to go to a point beyond the lines of his lot, either to cross over or under such obstruction, he suffers thereby an inconvenience and injury not common to the public, for which he is entitled under the constitution to compensation.

ERROR to the Court of Common Pleas.

JOHNSTON, J.

This action was brought to recover the sum of \$20,000 damages, alleged to have been sustained by the plaintiff, by reason of the construction in front of his property on McLean avenue and Court street in this city, of the Cincinnati Southern Railway. The plaintiff alleges, in substance, that about 1870 he purchased one of the lots, of which he was owner at the time of the alleged grievance, and in 1874 he purchased twelve other lots, making in all thirteen lots, at the southwest corner of McLean avenue and Court street, the lots together having a frontage on the west side of McLean avenue of 136 feet, and running back along the south side of Court street, 325 feet.

That about the year 1874 McLean avenue was graded as it was laid out, 100 feet in width, leading from Eighth street northward to Liberty,

at a large expense, and according to an established grade. A portion of this expense was assessed upon the property abutting, and thereafter, and before the track was laid upon this avenue, he, carrying out his design to use it for manufacturing purposes, erected thereon a stone and brick building, some four or five stories in height, for the use of himself and tenants, in conducting the manufacturing business, embracing that of manufacturing bellows, furniture and other articles, and so continued to use the property. He avers that Court street, upon the north side of his property, was not improved westward of McLean avenue, so that his means of ingress and egress, or, in other words, his access was limited to the frontage upon McLean avenue, and depended thereon for his means of reaching the city proper.

In the fall of 1877, in the months of September, October and November, he avers that the trustees of the Southern Railway, with the sanction of the city of Cincinnati, proceeded to construct thereon, between Eighth street and a point north of Court street, which embraced his property, a trestlework upon which the track for the Southern Railway was laid down; that this trestlework descended from Eighth street, and when it reached his property on the corner of Court and McLean avenue, it stood at a height of from three to four feet in front of his property, not upon the center line, but upon the side of the street nearest his property; that the direction of the trestlework was that of a curved line, starting in at the sidewalk at Eighth and McLean avenue, swinging out into the center of the street and bearing then towards his property, and after passing Court street, finally running into the sidewalk again, leaving his property virtually in the arc of a circle.

In February, 1878, his building erected thereon was burned. Before he rebuilt he waited upon the defendants and offered to sell them his property, but they declined to purchase. Thereupon he rebuilt and added another building alongside, and resumed the occupancy thereof, and in the same manner substantially as it was occupied before. He avers that he made claim for damages to these defendants, but they refused to pay him anything. He avers by reason of this structure in front of his property, that on account of the way in which it is constructed, touching the sidewalk at points on either side of his property, that public travel was substantially cut off from that portion of the street immediately in front of his property, and driven to the eastward side thereof, beyond the railroad track, and that in order to gain access to his property with vehicles of any kind, or to get out of his property and away from it with a vehicle of any kind, he was obliged to go north to a point on Court street where the railroad reached the grade of McLean avenue, and a crossing was prepared, or to go south from his premises to a point between Eighth and Ninth streets, where he could find the trestlework high enough to permit a vehicle to pass under to the other side—the traveled portion of the avenue; that by reason of this he claims that he was damaged in the reasonable use and enjoyment of his property; that it placed him at a great inconvenience and disadvantage; that he sustained thereby great loss, and he avers that beyond this crossing on Court street, there were switches, and that in conducting the business of this railway in making up its trains, cars were almost continually being backed on the trestlework in front of his property, both by night and day, closing up, a great portion of the time, the crossing over which he was obliged to pass to reach the traveled

thoroughfare upon the opposite side. By reason of all which he claims he sustained damages in the sum of \$20,000.

The trustees answered and denied any liability on their part to pay these damages. They admitted the construction of the track, but pleaded the legislative enactment conferring authority upon them to take possession of this street, or any other street that might be deemed necessary in constructing this railway. They averred that they were acting as trustees; that the city of Cincinnati was the beneficiary, and the party to pay for this improvement; that they were simply authorized to borrow money upon the bonds of said city, to procure the rights of way, and attend to the construction of the road, to be paid for by bonds issued by said city, and acting simply in this capacity they averred that the money entrusted to their care was in no sense to be used for the purpose of paying damages, if any such are sustained by Mr. English, being damages as for consequential injuries, and not damages for the purchase of rights of way, a power admitted to be vested in them.

The city answered that it was not liable, for the reason that the track was put down by the trustees of the Cincinnati Southern Railway, against its solemn protest. It admitted the construction of the railway track as described in the petition, but denied any liability thereof, and closed with a general denial of all the facts not specially admitted. Leave was granted, after the trustees had filed an amended or supplemental answer, to withdraw a portion thereof, and also a portion, to-wit, the second defense set forth in their original answer, and thereupon the plaintiff demurred to the remaining portions of the original answer, and to the part left of the supplemental answer, upon the ground that they did not present a defense on behalf of the trustees. The court overruled the demurrer, and the plaintiff not desiring further to plead as against the trustees, a final judgment was entered on their behalf, dismissing them from the action at the cost of English, to which he excepted.

Thereupon the case proceeded to trial against the city, and a motion for a new trial having been made upon the ground that the verdict was contrary to the law of the case, and contrary to the evidence, and that the court erred in its charge to the jury, and for other errors occurring during the progress of the trial. A judgment was entered for the city, to which the plaintiff also excepted, and it is sought here to reverse that judgment. There is also a prayer for the reversal of the judgment in favor of the trustees, dismissing them from the action.

First, as to this last prayer that the court erred in dismissing the trustees from the action. From the answer of the trustees and the law through which they derived their power to act in the premises, and especially after what has been said by the supreme court in *Walker v. Cincinnati*, 21 O. S., 55, 56, touching the character in which they act in connection with the city in the constructing of this railway, it is the opinion of the majority of the court that they were acting simply in the capacity of agents for the city, and not as principals; that the city was and is the beneficiary, and acting in this capacity, simply in the capacity of agents, the court did not err in dismissing them from the action, the liability, if any, in the opinion of the majority of the court, attaching to the city. As to that branch of the case, therefore, the judgment of the court below must be affirmed.

Now, coming to the consideration of the judgment of the city against English. The record in this case presents a question of the right of lot

owners in streets upon which their property abuts. Over twenty-five years ago it was distinctly established by our supreme court, in the case of *Crawford v. The Village of Delaware*, 7 O. S., 459, that the abutting property holder, where he had improved his property to the established grade, possessed certain rights in that street covering questions of ingress and egress or access that were peculiar to him and distinct from the public right in that street, which right was, as to him, as much property as the lot itself. This decision has been followed without any variation from that time to this, notwithstanding the very pointed criticisms at times of the courts of other states, and perhaps we might say the sharp antagonism of the supreme court of the United States. The case referred to may be found in the 99th United States, *The Transportation Company v. The City of Chicago* in which Justice Strong took occasion to remark, in deciding this question of the access and the right of abutting proprietors in a public street of a corporation, "that the state of Ohio was a solitary exception in such cases, the authorities all being the other way," against the right of the abutting proprietor to recover for an injury by a public improvement laid down upon the surface of the street, no matter of what character, so that room enough be left for ordinary public travel.

It would be a work of supererogation to refer to all the cases in which this principle of our supreme court has been referred to since the *Delaware* case. Perhaps the most pointed affirmation of the doctrine is to be found in the case in 14 O. S., 523, *The Street Railway v. The Village of Cumminsville*. But a few days ago the supreme court was again called upon to pass upon the question, and they stand as firmly by the principles laid down in the *Delaware* and in the *Cumminsville* cases as though those decisions had been announced but the day before. I refer to the case in the 37 O. S., decided March 28, 1882, case of *The Scioto Railway Co. v. David Lawrence and others*, which was an action to enjoin the obstruction of a street sought to be occupied for the purpose of a railway before the railway company had proceeded by condemnation to acquire the right to do so, the municipality, under the statute, having already granted the right to the railway company, under proper restrictions. Judge White, announcing the opinion, refers to the *Cumminsville* case, and adopting its language, says: "The established doctrine in this state is that the abutting lot owners have a peculiar interest in the street which neither the local nor the general public can pretend to claim, a private right of the nature of an incorporeal hereditament legally attached to contiguous grounds, and the erections thereon are incidental title to certain facilities and franchises assured to them by contracts and by law, and without which the property would be of little value. This easement appendant to the lots, unlike the right of any lot owner in the lot of another, is as much property as the lot itself. In speaking of the rights of the public in the street, in the case already referred to, the court (on page 549), says: It (the public), may regulate and modify the manner of using the street by the public at large, and may, undoubtedly, devote its own interest to the maintenance of new structures placed in the hand of other agencies, and calculated to enlarge the general purposes for which the highway was originally constructed. But where these new structures and new modes of travel devolve additional burdens upon the land, and materially impair the incidental rights of the owner in the highway, they require more than the public has or can grant, and the de-

ficiency can only be supplied by appropriating the private right upon the terms of the constitution.

Thus the right of the abutting property holder has, as will be observed, at a very recent date, been again affirmed without qualification by the supreme court, and stands as a well settled law of this state.

The very decided weight of evidence in this case is to the effect: That in the construction of the tract in front of the plaintiff's property it forms almost the arc of a circle, touching where the sidewalk naturally would be at Eighth street, and swinging into the center of the street. As it passes the property of English it turns toward his property, leaving the center of the street, and at a point beyond Court street again touches, and in fact crosses that portion of the street upon which the sidewalk, if ever, must be laid down. That English's property is built on the line of the street; that the track in front of his premises averages from three to four feet in height, erected on wooden trestles; that nothing is able to pass out of the front of the bounds of his lot over across the trestle work, in the shape of a vehicle drawn by animals, nor foot travel even. The evidence conclusively establishes the fact that since the construction of the railroad in this shape, in front of his property, the public travel has been driven to the other side, the easterly side of the avenue, and passes there the railway track and the trestle intervening between the traveled portion of the avenue and his premises. The evidence establishes that directly in front of his property there perhaps is an open space of forty or forty-four feet in depth, between the front of his building, including the sidewalk, up to the west line of the trestlework, and room enough, according to the evidence, in which to turn, with care, a four horse team.

The evidence discloses the fact that in passing away from the property of English, being unable to cross over the railroad trestle in front of his property, he is obliged to leave the lines and frontage of his lot, and go north beyond Court street to a point where the railroad reaches the grade established for McLean avenue, and there cross into that portion of the avenue used by the traveling public. This, if he desires to go to points northward. If he desires to go southward, and then cross this street, to intersecting streets coming in from the east, he is obliged to pass beyond the frontage of his lot, and its lines, to a point near Ninth street, some hundred or more feet away, where the opening under the trestlework is high enough for the vehicle, such as it may be at the time, to pass without impediment, to the traveled highway, or portion of the avenue used by the public. In fact there is no dispute, no conflict in the testimony upon this point. It is simply, we might say, all one way.

Testimony as to the damage this party sustained by reason of the railway being constructed as it was, took a very wide range, but the clear weight of the evidence was that the man had sustained substantial damage. It was claimed, however, in argument, that inasmuch as the evidence showed that there was free and unimpaired access from his building into the street immediately in front of his property, between the front of his building and the trestle work of 40 to 44 feet, that because there was a passage way, by which he could get up to a point above Court street, and there cross into the traveled thoroughfare, or a passage way still wider, by which he could pass down on the westerly side of the avenue to a point near Ninth street and cross under, that although he may suffer inconvenience thereby, it was simply the same character of inconvenience that the public generally sustained in traveling upon that street; that as

to him it simply differed in degree and not in kind, and such being the case, he could not complain.

No exception well grounded as to the exclusion of evidence on the part of the plaintiff, was taken, but exceptions were taken to the charge of the court to the jury, and properly brought upon the record, and it is to the consideration of these the court has given a very careful consideration. The question in this case, as already stated, was a question whether or not English had been injured in his means of ingress and egress to and from his property; in other words, whether his access had been materially injured, so that he was entitled to recover damages therefor. Among other things the court charged the jury as follows: "The only right of the abutting owner, distinct from the right of the public, is that enough of the street shall be left to give passage for ordinary purposes to his lot, and that direct access from the lot to the street in his front shall not be rendered inconvenient or be impaired." * * * "The only question is whether passage way has been left by the avenue to plaintiff's lot, and whether access between the lot and the avenue, directly in front, is obstructed or impeded by the railway, or made less convenient than before. Only to the extent that passage-way has not been left, or that access between the lot and the avenue, directly in front, has been impaired, can there be compensation for loss of value to the property. For loss, except as caused by this, compensation must be sought at the hands of the legislature. The question whether passage-way has been left does not depend upon whether the railway has affected the convenience of travel. Inconveniences attend travel upon all streets where there are railways, especially steam railways. But all travel upon the street is subject to the same inconvenience, and while abutting owners may be compelled constantly to travel the street, and therefore in the use of their property be constantly subjected to inconvenience, the difference is in the degree, and not in kind. It requires inconvenience in kind, different from the public inconvenience, to give the plaintiff any claim for damages. If, for example, the track in McLean avenue were taken up, and under proper authority put down upon the next parallel street to the east, in the same relative position to the grade of that street, it would present the same obstruction to crossing. But the plaintiff in that case could not have damages, because of being compelled to drive south as far as Eighth street, or north beyond Court street, to make the crossing, or because of being detained at the crossing. For the same reason he cannot, in this case, have damages for the inconvenience of driving up, or down, by the side of the railway, or for the inconvenience of the crossing, or detention there, so long as passage way had been left for driving up or down. To hold that damages could be recovered in such case would, in effect, prevent the construction of a railroad upon a public street."

Now, if this had been a case similar in its facts to the Delaware case, and other cases that have gone to the supreme court, where the injury to the abutting owner was the cutting down in front of his improved property, or the filling up of the street immediately against his building, directly affecting his ingress and egress to and from his premises, the propositions of law here laid down would have proper application, but this question of access, of ingress and egress to and from an abutting owner's lot to the street, must, in some instances, vary with the circumstances of the particular case. It is not in every case that this right of an abutting owner to pass unimpeded from his lot to the street and from the

street to the lot, is in our opinion satisfied, where he is enabled to pass in fact from his lot to an open space, a portion of the traveled street, before the construction of the alleged obstruction. He has the right, when he passes from his lot, in going out, to pass directly on to a portion of the street, over which the public travel passes. If he is enabled to do that, and thereafter, in common with the public, he meets with an obstruction beyond his lot, or at any other point, that gives him no greater inconvenience than the ordinary traveling public, he cannot complain, but until he reaches, after passing from his lot, that portion of the street over which the general public do travel, he does not stand upon a level with the traveling public or the public at large, but in our opinion, suffers an inconvenience and damage not common to the public, but peculiar to himself as the owner of property abutting upon that street, an inconvenience that is not only different in degree, but different in kind. Now, the jury in this portion of the charge, were, in substance, instructed that if they should find that directly in front of the plaintiff's property there was free access, that the access was unobstructed, and that in passing from the lot he reached a passage way—sufficient for opposing vehicles to pass and repass, and that that passage way was a portion of the street in front of his property, he could not complain. As applied to the facts of this case, we think this portion of the charge too narrow.

We think the supreme court, in the case of *Hatch v. R. R. Co.*, 18 O. S., 92, 123, is authority for the position taken by this court. In that case the court below had instructed the jury, in substance, perhaps not so directly as in this case, that the injuries complained of by Hatch were such injuries as were common to the public, and he could not recover. It is proper to say that the facts in the Hatch case were these: He owned a farm below this city, in Delhi township. It had been cut asunder by the Whitewater Canal Co. and also by a turnpike that traversed it from one side to the other, near thereto, and parallel with the Ohio river. At right angles with the river ran a county road upon one side of his farm. Shortly before suit was instituted for damages by Hatch against this railroad company, the company had acquired the easement of the canal company to its bed, and proceeded to, and did lay down its track, and commence running trains thereon. Hatch commenced his action, claiming that it interfered with the reasonable use of his farm; that he was obliged to travel upon this turnpike to go from one portion of his farm to the other; that it frightened his horses; that it endangered his barns and buildings, and rendered the passage from one part of his farm to another hazardous and inconvenient, and furthermore charged that the railway company, in taking possession of this easement of the canal company, were placing additional burthens upon his property abutting and adjoining this canal bed. In order to enjoy reasonably his property, he was obliged constantly to pass over this highway alongside the railroad, at one point crossing it, or near to it, and the court below charged the jury, in substance, that his inconvenience and damage were not different from that sustained and endured by the public at large, and therefore he had no right to recover. The supreme court, in reviewing this portion of the case, have this to say, relative to the inconvenience of Hatch as compared with the public:

The court below held: That in so far as the plaintiff's access between the public highways and his adjacent lands were affected to his inconvenience or damage, by reason of the change of the uses of the

easement from those of a canal to those of a railroad, he was entitled to compensation; but if his convenience of access to and from his lands and the highways adjoining them remained the same, the fact that his passage along the public highways, to and from one portion of his lands and another, was by such change made less safe or convenient, he was not, on this account, entitled to any compensation, because it was an inconvenience which he suffered in common with the public at large. In this holding we cannot but think that it erred. As a matter of fact, is the inconvenience one which the plaintiff suffered in common with the public at large? Let it be remembered that the plaintiff was at first the owner of an entire tract of land, and that this was, first by the canal and afterward by the railroad, cut asunder. His tract being thus cut into two parts, his means of access from the one to the other were by a turnpike and a county road, the former running through and the other along the side of his original tract, and the fact assumed is that these means of access from the one part of the tract to the other were made inconvenient and dangerous by reason of cuts and embankments, one or both, made by the railroad. It seems to us that this case differs from that of a member of the public at large, in this, that the latter is only inconvenienced in a matter of ordinary travel, as in the case of *Jackson v. Jackson*, 16 O. S., 163, while the plaintiff, in addition to this, is subjected to inconvenience and danger in the ordinary use of his property, which involves the necessity of constant and necessary passage by him from one part to the other.

Now, as already stated, while the travel was driven to and passed up and down upon the easterly side of this track from English's property, he, according to the evidence in this case, was utterly unable to reach that point and join with the general public until he first should pass away from the front of his lot either up beyond Court street or down below Ninth street. The court, however, in charging the jury, said that it was sufficient for the purpose of this case if they found from the evidence that he had unimpaired access to the street, immediately in front, and if they found also the further fact that there was passage way sufficient left in front of his lot to pass and repass when meeting opposing vehicles, that he could not recover.

But another branch of the charge which has been read is objectionable in this—if in fact the court, by a simile drawn, did not take the question of fact from the jury, as to whether or not Mr. English was subject to any inconvenience greater than that of the public. That was a question of fact for the jury. This is the simile: "If, for example, the track in McLean avenue were taken up, and under proper authority put down upon the next parallel street to east—that is to be understood the track just as it is, with its switches, bents, track, and all—"in the same relative position to the grade of that street, it would present the same obstruction to the crossing." That is very true. "But the plaintiff in that case could not have damages, because of being compelled to drive south as far as Eighth street or north beyond Court, to make the crossing, or because of being detained at the crossing." It is unobjectionable to that point, because he, Mr. English, would have passed out from his property directly on to McLean avenue, where the public travel passed unobstructed and traveled through Richmond or Ninth or Court street to the street above, and there he would simply meet with the

same obstruction and inconvenience that the travelling public generally would at that point. Then follows this: "For the same reason that he,"—that is English—"cannot, in this case, have damages for the inconvenience of driving up, or down, by the side of the railway, or for the inconvenience of the crossing, or detention there, so long as passage way was left for driving up or down." Now that was, in effect, we think, saying to the jury that as he would sustain no damage if the track were in the street next east, being put only to such inconvenience as the public are, so he sustained no damage in this case, his inconvenience being the same as that of the public, thus determining for them the question of fact, of inconvenience.

Upon the question of damages, the only place where the especial attention of the jury was called to that question the court says this: "Opinions of witnesses as to value have been admitted. So far as they include in their estimates of differences in value, losses to the plaintiff's property, for which only the legislature can compensate him, their estimates should be rejected in making up your verdict, or if considered at all, should be only for comparison, that you may, if plaintiff be entitled to recover anything, only include what is permitted by law." Now, we think this portion of the charge did not explain to the jury in language that might be easily comprehended the manner in which they should weigh the evidence bearing upon the measure of damages after they should reach that point. They are told that they cannot include in their verdict damages that only can be obtained at the hands of the legislature, and that class of damages is not defined with such clearness, in any portion of the charge, as that the jury might understand what was meant, and after having been told that they should exclude any estimate that they might make of damages of that class, the court then proceeded to say that the only class of damages for which he might be entitled to recover were such damages as were permitted by law, without telling them what kind of damages were embraced therein. In the Whetmore case, 19 O. S., 110, the supreme court say this, respecting the charge to the jury: "A charge to the jury, though not strictly objectionable in point of law, but which leaves the jury to draw an incorrect inference from facts in the case material to the issue, constitutes good grounds for a new trial, where it is reasonable to suppose, from a consideration of the whole evidence, that a different verdict would have been rendered if the jury had been fully instructed. The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury in the application of the law to the facts as they may find them from the evidence."

We think that this portion of the charge at least tended to mislead or confuse the jury, and left them wholly at sea as to the course they should pursue in properly ascertaining the damages sustained. If the objections noted to the charge of the court had not occurred, but the law, as we view it, in relation to access, had been given, under the clear weight of the evidence in this case, plaintiff certainly must have recovered something. As it was, the verdict was for the defendant and against the plaintiff, and from the charge, taking it as a whole, we feel that it could not have been otherwise.

One member of the court, being of the opinion that the trustees were the proper parties to have been sued in the case, and the only parties liable for this injury, of course cannot concur with the majority of the

court in reversing this judgment, for the reason that the judgment being in favor of the city, it ought to have been in favor of the city because the city was not responsible in any event. The result, therefore, is, that, while we all concur in the opinion that the court erred in his instructions to the jury, yet it is by a majority of the court that the judgment below is reversed and the cause remanded for a new trial.

Alexander Huston and Alexander Long, for plaintiff in error.

Kumler, Ampt and Warrington, for defendant in error.

21

DESCENTS.

[Hamilton District Court, 1882.]

†E. J. TARVIN et al. v. SARAH BROUGHTON.

1. Legislature may change course of descent during the lifetime of the owner.
2. Such laws are not retroactive nor impairing contract rights.

PETITION in Error to the Court of Common Pleas.

SMITH, J.

The facts are these: John Gundry died on the 7th day of January, 1875, without issue and intestate, leaving considerable property. His widow, Matilda Gundry, took out letters of administration, settled the estate, and as such widow, became his sole heir under section 4159, Revised Statutes. On the 13th of November, 1880, the widow died, and W. H. Caruthers was appointed administrator of her estate. Matilda Gundry died without issue and intestate, leaving as her next of kin three brothers, R. J., S. W. and Joseph W. Tarvin, who claim as her heirs to inherit this estate. Sarah Broughton, the defendant, was a sister to John Gundry, the husband from whom Matilda Gundry had received the estate, and claims to inherit one-half the property by virtue of section 4162, Revised Statutes, which provides that when the relic of a husband or wife dies intestate, and without issue, possessed of any real or personal estate, which comes to such intestate under the 4159th section, Revised Statutes, above referred to, then such estate shall descend one-half to the brothers and sisters of such intestate, and the other half to the brothers and sisters of the deceased husband or wife, from whom said estate comes. Sarah Broughton, under that section, claims one-half of the estate of Mrs. Gundry, and the administrator brings this action under section 6202, Revised Statutes, that the court may determine the rights of the parties under the statutes of descents.

Section 4162, was passed in 1877, after the death of John Gundry, and before the death of Mrs. Gundry, and it was claimed, on behalf of the Tarvin heirs, that the legislature could not change the course of descent as it existed at the time of John Gundry's death, so as to divert it from the brothers and sisters of Matilda Gundry, who would have been entitled to the property under section 4159.

The court held, citing numerous authorities, that the course of inheritance is always subject to legislative control, and therefore, while the estate was in Mrs. Gundry as sole owner, the legislature could change the course of descent, which had been done in this case. It was not a retroactive law, nor did it impair the obligation of a contract, as claimed by the Tarvin heirs, because it in no way affected or interfered with the ownership or interest of Mrs. Gundry in the property. Her heirs had no interest until her decease, under the maxim that no one is heir to the living; and therefore her heirs could not complain of any act of the legislature changing the course of descent, when the act was passed during the ownership and before the death of Mrs. Gundry. Therefore, as to that branch of the case under section 4162, Mrs. Broughton, being the sister of John Gundry, from whom the estate came, was entitled to one-half. *Pollock v. Speidel*, 27 O. S., 86; *De Witt v. Lockwood*, 3 Blatch., 56, 63; *Cooley Constitutional Limitations*, 445, 446.

It was claimed by the Tarvin heirs that inasmuch as the personal property belonging to Gundry, and which descended to his wife, consisted of promissory

†For opinion of common pleas court affirmed hereby, see *ante*, 344. The decision of the district court was affirmed by the supreme court, without report, November 11, 1884.

notes, other securities, and choses in-action which had been converted by Mrs. Gundry into other negotiable securities which she held at the time of her death, it was not the same personal estate she had received from her husband, and was, therefore, not included in that section of the statute. The court held as to that question that there being an agreed statement of facts that the personal property she held was the proceeds of the property she received from her husband; it was, in fact, the same estate, and was covered by that section of the statute.

Judgment affirmed.

A. C. Collins, for plaintiff in error.

King, Thompson & Maxwell, for defendant in error.

CONTRACTS.

22

[Hamilton District Court, 1882.]

S. W. SWIGGETT v. M. M. WHITE.

- A promise to pay if the promisee will introduce the promisor to a widow, and secure renunciation of her right to administer her husband's estate, and have the promisor appointed, is against public policy, and void.

SMITH, J.

This was a petition in error to reverse a judgment of the common pleas in favor of White. The plaintiff claimed that he had been solicited by White to introduce him to Mrs. Cadwalader for the purpose of getting her to renounce the privilege of administering upon her husband's estate, and having him, (White) appointed administrator, and that upon the contingency of his being appointed he would pay the plaintiff a reasonable sum for his services.

The appointment of White was made, and the claim of the plaintiff was, that he was entitled to \$300 as a reasonable compensation. The ground taken by the defendant was, that the agreement set up by the plaintiff was contrary to good morals and public policy, and could not be maintained. The court below rendered judgment for the defendant, and Judge Smith announcing the opinion of this court said:

"This case comes up before us on a demurrer to the petition on the ground that the contract alleged is contrary to good morals and public policy. The claim in substance is that the defendant solicited the plaintiff to introduce him to Mrs. Cadwalader with the intent and for the purpose that he be appointed administrator of her husband's estate, and to compensate the plaintiff if he secured said appointment.

The office of an administrator is to some extent a public office. It is certainly a very important trust. He becomes the representative of the estate, looking after the interests of the creditors and next of kin. The statute determines upon whom this duty shall devolve, viz: 1st, the widow and next of kin, then a creditor, and if there is none such suitable, then upon such person as the probate court may designate.

The defendant in this case is a stranger to the estate, not a relative, not a creditor, nor in any way entitled to the appointment. He may be a very suitable person for it, but it should not be obtained by any mercenary influence exerted upon the widow or appointing power. Such an agreement has a bad tendency and holds out the temptation to use an improper influence upon the widow at the time she may be in need of and suppose she is receiving disinterested advice. Contracts of this nature have uniformly been condemned. In a very early case reported in Coke,

but cited in Benjamin on Sales, section 548, Sir Arthur Ingram's case, it was held that a contract that A resign a public office that B get the appointment is void. There were numerous authorities cited in the brief of counsel many of which are found in Wald's Pollock upon Contracts, 306, among others. The Tool Company v. Norris, 2 Wal. 45, and Fuller v. Dame, 18 Pick., 482, where this subject is fully discussed and similar contracts emphatically condemned.

Judgment affirmed.

[Superior Court of Cincinnati, General Term, 1882.]

C. H. KILGOUR v. PENDLETON STREET RAILWAY CO. et al.

For opinion in this case, see 6 Dec. R., 1157; (s. c. 11 Am. Law Rec., 38.) The case was reversed by the supreme court. See opinion, 39 O. S., 543.

GRADE OF STREET—EASEMENT.

[Superior Court of Cincinnati, General Term, June, 1882.]

W. H. BIRTWHISTLE v. CITY OF CINCINNATI.

Where a city, in improving a street to an unreasonable grade, injures a lot by removing a lateral support on a street which the lot did not abut, the owner of the lot cannot recover on account of the unreasonableness of the grade, as to which he is interested only in common with the public; but if the injury was caused to the improvements by negligence on the part of the city in the manner of doing the work, he can recover.

HARMON, J.

Plaintiff sued for damages to his lot and improvements caused by the acts and negligence of defendant in cutting down Lodwick street to what he alleges was an unreasonable grade. Plaintiff's lot did not abut on Lodwick street, but upon the Columbia avenue, a street parallel to and above Lodwick street upon a hillside. He offered evidence tending to show that the grade adopted by the city for Lodwick street was unreasonable; that its act of cutting down said street removed the lateral support and caused his lot to slide, and that the city was guilty of negligence in doing the work and in not providing against danger to his property therefrom. At the close of his testimony the court on motion arrested the testimony from the jury, and gave judgment for defendant. The case was reserved upon motion for a new trial.

The learned judge below was governed in his ruling by the decision of the Hamilton district court in the case of Keating v. City, 6 Dec. R., 605 (s. c. 7 Am. Law Rec., 15).

Since the reservation of the case that decision has been reversed by the supreme court, whose decision will appear in 38 O. S., 141. The principles announced are that any owner of land, though non-abutting, may recover against the city damages thereto resulting from its excavation in building a street, and that he may recover damages to the improvements upon his land by showing that they resulted from the city's negligence.

While we think the court below rightly rejected the testimony offered as to the unreasonableness of the grade adopted for Lodwick street, because, plaintiff's property not abutting, his only interest in that question was one common to the public, we think, on view of the decision just

cited, the court erred in excluding the evidence as to the effect of the cutting down of that street upon his lot, and the evidence as to the city's negligence in doing so and the effect of that negligence upon the improvements on his lot. The evidence clearly tended both to show damage in both regards, and to trace it to the acts and negligence of the city.

The motion is granted, and the action remanded for a new trial.

Force and Worthington, JJ., concur.

Paxton & Warrington, for plaintiff.

P. H. Kumler & J. C. Ampt, for defendant.

PERJURY—AMENDMENT.

26

[Hamilton Common Pleas Court, 1882.]

STATE OF OHIO v. JOB M. HAYES.

Where an accused is charged with having committed perjury in falsely making an affidavit in replevin, before a justice, that affiant owned, and had a right to possess, certain property, and the proof is of the preliminary affidavit, this is a variance, for it is not made in a pending action, and such variance is material. The party would be misled, for the evidence would not be the same, since the record would be sufficient proof that no such affidavit had been made after the action began. Besides, a trial would still leave the party in jeopardy of another indictment for swearing before the action. Therefore, no amendment can be made after trial, but an acquittal must be ordered.

AVERY, J.

The indictment is for perjury, and alleges that in a certain action in replevin, then pending before H. C. Powers, a justice of the peace of this county, wherein defendant was plaintiff, and other parties named were defendants, he did appear before said justice of the peace, and then and there was solemnly sworn by said justice, who was duly empowered and authorized by law, as such to administer said oath, and so being sworn in the said action and cause, and in a matter material thereto, did unlawfully, corruptly and wilfully depose and declare certain matters then and there to be fact, to-wit: Here follows the false swearing alleged, namely, that he was the owner and had good right to the possession of 230 sacks of meal, and 230 sacks of grits in cars at the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company's depot in Cincinnati, which it is averred was false to his knowledge.

The only evidence of any such swearing is, that he was sworn by the justice of the peace to an affidavit for a writ of replevin, wherein he made the alleged false statements, and upon which the justice issued summons in replevin against the parties named in the indictment. The motion to direct an acquittal is upon the ground, that this does not sustain the charge of the indictment.

The indictment describes the perjury with which the defendant is charged, as having been committed in a pending action. An affidavit for replevin before a justice of the peace is not in a pending action, for the reason that summons can only issue after it is made and filed, 6613 Revised Statutes; and until summons there is no action, 6473 Revised Statutes. The affidavit is no more made in a pending action, when made before the justice, than if made before a notary public and afterward filed with the justice.

There is a variance, therefore; in other words, the occasion of administering the oath is not proved as charged.

At common law this would have been fatal. 2 Chitty Criminal Law, 307a., 312. The only question is, under our Statutes. These provide that no variance between the indictment and evidence, in the name or description of any matter or thing herein named or described, shall be deemed ground for acquittal, unless the court find that such variance is material to the merits of the case, or may be prejudicial to the defendant. Revised Statutes, 7216.

The construction given to this provision is that, whether the variance be material to the merits, or prejudicial to the defendant, is a question reviewable on error. *Lytle v. State* 31 O. S., 196-199. *Gilmore, J.* The finding, therefore, is not left to discretion; it is a question of law for the Court. *Mead v. State*, 26 O. S., 505, 507.

This question requires that the object and purpose of an indictment be kept in view. It is the constitutional right of an accused to demand the nature and cause of the accusation against him, and the indictment must advise him with reasonable certainty what he may expect to meet on the trial. *Dillingham v. State*, 5 O. S., 280; *Fouts v. State*, 8 O. S., 98, 114.

The charge that, in a pending action of replevin before a justice, the defendant did appear and was sworn, and so being sworn in the said action and cause, and in a matter material thereto, did depose and declare, gives him no notice that he is expected to meet, on the trial, an affidavit before the action commenced. It would mislead him as to his defense. For example, in the present case, the record itself could be relied on against the charge that he was sworn in the action, since the action did not proceed before the justice, but, the appraised value of the property exceeding his jurisdiction, was certified to the court of common pleas.

The charge is not surplusage. Perjury is not mere false swearing, but false swearing as to something material in a proceeding before a court, tribunal or officer, or in a matter in relation to which an oath is authorized by law. Revised Statutes, 6897; *Hamm v. Wickline*, 26 O. S., 81, 84. Take out of the indictment what refers to a pending action, and the only thing left is false swearing before a justice, without being in a proceeding before him, or in a matter in relation to which an oath is authorized by law, indeed without being material, since all the indictment alleges is that it was in a matter material to said action.

In an indictment for perjury, it is sufficient to set forth the substance of the offense charged, and before what court or authority the oath was taken, averring such court or authority to have full power to administer the oath. Revised Statutes, 7221. But that it was in a proceeding, or a matter in relation to which an oath is authorized by law, is part of the substance. *Archbold Criminal Practice & Pleading*, 8 Am. Ed., 1718; original p. 592. The statute is copied from 23 Geo. II., ch. 11, the object of which was to dispense with the necessity required at common law of setting forth the whole record to which the perjury alleged was incidental. 2 Chitty Criminal Law, 307; *Wharton Criminal Evidence*, section 115; *State v. Stillman*, 7 Coldw., 341. The substance to be set out is intended as in opposition to the details, but there must be enough to describe and render the charge intelligible in its legal requisites. 2 Chitty Criminal Law, 307. The occasion of administering the oath must be stated. 2 Chitty Criminal Law, 307a. In other words, the occasion

must be identified. *Flint v. People*, 35 Mich., 491. The substance in respect to which the crime is alleged must be set out. If it was in the course of a suit the indictment must show the suit was then depending; if preliminary to a suit and in a matter of which the court had jurisdiction, the indictment must show it. *Archbold Criminal Practice & Pleading*, 8 Am. ed., 1719, original p. 594. The accused is entitled to be advised of all material facts relied on to establish the offense. *Kerr v. State*, 42 Ill., 307; *State v. Oppenheimer*, 41 Tex., 82.

Descriptive averments must be proved as laid. *Wharton Criminal Evidence*, section 146. Undoubtedly the legislature may modify or simplify criminal proceedings, but essential matters must be retained. *State v. Learned*, 47 Me., 426; *Commonwealth v. Holley*, 3 Gray, 458; *Shaw, C. J.* "The strictness of ancient rules as to variance between the proof and indictment has been much relaxed in modern times. Variances are regarded as material, however, where they may mislead a prisoner in making his defense, or when they may expose him to the danger of being again put in jeopardy for the same offense." *Harris v. People*, 64 N. Y., 148, 154, *Earl, J.*

Perjury in swearing to an affidavit in replevin before action commenced is equally perjury with false swearing in the action after it is commenced. The criminality is the same, but it is not the same offense. The proof required is different. Conviction or acquittal of swearing in the action, would still leave the defendant in jeopardy of another indictment for swearing before the action. The record of this trial would be no bar since what he had been tried for could only be determined by the record of the indictment on which he had been tried. The motion to direct an acquittal is sustained.

M. F. Wilson, for motion.

[Superior Court of Cincinnati, General Term, July, 1882.]

29

JULIANA MEIER v. BARBARA HERANCOURT, Ex'rx, et al.

For opinion in this case, see 6 Dec. R., 1164; (s. c. 11 Am. Law Rec., 46.)

[Superior Court of Cincinnati, General Term, July, 1882.]

31

MARY A. WILLIAMS v. YOUNG MEN'S MUTUAL LIFE ASSOCIATION.

For opinion in this case, see 6 Dec. R., 1168; (s. c. 11 Am. Law Rec., 48.)

[Superior Court of Cincinnati, General Term, July, 1882.]

32

CAROLINE SCHURICK v. CHAS. C. FULTON.

For opinion in this case, see 6 Dec. R., 1168; (s. c. 11 Am. Law Rec., 47.)

[Superior Court of Cincinnati, General Term, July, 1882.]

35

CLEVELAND RUBBER CO. v. E. F. BRADFORD.

For opinion in this case, see 6 Dec. R., 1160; (s. c. 11 Am. Law Rec., 44.) The case was overruled by the supreme court in *Needham v. Pratt*, 40 O. S., 186.

[Cuyahoga Common Pleas, July, 1882.]

69

A. L. McCURDY v. SOCIETY FOR SAVINGS.

For opinion in this case, see 6 Dec. R., 1169; (s. c. 11 Am. Law Rec., 156.)

83 CONSTITUTIONAL LAW—INJUNCTION—ROADS.

[Hamilton District Court, 1882.]

†STATE OF OHIO ex rel. MCGILL v. COMMISSIONERS OF HAMILTON CO.

1. The constitution does not forbid the passing of a local act by the legislature.
2. This court should not grant a restraining order, pending a hearing on a petition in error, unless the rights of the parties were pretty clearly ascertained.
3. Where a road or right of way is owned by wards who have guardians appointed, the guardians are authorized to act for them in granting the right of public way over their lands.
4. The fact that the commissioners in laying out a road occupy a portion of an existing road, does not invalidate the road laid out by them.

SMITH, J.

In this case an application has been made to the court, first, to fix the amount of a supersedeas bond; secondly, for a preliminary injunction pending the hearing of this case on error.

The origin of this case, it would seem is, that in 1881, the legislature passed an act for the opening and macadamizing of what is called the Mt. Airy free turnpike. This act was passed in 1881, and is published in volume 78, of the Session Laws, page 43, and is a local act, providing that the commissioners, if in their judgment expedient, may open, lay out, grade and macadamize a road commencing at the intersection of the Kirby road, where it terminates at the corporate limits of the city, and extending the shortest and best route to the Colerain turnpike, north of the school-house at Mt. Airy, a distance not exceeding two miles in length, the same to be paid for out of any unexpended balance in the road fund of said county; provided that nothing should be paid from that fund for the right of way; also, that they must act upon a petition of a majority of those who own property upon the line of the road. In pursuance of the act it seems that the commissioners, being of the opinion that the public interest required such a road to be opened, have caused it to be surveyed, and cost estimated, and they propose to make the contract. The petition in this case was filed in the superior court of Cincinnati, by the plaintiff asking for an injunction restraining the commissioners from contracting said road to be paid for from the county road fund; a restraining order was granted, and a motion was made to dissolve the injunction, which motion was heard upon affidavits, and the court having fully considered the motion, as we have reasons to believe, granted the motion and dissolved the injunction, to which action the plaintiff excepted, filed his bill of exceptions, and filed a petition in error in this court to reverse the order of the superior court. I suppose, this being a final order, in a special proceeding, this court has undoubtedly jurisdiction to maintain a petition in error, and the statute also provides that when a petition in error is pending, either in the supreme court or this court (which is found in the 5573d section of the Revised Statutes), if the parties are clearly entitled to it, the court may grant a restraining order pending the hearing of the case upon error; and it is upon this motion that the case now comes before us. The petition in error is now pending in this court.

First, as to fixing the amount of the supersedeas bond; it seems that very little is required of us; the judgment is substantially a dismissal, and there is nothing to be superseded except possibly a judgment of costs, which hardly requires it, and I doubt whether the section referred to by counsel (viz.: 6725) applies to cases of this character, where the judgment is for costs; therefore, so far as the motion is concerned, we overrule the motion.

Now, upon an application for an injunction, it is claimed by the plaintiff, on the hearing, first, that the special act referred to, upon which this proceeding is based, is unconstitutional. True it is a private act, or rather it is a local act; but the constitution does not forbid the passing of a local act by the legislature, the constitution does require that all laws of a general nature shall have a uniform operation throughout the state; but the constitution does not forbid the passage of local acts, *State v. Covington*, etc., 29 O. S., 102. It is a matter of general notoriety, that there are more or less local acts passed by the legislature every year, especially for the opening or building of roads, many of which, in this county, are the result of local legislation. It is claimed, however, on the part of the plaintiff, that the constitution provides that

†The injunction denied in this case was allowed by the supreme court. See opinion, 39 O. S., 58. For superior court decision see *ante*, 439.

all laws for the raising of taxes must state the objects for which they are raised, and that when raised, the taxes cannot be appropriated for any other purpose, and it is claimed that this special law contravenes that special inhibition of the constitution. Now, it may be said that the law of the whole road system of this state is to a certain extent complex; there are state roads, county roads, township roads, and there are free turnpikes of one mile assessments and two mile assessments; there is a law providing for the repair of roads, for working roads, laws also for the repair of free turnpikes, laws also for the converting of a toll road into a free turnpike upon an arrangement between the owners of the turnpike and the county commissioners; but the general law provides for raising certain monies by the county for road purposes. The county commissioners, at their spring session, shall determine how much money shall be raised for various purposes of the county; they shall also determine how much money shall be raised for road purposes; that is the expression, "for road purposes;" and unless there are other limitations, or restrictions in the statute, the term "for road purposes" may as well include building, as the repair of roads; and as to the taxes raised for road purposes, the law provides how they may be expended, by the supervisors of the road districts, and a certain portion in certain counties by the county commissioners themselves. Now, without determining, so far as I myself am concerned, and holding myself open to further argument when the case comes on for hearing, I think it may well be stated that this court should not grant a restraining order, pending a hearing on a petition in error, unless the rights of the parties were pretty clearly ascertained. In the first place it may be considered, that we should hesitate to grant an injunction, the tendency of which is to restrain public officers from the performance of a public duty on the ground that the law itself is unconstitutional, unless we are clearly satisfied that the law is unconstitutional. It is a matter of delicacy to determine that the legislature has exceeded its constitutional power in passing a law of that kind, although the court may do it if it be clearly satisfied that the law itself contravenes some clearly defined constitutional principle.

It is not as to the policy of that class of legislation, that is a matter for the legislature to determine; but, unless we are clearly satisfied that the law contravenes some provisions of the constitution, we should not declare the law invalid for that reason, and more especially in this case, as this matter has been already passed upon. It is not like an original action for injunction. The matter has been presented to one court, fully considered and passed upon by the court, and its decision remains in full force, dissolving the injunction, unless it is finally reversed in this court. Now, when the matter has been fully considered and determined, by the court below, it strikes me we should not reverse it, or rather we should not until it has been fully considered upon the hearing, unless some manifest injury is likely to arise from the action of the county commissioners. Now, this court will be in session on the first Monday of October, and this case will be ready for hearing upon its merits. It seems to me there is no reasonable probability of such an injury taking place as to deprive the plaintiff of his redress, provided he is clearly entitled to have the cause reversed when heard upon the petition itself; we therefore are of the opinion that at this stage of the proceedings we should not grant an injunction.

It was also said upon the hearing, admitting that the law was constitutional, that the commissioners had not taken the proper steps to authorize the road to be laid out. In the first place it is said that they have not obtained a right of way, and the law says that no part of the money to be appropriated shall be applied to the purchase of the right of way. Now, it may be said in answer to that, in the first place, that Mr. Hopkins, one of the commissioners, has stated in an affidavit that the right of way has been obtained; this perhaps should be qualified by the agreement or statement in the bill of exceptions, that as to the Kirby property, the right of way was obtained by a deed signed by Mrs. Kirby, as guardian for the children, who are really the owners of the property. I suppose it may be well conceded that the first thing to be done by the commissioners is to obtain the right of way. They are not authorized to use any of this money for that purpose, and certainly not authorized to lay out, grade, and build the road, until the right of way had been obtained. But, I think, in a matter of this kind, a guardian would have the power to act for the children, to make an agreement as to the right of way. Now, it is true that the guardian has no power to sell the real estate of a ward, except by a proper proceeding in the probate court; but under various statutes guardians have power to act for wards in other matters. For example, in proceedings in partition; and in all proceedings of condemnation of real estate for improvements. By section 6415 of Revised Statutes, a corporation can only proceed when they are unable to agree with the owners or their guardians, if minors, for the amount to be paid for damages; and

in the various provisions relating to the laying out of county roads, the statute refers to the guardian acting for his ward; for example, in section 4645, the notice given for the laying out of county roads is to the guardian; and in section 4647, damages are to be arranged with the guardian; then also, in the statute relating to the two-mile assessment pike, by section 4834, it is provided that guardians may act for their wards, and it seems to us from the general tendency of this legislation, that where a road or right of way is owned by wards who have guardians appointed, the guardians are authorized to act for them, having control and charge of the real estate. The right to locate the route is given by the act itself to the commissioners, and authorizes them to locate the road within certain termini; therefore, it seems to me, so far as it appears from the case at this hearing, that the injunction should not be granted on the ground that the right of way has not been obtained.

It is claimed also, that it does not appear that there is a sufficient unexpended balance of the road fund in the county treasury for that purpose. But it does appear that there is an unexpended balance of the road fund, and the law does not require that the full amount shall be certified as in the treasury before the road is built. This act differs from the act relating to municipal corporations, which forbids certain improvements until there shall be a certificate that a certain amount of money is in the treasury, which may be appropriated for that purpose when the improvement is ordered. I think we have a right to place some confidence in the discretion and action of the county commissioners; they are responsible men, and we may, I think, take it for granted, that if there is an unexpended balance subject to their control in the county treasury, that they will not expend it except upon the conditions which are provided, that they will not expend any unexpended balance, unless they have it for that purpose; and that any contractor contracting to build the road, it being a contract with the public, he must know the source of his payment: he takes his chances of there being an unexpended balance of the road fund, and he takes his chances that his payment comes from an unexpended balance after the usual and ordinary expenditure of the road fund has been made; and it appearing in evidence that there is more or less money in the road fund on hand in the county treasury out of which this could be paid, it seems that objection ought not to prevail.

It is claimed further on the part of the plaintiff, that the road as located does not follow the statute: The statute provides for a road commencing at the intersection of the Kirby road with the corporate limits of Cincinnati, and thence, according to the shortest and best route to intersect the Colerain turnpike north of the school-house. It appears from the plat produced, and I take it for granted that the road has been surveyed, that the lower terminus is not where the Kirby road intersects with the corporate limits, but is some distance from it, on what is called the "Badgeley road," and extending from the Badgeley road to the Colerain pike. Now, it is very true that a road authorized by special law, should substantially fall within the provisions of the law, and not exceed the limits provided for by that statute; but, we do not think that this law requires a straight line, although a straight line is the shortest line between two points. It is the shortest and best way, and in locating a route some reference must be had to the general surface of the country—the lay of the land. It is the shortest practicable way, and if the engineer employed by the county commissioners has located a road in the shortest practicable way, then it seems to us that it falls within the provisions of the statute, and the mere fact that a part of the road covers an existing road, should not invalidate the road laid out by the commissioners. In a case found in 9 O. S., 495, *Bisher v. Richards*, the question arose before the supreme court as to the validity of a certain road; it seems that a part was claimed as a state road, and a part as a county road, and it was claimed in the argument that the mere fact of locating a state road, over a county road, vacated it, but the court (Judge Gholson) saw no reason why the two roads should not co-exist at the same time; that for certain purposes it might be a state road, and there might be a county road over the same limits. Now, if so, I see no reason why the commissioners, in laying out this road, may not occupy a portion of the existing road, within the substantial direction of the line required by this act.

Now, it seems to us upon this particular application for an injunction pending the hearing of this case, on petition in error, there is not sufficient showing to entitle the plaintiff to the injunction, and therefore the motion is denied.

Joseph Cox, O'Connor, Gibson & Burgoyne and E. H. Kleinschmidt, for the relator.

Storer & Harrison, and Charles Evans, contra.

DIVORCE.

86

[Hamilton Common Pleas Court, 1882.]

HOLLAND v. HOLLAND.

1. Where a husband for several years wilfully withheld support from his wife, or by gambling away his wages, leaving her with two small children unprovided for, and answered her complaints with insulting language, she being unable to labor effectively, by reason of the cares of the two children, is more than mere neglect, and constitutes gross neglect of duty, entitling her to a divorce.
2. The fact that she was enabled to eke out a support through the kindness of relatives or friends, does not mitigate the offense.

AVERY, J.

This is a petition by the wife. The marriage was in 1873, and the husband and wife lived together until November, 1878, when she left him. He persuaded her to come back by his promises to do better, in March, 1879, and they lived together until September of that year, when she left him finally.

The weight of the evidence is, that the husband gambled away his wages, leaving his wife with two small children unprovided, so that, but for the kindness of her sisters, and the occasional charity of a neighbor, she would frequently have been without food; that this had continued for some time before the first separation, and became the same again four or five weeks after they returned to live together, without, except for this brief interval, any effort or offer on his part to do better, but on the contrary, with insulting language in answer to her complaints.

The question is, was this gross neglect of duty?

In *Holt v. Holt*, 117 Mass., 202, a husband shortly before his wife's confinement, sent her to the house of her aunt, and left her there without means of support, he having at that time a trade by which he could earn \$3 a day. It was held that this was not grossly or wantonly and cruelly refusing or neglecting to provide for her, within the statute of that state. But the decision appears to have turned upon the construction that the statute required it to be "cruelly" as well as "grossly," and that the court could not say that there was any cruelty, that is, any injury to health, or danger of such injury to be apprehended.

In *Jennings v. Jennings*, 16 Vt., 607, the husband was without property, but able by his labor to support his family, and had abandoned them, refusing to render them any assistance whatever. This it was held was not within the statute of that state, which is like the Massachusetts Statute, in authorizing divorce for grossly or wantonly and cruelly refusing to provide suitable maintenance for the wife, the husband being of sufficient ability, except in this, that "pecuniary" ability is required.

In New Hampshire, likewise, where it is cause of divorce that the husband has willingly absented himself for three years without making suitable provision for the support and maintenance of his wife, he must have property; it is not sufficient to show ability to labor. *F. v. F.*, 1 N. H., 198; *Fellows v. Fellows*, 8 N. H., 160. This ruling has been followed in California, under a statute assigning as a cause of divorce the willful neglect on the part of the husband to provide for his wife the common necessities of life, he having the ability to do so. *Washburn v. Washburn*, 9 Cal., 475.

It has been pertinently remarked that alimony may be allowed from earnings, and that there is no reason for distinguishing, upon the ques-

tion of a husband's ability to provide for his wife, between his property and labor. 1 Bishop Marriage & Divorce, 6th ed., 618. Indeed under a Kentucky statute, the "wasting of the husband's estate without any suitable provision for the maintenance of his wife and children," was deemed to apply to and embrace a man's health, time and labor, all of which for the purpose of supporting himself and family were essentially his estate. *McKay v. McKay*, 18 B. Mon., 8; *Shuck v. Shuck*, Bush., 306.

But even within the limited rule, that pecuniary ability of the husband is required, it will be enough that there are avails of his own labor which he refuses or neglects to appropriate. *Davis v. Davis*, 37 N. H., 191, 193; *James v. James*, 9 Rep., 685.

At the same time the decisions seem uniform that there must be something more than mere refusal or neglect. In *Rycraft v. Rycraft*, 42 Cal., 414, it was not enough that the husband neglected to provide the common necessities of life, although a good workman; the earnings of the wife by keeping a boarding-house, and selling milk and eggs, being sufficient for her support and not being interfered with by the husband. In *Brown v. Brown*, 22 Mich., 242, in allowing alimony upon a divorce from bed and board, for refusing and neglecting to provide suitable maintenance—the statute being similar to that of Massachusetts—it was held the allowance ought not be so large as to relieve the wife from the necessity of doing anything toward her own maintenance. Under the Massachusetts statute, it is held that the words "grossly or wantonly and cruelly," were used for the purpose of giving to the conduct of the husband, the character they imply, and are not to be disregarded. *Peabody v. Peabody*, 104 Mass., 195. Under a similar statute in Nebraska, there is a similar ruling. *Fuller v. Fuller*, 10 Neb., 144. Like expression of opinion is also found in *Mandigo v. Mandigo*, 15 Vt., 786.

In *Smith v. Smith*, 22 Kan., 699, it was held that the neglect without circumstances of aggravation was sufficient. The ruling is substantially the same as in *Peabody v. Peabody*, just cited, but the case has peculiar importance.

Kansas is the only state with a statute like our own. The Massachusetts statute, the provisions of which prevail by legislative adoption, or judicial construction, in all the New England states except Connecticut, and are copied in the statutes of Michigan, Wisconsin and Nebraska, requires that there should be ability on the part of the husband, and provides only for his gross or wanton and cruel refusal or neglect. It was the same in California before the Code of 1873, except that it must have been willful neglect, and continued for three years. The statutes of Delaware contain a provision for neglect on the part of the husband for three years to provide his wife with the necessities suitable for her condition. In New York the wife may have a divorce from bed and board for her husband's neglect or refusal to provide for her. It is the same in Minnesota and Tennessee, except that the refusal or neglect must be coupled with abandonment. In Indiana the language is, "failure of the husband to make reasonable provision for his family for two years." In Kentucky, it is the confirmed habit of drunkenness of not less than a year on the part of the husband, accompanied with the wasting of his estate without any suitable provision or maintenance of his wife and children. The statutes of other states are silent. Only in Ohio and Kansas, is it "gross neglect of duty."

The absence of any authoritative decision in this state, gives prominence to the construction of these words by the supreme court of Kansas. The reasoning of the decision, indeed, commends it; and although, from the differences of language, comparisons can only be made by analogy, the essential consideration under such statutes, as those of Massachusetts and California, are the same. The case, therefore, derives support from the supreme courts of those states; and from the courts of Michigan, Nebraska, New Hampshire and Vermont.

But while gross neglect of duty is not mere neglect to provide maintenance for a wife, without aggravating circumstances, the question must always be, whether there were such circumstances. The expression "gross neglect of duty," it is said in *Smith v. Smith*, supra, "is indefinite, and it is difficult to lay down any general rule, by which every case can be determined to be within or without its limits. Each case must be examined by itself."

In that case, the husband sent his wife away, ostensibly on a visit, with a small sum of money for her expenses, and although while away, she required the attention of a physician, he neglected sending her any more, and on her return declined to receive her; he having means and being able to support her, while she had no property except a piano. But say the court, "there was no act of cruelty, no word of insult, no circumstances of aggravation. Her subsequent sickness does not appear to have been an anticipated one. For aught that appears, in perfect health, and mutual ability to labor and support themselves, they parted."

In the present case, mutual ability to labor was wanting. The wife had two small children, the cares of the household were devolved on her.

There were words of insult. Not that the words testified to by the wife are supported by other testimony, but on one occasion, at least, she is corroborated, that when she complained of want, asking him how he supposed she was going to take care of her children, he answered, if she didn't like the way he was doing she could pack up and leave; and upon another occasion, at the end of a week, when she asked him for his wages, he gave her 93 cents, telling her she could live fat on that.

These were aggravating circumstances. That he gambled away his wages, was an aggravation. It was wilfully depriving his wife and family of their means of support, no less than if he had thrown his wages away. It was with an open indifference to her wants as shown by his language. It was without effort or promise to do better, except when she left him and he wanted her to return; and then, he broke his promise.

Continuous and protracted, careless of remonstrance, exhausting patience, it was more than mere neglect. Its very continuance aggravated it. Nor was it lightened by the fact, that, from the kindness of a sister, or occasional charity of a neighbor, she was enabled to eke out a support. What is contemplated, upon the question of providing for the wife, is an assured maintenance by the husband's own means, and not dependence on a precarious and contingent expectancy from generous kindred. *Shuck v. Shuck*, 7 Bush., 306.

Upon the whole I am constrained to hold that gross neglect of duty is made out.

Decree granted, with custody of the children, while under fourteen, to the wife; but with permission to the husband to see them at reasonable times.

L. M. Hadden, for petitioner.

C. H. Blackburn, contra.

DIVORCE.

[Hamilton Common Pleas Court, 1882.]

CAROLINE T. NICHOLS v. HARRY J. NICHOLS.

Gross neglect of duty as a ground of divorce, is not sustained by proof of willful absence, which is a separate cause of divorce, although it be coupled with neglect to provide during the time of absence. And mere failure to provide, while not absent, is not gross neglect of duty; but if it were, it must continue for some length of time, and where such time, leaving out what must be considered as absence, amounts in all only to seven weeks, and it is not shown that he squandered his earnings or was in any way offensive, except that he was not anxious to work; this ground of divorce is not made out.

AVERY, J.

The parties were married in Chicago, where the wife had gone from the residence of her parents in this city, to find employment. She made the acquaintance of her husband, who was a telegraph operator there, and married him. Their marriage was in April, 1880. After the end of the first week, he fell out with the company employing him, and was discharged. After two weeks more, without work in Chicago, he left her there and came to this city for work, telling her he would send her money to follow him. He did not send her money, but her parents sent her money, and she came here, meeting her husband at the depot. They went to live together at her parents' house, and lived there four weeks. The first two weeks the husband worked, the other two he did not, and at the end of the time left her again to go elsewhere for work, telling her when he found work he would send for her. She has not seen him since. Had a letter from him at Cleveland telling her he would send her money, but did not send it, and she has never heard from him.

The petition was filed January 18, 1882. The charge is, that he did nothing towards her support, while living together, and left her, since which time he has furnished nothing for her support, and she has supported herself and the child of the marriage, born January, 1881. This, the petition calls, "gross neglect of duty."

Whatever uncertainty may attend the definition of gross neglect of duty, it is certain that it does not consist in a husband's merely absenting himself from his wife, without her afterward receiving any support from him. No, that this might not be a neglect of his duty to cleave to her, and in ordinary language, gross neglect. But in classifying the ground of divorce, "willful absence" is assigned as a separate cause, and what is a part of, or consequence of willful absence, belongs to that head, and not the head of "gross neglect of duty." Willful absence may include not only withdrawal of the presence of the husband, but of all communication with, or provision by him; the one is part of, or a consequence of the other. It does not become more than willful absence, because meanwhile nothing has been contributed to the wife's support. The law of divorce has certainly not been left by the legislature in such a state, as that it may be made to adjust itself to whatever is named, in the complaint for divorce, as the cause; and that part of a cause, under one head, will become full cause under another.

Willful absence is not charged in the petition. A divorce would not be authorized on that ground, since the time has been not even two years, before date of petition. But, unless names change the thing, and a part become as good as the whole, failure to furnish support during the time,

will not authorize a divorce, although not charged under the name of absence, but of gross neglect of duty.

As to not furnishing support, while living together, the period was in all only seven weeks. Three weeks of this time he worked at his employment of telegraph operator, the rest of the time he did not. In Chicago, he lost his situation from some disagreement with the company employing him; the wife says, "he had a spat with them." Why he worked only two weeks, during the four they lived together in this city, is not explained, except that the wife's father don't think he wanted work, and testifies he had watched him going to drinking places; the brother, that he was of a roving disposition, not contented to stay anywhere; and the uncle, that he was generally in his saloon. But this uncle charged him nothing for what he drank, and therefore it could not be that he spent his earnings there; his roving habits might have been anticipated, perhaps, from his employment, if not from the circumstances under which the wife met and married him; and the opinion of the father, that he didn't want work, is open, at least, to the observation, that he came here to get work, and went elsewhere, saying he was going for work.

Unless it be that he drank, there is no evidence that his conduct was in any way offensive. The wife's mother testifies: "He was a very nice man, not cross nor anything; only not feeling obliged to work."

To hold, that cause of divorce is made out upon this evidence, would be straining the law; nay, more, would be openly misinterpreting it. Gross neglect of duty, as must be so often repeated, is not mere failure to provide.

But if it were, it would require continuance for some length of time. Not three years, nor any particular limit, but some duration of time. *Stevens v. Stevens*, 8 R. I., 560, *Durfee, J.*

The entire time, here leaving out what must be considered not gross neglect of duty, but absence, was seven weeks.

The petition is dismissed.

Clemmer & Clemmer, for petitioners.

DIVORCE.

89

[Hamilton Common Pleas Court, 1882.]

TIBERGHEIN v. TIBERGHEIN.

Failure to provide for many years, even though no proper effort to provide was made, is mere indolence and failure, not gross failure to provide. Mere default is not gross neglect, but it must be attended with circumstances of indignity or aggravation.

AVERY, J.

The petition of the wife sets forth the marriage in 1871, and alleges that nine months thereafter the husband wholly abandoned her, and has never since done anything toward her support.

The evidence is, the wife was sick, and the husband didn't pay the rent, and her mother took her home. This was in 1871. Six years afterward her father induced her to go to live with her husband again, and he paid the first month's rent, but did not pay the second, when she left him again, and went to her sister's and since then has not lived with him.

They have no children; she has worked in the kitchen of a restaurant, and is now chamber-maid on a river boat, and is an industrious, respectable woman.

He does not appear to have had any trade, but is now employed as a bill-poster. He was not a drinking man. He was, says her sister, only inclined to be lazy, and wanted her to support him. Since her leaving him, he has not interfered with her earnings. There would seem to have been about five years between the first time she left him, and the last, and the entire period they lived together was nine months.

The charge is gross neglect of duty, and willful absence for three years. These are prescribed by the statute, as distinct causes. Absence is not gross neglect of duty, for the reason that in the statute it is called by its own name, absence. Not absence, merely, but willful absence; and not for a limited time, but for three years.

Willful absence is not separation by mutual consent. Wright, 636; 31 Mo., 24, 35 Mich., 461. Still less can it be considered willful absence of the husband where, without any such treatment as compels her to leave him, he is left by his wife. Poverty, idleness, unthriftiness, it has been held, are great evils, when they drive a wife into separation from her husband, but must not be mistaken for desertion of her by him. Ingersoll v. Ingersoll, 49 Penn. St., 249, 251.

Gross neglect of duty is not mere failure to provide support. There must at least be ability. In addition there must be, in the circumstances attending, neglect to provide, something to justify the appellation "gross." This has already been sufficiently discussed; in Holland v. Holland. The wife was sick, when the husband first failed to pay the rent, and she was taken home by her mother; but not the second time. She was then, at least so far as mutual ability is concerned, as capable of supporting herself as he. In her sickness there was due, of course, an increase of effort (to provide for her by her husband. But all that is said is that he didn't pay the rent, and he didn't provide, not that he didn't make the effort). If, however, he did not make the effort, it would be mere indolence and failure to provide, not gross failure to provide.

To constitute gross neglect of duty, there must not only be a default, but the default must be attended with circumstances of indignity, or aggravation. Smith v. Smith, 22 Kan., 699. It has been well said if this were not so, and any mere neglect of duty were ground of divorce, the aid of the courts might as well be abandoned, and voluntary separation permitted. Smith v. Smith, supra, Brewer, J.

The language of our statute is, "any gross neglect of duty." But this is not something less than gross neglect of duty. It is left the same. It must still be gross neglect of duty. When gross neglect of duty is not made out, how can it happen that there will be "any" gross neglect of duty?

The petition is dismissed.

MANSLAUGHTER.—SELF DEFENSE.

90

[Hamilton Common Pleas Court, 1882.]

STATE OF OHIO v. THOMAS E. SNELBAKER.

1. To justify killing in self-defense there must be both a belief in the existence of the necessity, and the occasion must be such, from the slayer's standpoint, as to reasonably warrant the belief.
2. To determine the existence of this belief, previous occurrences and communicated threats may be considered. Outward acts or demonstrations of violence reasonably inducing the belief of the necessity are necessary. Whether these appearances were deceptive is of no moment. There must be, however, not only a seeming intent on the part of the deceased, but also a seeming capacity, and to determine this the presence and acts of others at the time may be considered, and the place and all its surroundings.
3. It is not necessary for the person attacked to retreat or fly if he was lawfully attending to his own business when assaulted, and the apparent purpose of the assault was to take his life or do him great bodily harm.

AVERY, J.

Gentlemen of the jury: The defendant, Thomas E. Snelbaker, is on trial for manslaughter.

The charge is that on the 8th of August, A. D., 1880, within this county, he did unlawfully kill Armstrong Chumley.

The fact of the killing must be made out beyond reasonable doubt, but if so made out, then to excuse or justify the act, it must appear by a preponderance of the evidence to have been done in self-defense. In other words, when reasonable doubt ceases that Armstrong Chumley is dead of a shot or shots, fired at him on the 8th of August, A. D., 1880, within this county, by the defendant, whether he meant to kill him or not would make no difference, the burden falls upon the defendant, and to acquit, on the ground of self-defense, requires a preponderance of evidence.

To kill in self-defense is to take the life of another under a reasonable belief in the immediate necessity for so doing, in order to save one's own life, or to save one's own self from great bodily harm. Two things must concur—the actual belief, and the existence of circumstances such as reasonably to warrant the belief. That is to say, not only must the man believe in the existence of the necessity, but the occasion must be such, looked at from his standpoint, as reasonably to warrant the belief.

To acquit the defendant, if the fact of the killing be established, it must therefore appear, that when he fired the fatal shot, he believed it was at that moment necessary for saving his life, or saving himself from great bodily harm, and that the occasion was such, looked at from his standpoint, as to a reasonable man in his position at the time, would have warranted the belief.

This opens up the inquiry, whether from a previous occurrence between them on the day, or from threats communicated to him, he had reason to believe that the deceased entertained a disposition to take his life or do him great bodily harm.

Coupled with this inquiry, however, indeed as a question first in order, upon the determination of which the admissibility of all the evidence as to any previous occurrence or threat depends, the enquiry is to be made whether there were outward acts or demonstrations of violence by the deceased at the time, such as reasonably to induce in the mind of defendant the belief, that the intention to take his life, or do him great bodily harm, was on the very point of being carried out. In other words, the

question is, whether danger to his life or of great bodily harm appeared imminent to him from some outward act or demonstration on the part of the deceased at the very time, and not whether there were previous acts or demonstrations or threats, except as in the judgment of the jury, these may have reasonably affected the appearance of danger to him from acts or demonstrations at the time.

The question as to acts or demonstrations by the deceased at the time, is to be determined from the evidence. It is the duty of the jury to compare the testimony of the witness of the transaction, and where there are differences, to adjust them according to the weight of evidence. The weight of evidence is in proportion to its influence in carrying conviction to the mind, and the question addresses itself to your minds. But, when the weight of the evidence is ascertained, if it appears by a preponderance, that without the defendant being himself at fault in provoking it at the time, there was an act or demonstration by the deceased to do him violence, from which, taking the appearances then presented, it was reasonable that danger to his life or great bodily harm was imminent, the question whether the appearances were deceptive is of no moment. In other words, the defendant is to be judged by appearances at the time, and not by facts afterwards turning out.

That imminence of danger, from some act or demonstration of the deceased, to the life or person of defendant should have been apparent, requires, however, not only that there should have been at the time a seeming intent, but also a seeming capacity, on the part of the deceased, to take his life or do him bodily harm. This opens up the inquiry into the question of the presence and acts of others at the time, since to resort to self-defense for his protection against unlawful violence, would require a reasonable belief, on the part of defendant, that he could not rely for protection upon others. The place was a police station of the city. The place and occasion are to be taken with all the surroundings, but it is to be borne in mind that the question is, whether it was reasonable for the defendant, under the circumstances apparent to him, to believe in the necessity of resorting to self-defense. This is a question for the jury.

One other word touching whether before resorting to self-defense, it is necessary for a man to retreat or fly. It would not be necessary if, in lawfully attending to his own affairs, he were unlawfully assaulted by another, with the apparent purpose of taking his life or doing him great bodily harm.

With these instructions as to the law, to be applied according as the facts shall be found from the evidence, the issue between the state and the defendant is now submitted to you.

COMPROMISE OF A CASE.

[Hamilton Common Pleas Court, 1882.]

ANN JORDAN et al. v. JOHN RUSSELL et al.

If counsel ever have a right to agree to a compromise of a case, such right should not be extended to a contest of a will, and where the contestant's attorneys agree on such compromise, and offer no evidence, and the jury bring in a verdict sustaining the will, a contestant who did not consent thereto on filing a motion at any time during the term to set aside the verdict, is entitled to have the verdict set aside at a subsequent term to which the motion is continued, and the verdict must be set aside as to all parties, their interests being joint.

AVERY, J.

In this case, an action to contest the will of John Russell, deceased, a verdict sustaining the will was taken at the last term of court, on the 23d of January, 1882, and judgment was entered April 8, 1882. Motion by Ann Jordan to set the judgment aside was made at the same term, April 29, 1882, and has been continued to this term.

The case had not been set on the trial calendar, but was called up by counsel for defendants, who, in presence of a representative of the firm of Campbell, Bates & Von Martels—T. C. Campbell of that firm being one of the counsel for the plaintiffs, stated they wanted to take a verdict by consent. Accordingly the jury in attendance was sworn, the probate of the will was offered, and there being no other evidence, the jury were directed to return a verdict sustaining the will, which they did.

The ground of the motion by Ann Jordan, is, that she did not consent, and that the verdict was entirely without her knowledge. In a supplemental affidavit she avers that she was first informed of it in the latter part of February, or early part of March, and after two or three interviews, or attempted interviews, with one gentleman of the bar, who finally declined, employed her present counsel, who "after some little delay, which seemed unavoidable," filed the motion.

The plaintiffs in the case were Ann Jordan, Bridget Kennedy and Sarah Gildea, the only daughters of the testator, John Russell, deceased, with their husbands. The petition was filed by Banning & Davidson, and T. C. Campbell, as attorneys. The professional statement of Mr. Campbell is to the effect that he had not been originally engaged, but came into the case for Mrs. Kennedy, and that when the settlement was proposed by defendants, he thought best to accept it, but left the matter to be arranged by the principal counsel, neither giving nor withholding his consent, and not assuming to act for Mrs. Jordan. The affidavit of counsel for the defendants is to the effect, that the verdict was taken with the full knowledge of both counsel for the plaintiffs, under the agreement that the property devised should be sold, and after paying the costs of the case, \$300 should be paid Mrs. Jordan, and \$300 to Mrs. Kennedy.

The issue of fact, so far as made by these opposing statements, must be left undetermined. Where counsel dispute upon the question of a verbal agreement, not made in open court, the court will not turn aside from the case to determine the dispute. But it is not disputed that the verdict was taken with the consent, at least, of the counsel for Mrs. Jordan. They make no affidavit or statement, and as to them, at least, the affidavit of counsel for defendants stands without denial. Upon the other hand, however, the affidavit of Mrs. Jordan, that she had no knowledge of the verdict, and gave no consent to the settlement, stands without denial.

The question then is, whether upon a motion at the same term, the judgment should be set aside, although to be determined now, it must be upon the same principles as if determined then. The motion was made and continued, and is in legal contemplation to be decided, as if at the trial term. *Knox County Bank v. Doty*, 9 O. S., 505, 508, Peck, J.

The question, treated as of the term when the judgment was rendered, is addressed to judicial discretion. The weight of authority is against the power of an attorney at law, by virtue merely of his general employment as such, to bind his client by a compromise. *Weck's on A*

torneys at Law, 228; and cases there cited. To which may be added, *Fraker v. Little*, 24 Kan., 387; *Card v. Walbridge*, 18 O., 411, 417; *Wilson v. Jennings*, 3 O. S., 528.

If extending to any case, it ought not certainly to a contested will case. How inconsistent with an employment to contest a will, that authority should be implied to agree to a judgment sustaining the will, or if the employment were to sustain the will, that authority should be implied to agree to its being set aside.

The question besides, is not whether the judgment would be binding on the parties, while standing as a judgment, but whether, so long as the court retains control over the record, it should, against the complaint of the client, be permitted to stand.

There might be cases where equitable considerations would require a judgment to be upheld, but there are no such considerations here; the parties, in other words, may be restored to their former position. The motion was not made within three days, but was made during the term, which is sufficient for the exercise of that control over the record, which is left to judicial discretion. *Ash v. Marlow*, 20 O., 119, 131; *Huntington v. Finch*, 3 O. S., 445, 447; *Knox County Bank v. Doty*, 9 O. S., 508, Peck, J. The interest of the parties to the judgment is joint and inseparable, and cause for setting it aside as to one, is cause as to all. *Banning v. Kirby*, 7 Amer. Law Rec., 601, 604; s. c. 6 Dec. Rec., 732.

The verdict and judgment are set aside.

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BUILDING ASSOCIATION MORTGAGE.

[Hamilton Common Pleas Court, 1882.]

†ALLEMANIA LOAN AND BUILDING ASSOCIATION No. 2 v. CATHARINE MUELLER.

1. Upon foreclosure of a building association mortgage, in determining the amount due on distribution, dues paid will not be credited with interest, as dues are entitled to dividends rather than interest.
2. In estimating the time required to pay the shares, probable profits may be considered, for the dues for the future are being paid, discounting for the time in advance.
3. The periods for the payment of profits are every six months from the organization of the society, and not from the various dates of taking the shares.
4. If interest is rebated annually, future interest is to be based on the amount of the shares less dues to date, as the principal at the beginning of the next year, from which dues and estimated profits for the next year will be deducted to form new principals for each succeeding year.

AVERY, J.

The question is upon a mortgage to a building association, securing dues, interest and premium on ten shares. The property has been sold in this proceeding, and the question is as to the amount of the proceeds to be paid in satisfaction of the mortgage.

The condition of the mortgage is, payment according to the constitution and by-laws, of fines, dues, premium and interest, subject to rebatement every corporate year by crediting on the principal the dues paid and profits made until the amount paid in shall equal the full value of the shares; or, to refund before that time, the full value of said shares with all dues thereon. In case of default in making any said payments

†See another decision in this case, *ante*, 402.

for three months, and a suit of foreclosure, the amount of the face of the mortgage with all arrearages, less the credits paid upon the principal, shall become at once due and payable.

The effect of such a proviso as this last, was considered in the *Monitor Building Association v. Eggen*, *ante* 114 and so far as in the nature of a penalty, it was held there, the proviso would not be enforced. The point requires no discussion; the decree of sale relieves the case of it, being for dues, interest, fines and premiums to date, and not for the face of the mortgage.

Touching the condition, it is to pay dues, etc., or refund the full value of the shares; but, the option is left to the mortgagor. The mortgage is to be void, upon doing either the one or the other, and the alternative remains open so long as the equity of redemption is not foreclosed. And upon foreclosure, which under our statute requires sale, and while barring redemption as to the land, leaves the proceeds subject to the equities, satisfaction may be made, one way or the other, according as those interested in the equity or redemption elect.

The constitution of the association contemplates such option. By article XI., a mortgage shall remain in force, until the weekly dues and dividends make up \$300 on each share, when the mortgage shall be cancelled. By article XIV, members can get their mortgage cancelled by paying back so much as, with dues paid and dividends, makes up \$300 on each share. In either case, upon cancellation, the membership ceases.

Calculation upon the basis of the difference, between the dues paid and dividends, and the amount of each share, requires only that the dues paid, and those for which there has already been a finding herein, with the dividends, if any, be deducted from \$300 upon each share. The dues paid will not be credited with interest, for the reason that dues entitle the member to payment of dividends, not interest. The balance found, will be the amount required for the satisfaction of the mortgage, in addition to what has been already found.

Upon the other basis of weekly dues, until, with the dividends, \$300 is made up on each share, the time required in the future, for the purpose, is to be ascertained, and the present value calculated of the dues and interest for that time. The rule of calculation is laid down by the district court, in *Korman's case*, *ante*, 60. But the question, here, is as to ascertaining the time.

This association is a permanent one, and the time is to be estimated, according to what would be required for paying the particular shares. The time required would be, until fifty cents a week had paid upon each share \$300. But the constitution prescribes that dividends shall be included, and by so much as this may assist in the payment, would shorten the time.

The constitution provides, that the secretary shall calculate the profits of each member every six months, and enter in their books. These are the dividends. There is no provision as to losses.

In the present case no dividends are entered in the book, and therefore it is to be presumed that up to the time of ceasing to pay dues, there were no profits. And so long as the dues ceased, there could be none, for the reason that only from money paid in, could there be profits. But the dues for the future, coming now to be paid, discounting for the time in advance, profits may be considered, no less than if payment were deferred to the dates of the installments, as they should successively accrue.

In that case, no more weekly payments would be required than, with the dividends of profits, would make up \$300 on each share, and it must be the same in this case. The cases differ only, in that, here, the number of weeks is to be ascertained in advance.

That without payment of dues, there could be no profits, is true, but here is to be payment of dues. Discounting for the time anticipated, there will be paid the present value of the dues, and no more than if deferred until the successive installments would accrue, can there be reason for not calculating profits.

The calculation of profits prescribed by the constitution every six months, refers to the date at which the association became organized for business, and not to the various dates of acquiring ownership of shares. It is every six months of the business of the association. For the future, of course, there could be only an approximate estimate. But with the probable future rate of profits, estimated as near as might be the time for which dues and interest would be required to be paid, could be ascertained. It would be for such time, as that the dues and estimated dividends, together with those paid and unpaid, up to date, would amount, on each share, to \$300.

The present value of dues and interest for this time, added to the dues and interest unpaid, will make up what is needed for cancelling the mortgage. But, there is a question as to interest.

By article XI, of the constitution of the association, interest is only to be charged on the amount remaining due, at the beginning of each year. The only possible meaning of this, is that dues and dividends of profits shall, with respect to computation of interest, be treated as credits upon a principal. The condition of the mortgage, itself, provides for the interest being subject to rebatement every corporate year, by crediting on the principal, the weekly dues paid and profits made.

However inconsistent this may be with the true nature of the transaction, which is not a loan to be paid back in installments, but a redemption of shares, by the association, in advance, *Hagerman v. Building Association*, 25 O. S., 205, 206, it has been agreed to by adoption in the Constitution of the Association, and has been made part of the condition of the mortgage.

In computing interest, therefore, for the period of the future installments, \$300 for each share, less the dues up to date, will be taken, as the principal to the beginning of the next corporate or business year, from which, for a new principal, will be deducted the dues and dividends of profits, estimated as accruing during the interval; and so on, each successive year, for a new principal, deducting the dues and estimated dividends for the preceding year.

For the purposes of such computation, including the estimate of profits, and calculation of present value of dues, and interest, reference may be made to a master, unless the parties agree.

Campbell, Bates & Von Martels, for plaintiff.

W. G. Mayer, for defendants.

TRADE NAME.

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[Hamilton Common Pleas Court, 1882.]

BEN COHN v. RACHEL KAHN and MOSES KAHN.

The mere description of a kind of business or quality or class of goods sold, by words in common use, as "misfit parlors," adopted by one selling misfit clothing, does not constitute a trade name for which he can enjoin the use by a competitor. But where the competitor adopts the name and opens a store on the same street and imitates the signs, cards and notices of a tradesman, and by misrepresentations, seeks to mislead customers to suppose they were dealing with latter, when in fact they were not, the imposition will be enjoined.

AVERY, J.

The plaintiff rented a residence in this city last March, and turned the parlors into a salesroom for clothing, which, he alleges, is purchased by him from various merchant tailors throughout the country, and is known to the trade as misfits, and has given his place of business the name "Misfit Parlors." The defendants have recently opened a similar place of business at the corner of the next street, and given it the name "The Original Misfit Clothing Parlor," for the purpose, the petition alleges, of depriving the plaintiff of the good will of his business, and inducing the public to believe that the goods furnished by them are those of the Misfit Parlors of which he is the proprietor. It is further alleged, that they have copied his signs, notices, cards, circulars and other means of advertising, which is calculated to and does draw off the custom of the public who have identified him under the name Misfit Parlors; that their place of business, although at the corner of the next street, and numbered on that street has also been given numbers on the same street with him; that before going there, they tried to rent the house adjoining his, and then the house opposite, and that they falsely represent to the public that his business is only a branch of theirs, and that they were the original owners and had sold the said business to him. The prayer of the petition is for an injunction against their use of the name Misfit Parlors, or Original Misfit Parlors, or from interference in any way with the good will or trade of plaintiff, or holding themselves out as the Original Misfit Parlors. The defendants demur.

Misfit Parlors is not a trade-mark. There are cases which include within that term the name applied to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. *Filley v. Fassett*, 44 Mo., 168; *Marshall v. Pinkham*, 52 Wis., 572, 578; *Shaver v. Shaver*, 54 Ia., 208, 210. But in strictness the meaning is confined to a name or device attached to goods manufactured or sold. *Gilman v. Hunnewell*, 122 Mass., 139, 147; *Manufacturing Co. v. Hall*, 61 N. Y., 226, 229. The name of a place of business is not a trade-mark at all, but a trade-name. *Pepper v. Labrot*, 8 Fed. Rep., 41, Matthews, J.

Protection will be extended, however, upon analogous principles. *Manufacturing Co. v. Hall*, 61 N. Y., 226. Thus, where a name is given to a hotel, or a newspaper, or a line of omnibuses, the use of the same name, or a colorable imitation thereof, by a rival proprietor, has been enjoined. *Howard v. Henriques*, 3 Sandf., 725; *Woodward v. Lazar*, 21 Cal., 448; *Marsh v. Billings*, 7 Cush., 322; *Stone v. Carlan*, 13 Law Rep., 360; *Clement v. Maddick*, 1 Giff, 98; *Bell v. Locke*, 8 Paige, 75; *Matsell v. Flanagan*, 2 Abb. Pr. N. S., 459; *Knott v. Morgan*, 2 Keen, 213. But these are all cases of a name of ownership, as in *Knott v. Morgan*, the

"London Conveyance Company;" or a fancy name invented or arbitrarily applied, as "Irving House," "What Cheer House," "Bells Life," "New Era," etc. *Gilman v. Hunnewell*, 122 Mass., 151, Gray, C. J.; *Burrows v. Knight*, 6 R. I., 438, Ames, C. J.

Misfit Parlors is not a name of this kind. Parlors is a style of description that may be adopted by anyone who thinks the public will walk in with more readiness, than if he called his place a shop or a store. Misfit defines the business, that is, as alleged in the petition, the selling of clothing known to the trade as misfits. The combination of the two words does not distinguish a particular locality, but is applicable to any place where business of the same kind is carried on. It is like the name "Antiquarian Book Store," *Choynski v. Cohen*, 39 Cal., 501; or "Carriage Bazaar," *Boulnois v. Peake*, L. R. 13, Ch. D., 513, note; and falls within the rule, that a mere general description by words in common use denoting kind or quality, or indicating that a certain class of goods is dealt in, cannot be the subject of exclusive appropriation. *Canal Co. v. Clark*, 13 Wall, 311; *Manufacturing Co. v. Trainer*, 101 U. S., 51, 55; *Gilman v. Hunnewell*, 122 Mass., 139; *Marshall v. Pinkham*, 52 Wis., 572; *Browne on Trade Marks*, section 161.

So far, therefore, as concerns mere use of the name, there is no cause of action. But the petition alleges something more, that is, false representations, such as that the plaintiff's business is only a branch of the defendants, that it was sold to him by them, that theirs is the original business under that name; all of which is calculated and intended, as alleged, to mislead the public into confusing the business established by plaintiff with their own, and deprive him of the good will of that business.

Reputation obtained by industry and enterprise in business will be protected in equity against efforts to purloin it. The fundamental reason is the same, as for the protection of trade-marks, since rights of property are equally concerned whether advantage be taken of the reputation of a man's manufactures or of his business. Protection in either case is upon the principle that misrepresentation likely to mislead the public into taking one man's manufacture or business for that of another constitutes an injury to the trade of that other, for which injunction is the only adequate remedy. *Leather Cloth. Co. v. American Cloth. Co.*, 4 DeG. J. & S., 137, 140; *Shaver v. Shaver*, 54 Ia., 208, 210; *Manufacturing Co. v. Hall*, 61 N. Y., 226, 231; *McLean v. Fleming*, 96 U. S., 252. *Clifford J.: High on Injunction*, section 1069.

The common occasion is where a name has acquired such distinctive character as representing proprietorship, that its mere use by another is a misrepresentation. But this is only an illustration of the principle, and does not limit it. There may be no misrepresentation in the mere name, that is, it may be one's own name, or a common name to which any person is entitled, and yet may be so used as to mislead the public into giving to one man's goods or business, the patronage intended for another.

In *Croft v. Day*, 7 Beav. 54, the defendant was held entitled to make blacking under the name of Day & Marton, which was his own name and that of a person with whom he was in treaty for a partnership, but was enjoined from so labeling or advertising it as to represent it to be the same with blacking made under that name by an older firm.

In *Lee v. Haley*, L. R. 5 Ch. App. 155, the defendant was held entitled to set up business under the same name with the plaintiffs, "The Guinea Coal Company," indicating that he sold coal at a guinea a ton,

but not so to use the name, as by opening his place of business on the same street, that people going there to buy coal from the plaintiffs might be misled into taking his business for theirs.

The principle is thus stated in *Levy v. Walker*, L. R. 10 Ch. D. 448, James L. J.: "You must not use a name whether fictitious or real—you must not use a description whether true or not, which is intended to represent or calculated to misrepresent to the public that your business is my business, and so by a fraudulent misstatement deprive me of the profits of the business which would otherwise come to me."

In *Meneely v. Meneely*, 61 N. Y., 427, it is pointed out that every man may use his own name in his business, and it is the same of any name to which there is a common right, and that, although there may be another business of like kind already established under that name, Courts will not interfere where the only confusion created is that which results from the similarity of the names. But this leaves it open as a question of evidence whether any artifice or contrivance has been added. "No man," it is said, *Burgess v. Burgess*, 3 DeG. M. & G. 904, Turner, L. J., "can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name and another person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses, but where the defendant sells goods under his own name, and it happens that plaintiff has the same name, it does not follow that he is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not." *Massam v. Thorleys Cattle Food Co.*, L. R., 14 Ch. D. 748, 753; *Hendriks v. Montagu*, L. R. 17 Ch. D. 649, Brett, L. J.; *Singer Manufacturing Co. v. Loog*, L. R. 18 Ch. D. 395.

The false representations alleged in the petition are admitted by the demurrer. They can be understood in no other sense than as an effort by the defendants to avail themselves of a reputation acquired by the business of the plaintiff. Why call their business, "The Original Misfit Clothing Parlor?" There is nothing original in a misfit, or in selling misfits; it must therefore mean that their business is the first established. But the plaintiff's business having been the first established, the only impression calculated to be produced is that, that business was theirs.

Any former customer of plaintiff, or person attracted by the reputation of his house when it was the only one of the name, who should now find two in competition, would certainly take that represented as the first established, to be the plaintiffs. The plaintiff is entitled to protection against this, not that there is anything in being called original, or that it belongs to him, but that he has the right to prevent them from personating his business by using any such false description as would lead customers to suppose they were trading with him. *Boulnois v. Peake*, L. R. 13 Ch. D. 514 note.

The admitted facts leave no doubt of the intention of the defendants; they take a number upon the same street, although their place of business has a number upon the cross street, and besides it is at a corner; they copy the sign, notices, cards, circulars and other advertisements of the plaintiffs. But whether intended or not, it is the same. *Singer Co. v. Loog*, L. R. 18 Ch. D. 47, Cotton, L. J.; *Leather Cloth. Co. v. American*

Cloth Co., 4 DeG. J. & S. 140; Hendriks v. Montagu, L. R. 17 Ch. D. 648; Manufacturing Co. v. Hall, 61 N. Y. 231.

The question of plaintiff's right to the interference of the court does not depend, as suggested by counsel, upon whether the interest of the public is concerned. The public may be very little concerned whom it buys its misfits from, indeed whether it buys any. But the court does not interfere to prevent the public from being misled. The interference is solely to protect the owner of a trade or business from a fraudulent invasion of that business by somebody else. *Levy v. Walker*, L. R. 10 Ch. D. 448, *James L. J.*; *Cloth Co. v. Cloth. Co.*, 4 DeG. J. & S. 141; *Webster v. Webster*, 3 Swanst 490, note.

Demurrer overruled, and judgment entered enjoining defendants from representing their business under the name "Misfit Parlors," or "Misfit Clothing Parlor," to be the original under that name, or to have been connected with, or to be the same with the plaintiff's business.

Long, Kramer & Kramer, for plaintiff.

Follett, Hyman & Dawson, contra.

BILLS OF EXCEPTIONS.

[Hamilton District Court, October 17, 1882.]

WILLIAM ARGO v. JOHN C. BELSAR.

Bills of exceptions taken before a justice in a pending trial must be entered at length on his docket, and until so done the reviewing court can take no cognizance of their contents.

ERROR to the Court of Common Pleas.

MOORE, J.

The original action was brought by John C. Belsar against William Argo, plaintiff in error, before a justice of the peace, to recover a judgment by way of damages to a horse. The case was tried before a jury, who returned a verdict for the plaintiff in the sum of \$17. The justice rendered judgment on the verdict. No bill of exceptions was entered on the docket of the justice, although it does appear from the transcript that a bill of exceptions was filed at a day subsequent to the judgment entry.

William Argo, the defendant below, filed a petition in error in the court of common pleas, asking a reversal of the judgment, on the ground of error committed by the justice, and as set forth in a certain bill of exceptions. There was filed with the petition in error a transcript with the docket entries of the justice; also a separate paper, which purported to be a bill of exceptions to the ruling of the justice, and which was signed by the justice. The court of common pleas affirmed this judgment. The defendant below, the defendant in error, prosecutes this his petition in error, to reverse the judgment of the court of common pleas. We hold, as is held in *Huston v. Huston*, 29 O. S., 600, that bills of exception taken before a justice of the peace are required to be entered at length on the docket, and until so entered, they constitute no grounds on which to found a petition in error. By an examination of this record it appears that this separate paper, purporting to be a bill of exceptions, was not

entered at length on the docket of the justice; therefore, in the absence of the bill of exceptions to the court below, no assignment of error appeared. The action of the court was proper.

Judgment affirmed.

H. L. Cooper, for plaintiff in error.

E. P. Dustin, for defendant in error.

LIBEL—PLEADINGS.

190

[Hamilton District Court, October 17, 1882.]

NICHOLAS JOSEPH v. JOHN CHRISTY.

Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be the plaintiff, hence words cautioning persons against using certain apparatus are not actionable.

ERROR to the Superior Court.

MOORE, J.

The plaintiff below filed his petition, claiming that at the time of the grievance thereinafter mentioned, he carried on the business of manufacturing and selling a certain machine, called a "device for lowering and raising steamboat chimneys," in the city of Cincinnati, on which he was dependent for the support of himself and his family. He states further, that he was the inventor, patentee and owner thereof, by letters patent, granted to him on the 12th day of April, 1881, by the United States; that he had full and exclusive right to control said device and the right of vending the same to his customers and the general public, for the term of seventeen years from said date; that on the fifteenth day of October, 1881, the defendant, contriving and intending to injure and damage the plaintiff in and about his business and calling, falsely and maliciously published and caused to be published and distributed among the plaintiff's customers, in the city of Cincinnati and elsewhere, a printed circular, of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said business, the false, scandalous, malicious and defamatory libel following, that is to say:

"Notice.—Steamboat captains and owners are cautioned against purchasing or contracting for the building on their boats chimney lowering apparatus of other persons than myself, which have the following features: An extension rod, one end of which is pivoted or hinged to the movable chimney section, and the other end of which is supported by a pivoted or swiveled connection with the deck. I cover all such devices in my patent of October 11, 1881. I learn that parties are offering to put such devices on steamboats in this city. I shall hold all parties responsible who hereafter infringe my patent.

JOHN CHRISTY,

Office No. 42, Public Landing,

Dated: Cincinnati, Oct. 15, 1881."

For a second cause of action plaintiff states that defendants, in an unlawful and malicious manner, published of and concerning him a defamatory libel in the form of an account, by means whereof he was greatly damaged in his business and vocation, and which said defamatory libel is in the following words, to-wit:

Cincinnati, Oct. 25, 1881.

Steamer Ohio.—To John Christy, Dr.,
No. 40 Public Landing.

"To use of chimney hoisting apparatus, which is an infringement of my patent.—\$75."

To this petition a demurrer was interposed. The court below sustained the demurrer, and to the action of the court in this respect, the plaintiff in error excepted. This exception is now urged and presented in this court as an assignment of error.

This is a case where damages are alleged to have been caused to the business and calling of the plaintiff, by discouraging the plaintiff's customers in and about the purchase of his particular device or patent; that he is injured by a false and malicious publication amounting to a libel, as set forth in the petition. The question arises, does this publication charge the plaintiff by name or by innuendo, with doing business in connection with said machinery in an unlawful manner, or in such a way as to render it unsafe for the public or persons to treat with him concerning said machinery?

It is an elementary rule of pleading, that whatever is alleged, must be alleged with certainty, and if not directly pleaded, in the case of a libel, the identity of the party is charged by an innuendo.

Although it does not appear that the name of Nicholas Joseph is used, or that he appears to have personally been mentioned in the publication as being guilty of infringing the patent or exercising the right of vending said device without authority, the plaintiff asserts it by an innuendo. To constitute libel, it is clear that the defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. In this particular publication the defendant recites, that "he is informed that certain persons are about to use this device." He does not charge the plaintiff by name, nor does he charge that the plaintiff was exercising control over any particular patent or device, nor does he attempt to say that the plaintiff was attempting to use a device such as is mentioned or described in detail by the defendant in his publication. Where words are used which might, by an innuendo, be directed to some particular person, the reference or meaning may be made clear and to the effect that in a peculiar sense they are defamatory, by evidence produced upon the trial. This publication is silent as to the plaintiff, and it is silent as to the character of the device, over which the plaintiff may exercise, or may have been in the habit of exercising, control. This being so, the want of words or references of an actionable meaning in the publication as stated, or words calling into question the special business and device of this plaintiff, he can not say that he is specially damaged in manner and form as set forth in his petition. We think the court below was right in sustaining the demurrer.

The judgment of the court below will be affirmed.

C. H. Blackburn, for plaintiff in error.

Samuel A. Miller, for defendant in error.

NUNC PRO TUNC ENTRY.

191

[Hamilton District Court, October 17, 1882.]

JAMES NEELY v. ANNA CUMMINS.

The court, after trial on merits and verdict for plaintiff, where no reply had been filed to a plea of payment, may allow a nunc pro tunc entry of a reply, filed as of the day of trial.

ERROR to the Court of Common Pleas.

SMITH, J.

This is a petition in error in this court to reverse a judgment of the court of common pleas, which Cummins recovered against Neely. The action below was brought upon a promissory note. The petition alleges defendant made the note for the sum of three hundred dollars; that plaintiff was holder and owner of the same; that no part thereof had been paid, and the whole amount thereon was due. There was an answer filed, in which a plea of payment was set up. To this plea of payment no reply was filed. The case was tried by a jury, and a verdict rendered for the plaintiff for the whole amount of the note and interest. After the verdict was in, the defendant made a motion for a new trial, on the ground that the verdict was against the weight of evidence, and also in effect, though not in terms, for a judgment notwithstanding the verdict, claiming that he was entitled to a judgment upon the pleadings, there being a plea of payment, to which no reply had been filed. The court, on consideration, overruled both motions, but allowed a nunc pro tunc entry of a reply to be filed as of the day of trial. This was done, and the defendant excepted to the action of the court: first, in not granting judgment for the defendant, and secondly, in allowing this nunc pro tunc entry to be made; and for the consideration of these exceptions the petition in error is filed in this court.

There is no doubt, I suppose, that in a proper case, a court of general jurisdiction has the power to make a nunc pro tunc entry. It is frequently done by the courts of England, by the courts of the various states and by the courts of this state. In the case of *Dial, adm'r v. Holter* 6 O. S., 228, the court fully examines the law upon the question and allows a nunc pro tunc entry in that case,—a very extreme case. In the present case there is no bill of exceptions; there is nothing upon the record to show that the power of the court, or the discretion of the court, was improperly exercised. In the absence, therefore, of anything upon the record to the contrary, in the absence of any evidence at all upon the subject, it being silent as to the circumstances of the case, we are bound to presume that this discretion was properly exercised, and therefore affirm the judgment.

W. L. Dickson, for plaintiff in error.

Lewis W. Irwin, for defendant in error.

ELECTIONS.

191

[Hamilton Common Pleas Court, October 13, 1882.]

STATE ex rel. HAWKINS v. SAM'L W. RAMP et al.

In the opening of returns and abstract of votes by clerk of court of common pleas and justices of the peace taken to his assistance, a candidate or his agent has a right to be present.

EVERY, J.

Relator was a candidate for the office of sheriff at the late election, and the clerk of the court of common pleas having taken two justices of the peace to his assistance as required by law, is now engaged in opening and making abstracts of the returns. The relator complains that they have refused admission to a person designated by him as his representative, and he prays a writ of mandamus. The answer is, that they offered and are still willing to admit any proper person named by him, except two, whose names they gave him, but that he refuses to name any others. To this there is a demurrer.

The question at the bottom is as to the right of a candidate to witness the opening of the returns. If the right exists, it would seem, according to ordinary principles of law, to be one that might be exercised by agent.

The statute is silent except as to the time and manner of opening the returns and making the abstracts. There is no provision for the admission of any one. But the duty, although not of a judicial character, is an official public duty. The clerk acts as clerk. The language is, "the clerk of the court of common pleas taking to his assistance two justices of the peace of the county, shall proceed to open the several returns made to his office." Revised Statutes 2980. The place is the office of the clerk, as appears not only from the fact that the returns are there, but also from this, that in the event of the death or absence of the clerk and his deputy, and the performance of his duty in this particular by the probate judge, the probate judge is required "to attend immediately at the clerk's office." Revised Statutes 2982. Whether in the same room where the ordinary official business of the clerk is carried on, or not, it must, for the particular purpose at least, be regarded as his office.

Now the clerk's office is a public place, open to all, at least to all who have an interest, distinct from that of the general public, in what is going on there. The precise extent of interest needed to sustain the right of inspecting public records cannot be accurately defined, but within it has been held to be the interest of a candidate at an election for public office, where the inspection sought is of the poll books of the election. *State ex rel. Block v. Henderson*, ante 112. Between the right of a party to be admitted to the clerk's office to look at the papers or records of a litigation, and the right of a candidate to look at the returns of an election as they are opened there, it is impossible to distinguish. The result, as declared by the clerk and justices, he, as an elector, may contest by appeal to the court of common pleas, and having such right of appeal, it would be strange if he were not entitled to be present at the proceeding.

The statute, while silent as to the presence of any one, except the clerk and justices, contains nothing from which it is to be inferred that their duty is to be discharged in secret. That by express provision of law, judges of election are required to permit candidates, or not exceeding three of their friends, to be present in the room, while they are receiving and counting out the ballots, does not lead to the inference, from the absence of any such provision in respect to the opening of the returns by the clerk and justices, that candidates were intended to be excluded. The difference is in the place. It was unnecessary to provide for permission to be present in the office of the clerk of the court of common pleas of the county.

That reasons of convenience might require the number of persons present to be limited, and that in the discharge of the duty committed

to the clerk and justices, they should not be hindered or obstructed, is true. Doubtless, for impropriety of conduct in their presence, the clerk and justices might exclude persons. But the answer raises no objection of the kind. It is not a question of number, for the offer is made to admit any proper person named by the relator, except two. It is not a question of any impropriety of conduct of these two. Except that they are excepted, nothing is said against them.

Let the writ issue commanding the defendants to admit the relator, or in his stead, such person as he may designate.

Campbell, Bates & Von Martels, for the relator.

Storer & Harrison, contra.

WORKHOUSE.

198

[Hamilton District Court, October 17, 1882.]

Ex parte JOHN WALKER, Habeas Corpus.

1. Under section 2099, Revised Statutes, it is discretionary with the court whether a minor under 16 years of age shall be confined in the workhouse or house of refuge.
2. The board of directors of the workhouse of Cincinnati cannot discharge a person committed thereto, unless the order therefor be made at a meeting of said board, at which a majority is present uniting in the action thereof.

JOHNSTON, J.

This is a petition for a writ of habeas corpus, charging that the petitioner John Walker, is illegally restrained of his liberty by James Morgan, superintendent of the work house of this city. The petition further states that he was held by said Morgan, wholly without authority in law. Morgan produced the body of Walker in court, and made answer, that he held him under commitment issued to him by the police court of the city of Cincinnati, and attached to his answer a copy thereof, which upon its face shows that petitioner had on or about the 30th day of August, last, committed an assault and battery upon a party within said city; that he was tried September 4, 1882, and convicted and sentenced by that court to imprisonment in the work house for a period of six months, and to pay a fine of \$200 with costs.

Against this defense, or showing Walker filed a reply setting forth that while it was true he was committed to the work house as alleged, that while the judgment and sentence were null and void ab initio, yet after his incarceration, by the action of the board of directors of the work house, to-wit, : on the 5th of October, 1882, he was released from further imprisonment, and therefore his further incarceration in the work house was wholly without authority and illegal, and he still prayed as in his original petition for a discharge. This plea, upon a hearing of the case, it was decided, still left upon the petitioner the burden of showing that he was illegally restrained of his liberty before any proof should be called for from the respondent Morgan. Accordingly the petitioner put in evidence the transcript of the police court, and a release or paper signed by three of the directors of the work house. Respondent then produced evidence to show under what circumstances this release was obtained, and it appeared that while petitioner was undergoing sentence, the paper or release presented was not acted upon at any meeting of the said board of directors, either at the work house or at any point of the city of Cincin-

nati, where a quorum was present, but that on the contrary the paper was taken first to one director at his place of business, and there signed, to another at his place of business, at a point distant from the other director and there signed, and finally to a third director, who signed it at his hotel. During the argument, counsel for petitioner claimed, first, that irrespective of this discharge which he claimed would entitle the petitioner to his release, that the writ should be granted and the petitioner discharged for the reason that upon the face of the record presented from the police court, that court had no authority either to hear this charge against the petitioner, much less to pass any sentence upon him; in other words, that the judgment and sentence of the police court were wholly illegal, unauthorized and void. It has been decided by our supreme court, that this writ of right may not be used for the purpose of reviewing the alleged errors of an inferior tribunal or any tribunal.

If it appear upon the face of the record that the court had no jurisdiction either of the person or subject-matter, then of course the judgment is null and void, and the person is entitled to a discharge, but otherwise, the remedy of the person is by proceedings upon error. This is decided in *Ex parte Shaw*, 7 O. S., 81, and that case has ever since been followed. It is claimed that the judgment was null and void for the reason that the record did not upon its face show that Walker was over sixteen years of age, and it is claimed that by virtue of section 2099, Revised Statutes of Ohio, that unless it appeared in the mittimus that the person was over 16 years of age at the time he was tried and sentenced to the work-house, that he could not be lawfully imprisoned there.

We have examined this section in connection with the provisions of the statute relating to the house of refuge, the only other place except the county jail that a person might be sentenced for the offense of assault and battery.

By referring to the act in relation to the house of refuge, section 2053, Revised Statutes, which is applicable to the present house of refuge, we find that an infant under 16 may at the discretion of the court, be sentenced to confinement therein if liable to confinement in the county jail for the offense committed.

"Section 2053. An infant under the age of sixteen years, who may be liable to confinement in the jail in any county in which a house of refuge and correction is situated, or in the penitentiary of the state from such county or at the reform farm, may, at the discretion of the court, or magistrate giving sentence, be placed in such institution until of legal age, under the exclusive control and guardianship of the directors thereof."

This clearly gives the police judge a discretionary power in the premises. If the accused be under 16 years, the court has a discretion to confine him either in the work house or house of refuge. Section 2099 is simply mandatory in this, that when a person is over 16 years of age and yet a minor, if he be convicted of an offense punishable by imprisonment in the county jail, the court must sentence him to the work house. If, however, he be liable to imprisonment in the county jail and be a minor under sixteen years of age, he may at his discretion confine him in the work house as well. In our opinion it was wholly unnecessary for the commitment to show whether the prisoner was over or under 16 years of age. This offense certainly was one over which the police

court had jurisdiction. The record shows that the offense was committed within the limits of the city of Cincinnati by the accused. He was arrested and brought before that court, and certainly from the record the court had not only the jurisdiction of the subject-matter but of the person, and had the right therefore to try him and pass judgment. As to the proposition made by counsel that the proceedings were wholly null and void as that the commitment was insufficient, we must hold that the court had jurisdiction and that the sentence was in accordance with law.

The next question then is, whether the petitioner obtained a valid discharge from the work house. As already stated, the prisoner produced in court a paper signed by three of the directors, authorizing the respondent Morgan to discharge him, and it appears from the evidence that he was discharged from confinement and thereafter was re-imprisoned. Petitioner claims that having been properly discharged the superintendent no longer had the right to re-imprison him for the offence for which he was convicted on the 4th of September, 1882. It is evident that at the time this discharge was received and at the time the writ issued, his term of sentence had not expired. It was claimed by the respondent's counsel that while it was true that the directors' names were attached to this paper, that it was not a valid discharge, for the reason that it was not the result of the joint deliberation of these members of the board or of any other three members of the board, and simply amounted to the individual act of each member; and that it was not a valid act. The statutes in relation to the work house and its government does provide that the board may discharge a person for good and sufficient cause, but that statute contains this provision:

"Section 2098, Revised Statutes. The board shall have the same powers, perform the same duties, and be governed by the same regulations, so far as applicable in the management of the affairs thereof, and care of the convicts therein, as are conferred upon and required of the board of directors of houses of refuge and correction, as provided in subdivision one of this chapter." * * *

This naturally carries us to the statute in relation to the control of houses of refuge. The statute, with reference to the discharge of an inmate there, is as follows: „

„Section 2075, Revised Statutes. If a parent, guardian, etc., feels aggrieved by the commitment of an infant to the directors of houses of refuge and correction by a person authorized by this chapter to commit such infant, he may make a written application to the board, at such time as the directors, by rule or resolution, provide for hearing applications, not later than the next regular meeting of the board, to have the infant delivered to him; which application shall state the ground of the applicant's claim to the custody of such infant, and the reason for claiming such custody."

Mark the language, "at such time as the directors, by rule or resolution, provide for hearing applications, not later than the next regular meeting of the board."

Section 2076 reads: "Within ten days after hearing such application, the directors shall decide; and if they be of opinion that the welfare of such infant will be promoted by granting the application, they shall make an order to that effect; otherwise they shall decline the application."

This is applicable undoubtedly to the management and control and care of the convicts in the work house. The statute therefore contemplates that before the directors of the work house shall pass judgment upon the release of a member therein confined, that there should be an application made to the board of directors, and they should hear the application at a meeting, and they should decide at the meeting what should be done, either to grant or refuse it. Where parties are thus acting in a collective capacity, and where a duty is devolved upon them by the legislature to discharge as a board, and a quorum may do an act, it is contemplated that each member is entitled to the opinion and judgment of his fellows; and that where any matter is brought before the board requiring action, that there should be action only after a joint consideration of the question, at least before a majority of the board, that they may act advisedly, that each one may know what his fellow member's opinion is, and thus be enabled to act advisedly. This question has not been decided by our supreme court in relation to joint meetings directly, but we find one or two cases in which it has been determined that there must be a meeting of persons who are to perform some duty in a collective capacity. In *Cupp et al. v. Commissioners et al.*, 19 O. S., 173-184, the supreme court say: "A quorum of the commissioners when met and in session as such, is the board of county commissioners in law."

In *State ex rel. v. Trustees et al.*, 20 O. S., 287, 294, a case reviewing the action of certain township trustees in causing certain bonds to be issued, it was claimed that because the bonds were not directed to be issued at a regular meeting of township trustees they were invalid.

The court say, p. 293: "Not only are the statutes silent as to the time and place for holding a special meeting of the trustees, but no previous notice is required to be given to the trustees. It therefore follows, that whenever and wherever within the township the trustees may meet, they may proceed to transact any lawful business for the township other than that which is required to be done at a regular meeting."

It is the opinion therefore of the court that the action of the board of directors in the premises in the discharge of Walker was unauthorized and not valid in law and did not have the effect to legally discharge him from imprisonment. Therefore, when he was again subjected to the authority of the superintendent of the work house, and by him imprisoned to serve out the remainder of his sentence, he was acting in accordance with his duty in the premises, and this petition must be dismissed at the cost of the petitioner and the prisoner remanded.

C. H. Blackburn, for petitioner.

Judge Wilson, contra.

201 MUNICIPAL CORPORATIONS—STREET RAILROADS.

[Hamilton District Court, October 17, 1882.]

†STATE OF OHIO ex rel. MEYER v. EDWIN HENDERSON.

An ordinance passed by the common council of Cincinnati, establishing a street railroad route in accordance with the provisions of general ordinance, No. 2954.

†This opinion, on the proposition stated in the above syllabus, was reversed by the supreme court, but it was held that the district court properly refused the writ of mandamus. See opinion, 38 O. S., 644.

relating to the construction and government of street railroads therein is a valid ordinance, and falling within the meaning of section 1666, Revised Statutes, in that it originates or creates a right, must, before it can take effect, be submitted to, and receive the approval of, the mayor.

MANDAMUS.

JOHNSTON, J.

At the last term of this court on the filing of this petition, the court permitted an alternative writ to issue requiring the defendant to show cause why he should not perform the act asked for in the petition of the relator, by the first day of the term of this court.

The petition in substance is that Meyer, the petitioner, is the owner of real estate near the corner of Dalton and Hopkins streets in this city and at other points in that vicinity; that he is interested in the construction of a street railroad known as "Route No. 20," to build which an application had been made by Nathaniel Caldwell; that this route, if established and a road built, would greatly enhance the values of his property and afford him and his family increased facilities, as well as his neighbors, to reach different parts of the city. He alleges that Caldwell's petition was presented, one copy to the common council or the clerk thereof, and another copy to the board of public works; that a publication for three weeks of this application was made in accordance with the law. He further alleges that the board of public works, in accordance with an ordinance, No. 2954, regulating the manner of constructing street railroads in this city, had, at the expiration of the application, prepared an ordinance in accordance with the provisions of said general ordinance; that it was transmitted to the council for its adoption, the office of that ordinance being the establishment of route 20, designating its termini, the streets and avenues through which it was to pass, and providing how bids were to be made, etc.

He avers that it was presented to the board of the common council and finally adopted; that that ordinance required after its adoption, the city clerk to go forward and publish it in the newspapers for a certain length of time. He says that the respondent has failed and refused to perform his plain duty in the premises and make this publication, and has failed and refused upon request to do so; that the excuse offered by the clerk was that while the ordinance did pass both boards it failed to receive the approval of the mayor as provided by statute and claimed that the mayor had vetoed the ordinance, and that after his veto, the council had failed to pass it over his veto.

The relator charges that this ordinance was not of that character requiring the approval of the mayor; that it was an ordinance not subject to his veto power, and even if it were, that he had failed to veto it for the reason that the pretended veto was not either written or signed by him, but simply by the clerk in his office, who could not perform that function. He claimed, therefore, that not having been vetoed in accordance with law, it became effective on the expiration of ten days after having been adopted by both boards, and therefore the clerk of the city had no right in law to refuse to go forward and perform what the law prescribes to be his plain duty in the premises, to publish this ordinance, that he has no other redress, and asks this court to compel him to go forward and discharge this duty by writ of mandamus.

To this petition the respondent answers, and detailing many things set forth in the petition of the relator, alleges that while this ordinance passed both boards, it was an ordinance of that character that required before it should take effect the approval of the mayor; that the mayor not only did not approve it, but upon the contrary, within the time fixed by statute, disapproved and vetoed it, and that in accordance with the language of the statute, the boards undertook to pass it over the veto upon re-consideration, but the ordinance failed to receive the votes of two-thirds of either, and therefore the ordinance failed and did not take effect, and there was no obligation upon him at all to go forward and publish said ordinance.

Upon these issues the case was resented. Very many questions were argued that do not directly appear upon the papers, and upon a number of them we do not propose to express an opinion. Perhaps upon some of them we may not all be agreed. It was claimed by respondent that the ordinance should have received the approval of the mayor for the reason that it contemplated or involved an expenditure of money, and therefore fell within the provisions of the "Worthington law." It was further claimed, that in effect the ordinance never had been properly passed by the boards of common council before it was presented to the mayor for his signature, it appearing that at the one time during its history it had been lost upon its final passage before the board of aldermen; that a motion was made to reconsider that it

was finally passed, but it was claimed by respondent that the motion was made out of time, or at least the reconsideration was not properly obtained and did not in fact revive the ordinance and place it upon its feet again.

It furthermore was claimed that in any event, if the mayor was not authorized to veto or approve it, it did not appear from the relator's petition, that it ever had gone, after its adoption, to the board of public works whence it emanated originally for their approval. These three questions were all discussed at length. We do not think that in the determination of this application it is necessary to express an opinion upon either one of these three propositions. The question arising in this case for determination is whether or not this ordinance, which for the purposes of this decision we treat as properly passed by both boards, was of such a character as that it required to be submitted first to the mayor for his approval before it should take effect. The respondent relied upon sections 1666 and 1667, Revised Statutes.

The former provides, among other things, that "every ordinance, resolution or order in which an expenditure of money, or the approval of a contract for the payment of money or for granting a franchise, or creating a right, or for the purchase, lease, sale or transfer of property, which shall have passed both boards of the common council in separate session (except such as levying special taxes for the improvements of streets), shall, before it takes effect, be presented, duly certified by the clerk, to the mayor of the city for approval."

Section 1667. "The mayor, if he approves such ordinance, resolution, order or contract, shall sign it, but if he does not approve it, he shall return it with his objections to the board in which it originated, within ten days thereafter, or, if such board is not in session, at its next meeting thereafter, which objections the board shall cause to be entered in full on its journal; provided, that the mayor may approve the whole, or any item, or part of any such ordinance, resolution, order or contract presented to him for his signature; and if he does not return the same within the time above limited, it shall take effect in the same manner as if he had signed it."

The relator claims that while there was a general ordinance of the city (2954) providing for the construction, operation and government of street railroads, requiring that the establishment of routes should be by ordinance, to be followed by another ordinance at a future time, granting the right to construct to the lowest bidder, that the first ordinance establishing the route was not called for by the statute, and it was unnecessary; that it neither created or granted a franchise nor did it create or grant a right, and that it did not contemplate the expenditure of money, nor was any involved in it.

The claim being made in argument, it might be proper to say that the relator charges in his petition, that Caldwell in making his application, followed this general ordinance 2954, and must have recognized it as binding, for while the statute does not say that the application of the petitioner shall be made or presented to the board of public works, Caldwell, he avers, did present his petition, one copy of it to the board, as said general ordinance requires he shall do. This ordinance provides, that one copy of the application shall be presented to the board of public works, and another to the common council or the clerk thereof. Relator evidently therefore recognized the fact that the proceedings were taken to obtain this route in accordance with the rules and regulations provided in this general ordinance, 2954; that the council had the right to establish this route there can be no doubt. True, the statute does not say in terms that the council is to establish the route by ordinance. It provides, that the granting of the franchise shall be by ordinance, that is, the granting of the right to build the road and lay down the track, that shall be by ordinance. Taking the sections of the statute together, 2501, 2502, Revised Statutes, in regard to the establishment of street railroad routes, perhaps their terms are not as clear and perspicuous as they might be.

But the right of the council in carrying out a statute to enact all needful rules and regulations for that purpose cannot be questioned. Perhaps the clearest instance of that is in relation to issuing licenses by the mayor. The statute provides for the issuing of licenses to do certain business, conducting certain shows, etc., but to carry out that statute, ordinances are passed, regulating to whom the license may be issued, the time it is to run, how renewed, and the sum to be paid, etc.; and so long as the ordinance enacted to carry out a given statute, so long as the provisions of the ordinance are not in conflict with the statute itself, but are in furtherance of it, they will be upheld. The supreme court, as we think, in *State ex rel. v. Bell*, 34 O. S., 194, directly recognized the right of the council, if it was not in fact its duty in the premises, to enact and enforce such an ordinance. That was a proceeding in mandamus by Henderson, to compel the board of public works to grant a franchise or right to construct a road, to him, rather than to one Kerper, who was a

rival bidder. The court say in relation to sections 411 and 412, of which sections 2501 and 2502 are in substance re-enactments:

"In prescribing the terms and conditions upon which the railway may be constructed and operated, and the time and manner in which notice shall be given, bids received, and the result of the bidding ascertained, the action of the council may be by ordinance, general or special, or in such other form as it may deem proper." Now, both of these sections of the statutes in relation to street railroads, 2501, 2502, are silent as to the manner in which bids shall be delivered, or to whom they shall be delivered, or by whom opened; yet this general ordinance of the city council in relation to the construction of street railroads, provides in terms, first, how they may be received, by whom received, within what time, by whom opened, and how the ordinance conferring the grant therefor, is to be prepared and sent to the council for action, devolving the duty upon the board of public works. Referring to the statute in reference to street railroads, there is an absence of direct power to confer any right upon any person or any body. The supreme court say, however, that it is in the power of the council to do so. Further on in this case occurs the following language: "When all these preliminary steps are taken and facts ascertained, that is, when on such application council has fixed the terms and conditions on which the railway may be constructed and operated; when notice has been given, bids received, the board of public works assents to the grant, and such lowest bidder complies with the terms and conditions prescribed, then, and not until then, the council may pass the ordinance granting the right provided in section 412," thus recognizing the right of council to provide by ordinance the preliminary steps to be taken, before passing the final ordinance conferring the grant or franchise to build the road. The question arises then, upon reading sections 2501 and 2502 and sections 1666 and 1667, whether or not this ordinance establishes the route, fixing the termini of the railroad, was of a character that either granted a franchise or created a right; for it is in this class of cases just enumerated, that an ordinance, before it becomes effective, must receive the approval of the mayor. The council have control over the streets and avenues of the corporation, and the duty is enjoined upon that body to keep them clear, free from nuisance, and unobstructed. The power to widen a street, extend, narrow or vacate a street, is vested in that body. An individual who desires to build a street railroad upon the streets of a municipal corporation in this state must go through certain preliminary forms before he can be possessed of that right. One right is secured to a party who desires to build a street railroad by the establishment of the route, and that power is devolved upon the council, and very wisely.

Until the route is fixed and established, no person has the right to bid to construct the railroad. His right to make the bid that will be of value to him is created by the council, establishing the route over which he may, if a successful bidder, build the road. By this act the streets named are appropriated in a sense to a new or additional use. By establishing the route the council does not thereby grant the franchise, but it creates the right which is but another name in this connection for a franchise. The granting of the franchise, the conferring of it upon an individual or company, does not occur until it is ascertained who is the party entitled to it, the statute fixing as that person the lowest bidder. When the individual or company makes a bid under the ordinance, if the franchise or right that has been created is granted to any person at all, the party who has made the lowest bid can compel the authorities to grant that franchise to him. And he has only acquired this right to compel the authorities to grant the same to him by his bidding to build the road under the ordinance establishing the route.

Looking at section 1666, enumerating the cases in which the mayor is to have the right to pass judgment upon the legislation of the council, while it may not appear in the letter, yet it would seem that the spirit of the statute is that, except in relation to ordinances levying taxes for streets, all ordinances, resolutions and orders of every kind passed by the two boards should be submitted to him for his approval before taking effect.

The object of it is to protect the public, the citizen, the tax-payer, the abutting owner, perhaps in this case, against wrong and injustice, and it would be strange indeed if the mayor undoubtedly having the right to veto an ordinance incurring an expenditure of five dollars, should yet not be required to pass judgment upon an ordinance conferring the right to a corporation or an individual to construct and operate over certain streets and avenues of the corporation for twenty years a street railway. We think that the letter of the law required that the ordinance under consideration should be submitted to the mayor for his approval. In our opinion this ordinance did in terms originate or create a right within the meaning of section 1666, Revised Statutes. Did he disapprove it? Relator claims that even if it did require

his approval, that in effect there was no veto of it, for the reason that what purported to be a veto never emanated from the mayor, but was wholly the production of his clerk, and not having been vetoed, it became by force of the statute a valid ordinance after the expiration of ten days. The clerk was upon the stand, and testified that the ordinance, after its adoption by both boards, was laid upon the table of the mayor, and that the mayor wrote out his objections to it, and signed the paper; that it was not a very nice, clean, official document to be presented to the boards for their consideration, being interlined and blotted, and without any suggestion from the mayor, he recopied it just as the mayor had written it, and instead of signing the mayor's name alone, as he should have done, signed the mayor's name "per Banks," which was wholly unnecessary. The reasons given for refusing to approve the ordinance, were not reasons of Mr. Banks, but wholly the reasons of the mayor, so that in law, as well as in fact, it was the act of the mayor, within the meaning of the statute. It was therefore vetoed, to use the common expression. It was within the power of the council thereafter to have passed the ordinance over his veto by a two-thirds vote. It was brought before the boards for that purpose, but failed, a two-thirds vote not being obtained. Therefore the ordinance, in our opinion, failed, and became wholly invalid and of no effect.

The respondent, in the opinion of the court, was justified in refusing to publish the ordinance, and this petition of the relator will be dismissed at his cost.

S. A. Miller, for relator.

Ph. Kumler, John W. Warrington and E. W. Kittredge, for respondent.

SALES—AGENCY.

[Hamilton District Court, October 17, 1882.]

JOSEPH BROCKHAUS & BRO. v. C. KLEIN & CO.

Where defendant, being solicited by a stranger who claimed to have a load of hay to sell agreed to buy it from him, and thereupon the stranger informed the plaintiff thereof, and accompanied plaintiff with the hay to defendant's place of business, and while the plaintiff was unloading the stranger asked and procured from him the weigher's certificate, and with the same arranged the amount due, and collected it from defendant, and went away. Held: Of the two innocent parties, defendant must suffer, for there was no sale by the plaintiff to the stranger, nor making him agent, and entrusting him with the weigher's certificate was not contributory negligence, and defendant refusing to pay for or re-deliver the hay is liable for conversion.

ERROR to Common Pleas Court.

SMITH, J.

This is a petition in error to reverse the judgment of the court of common pleas. This case involves the value of a load of hay. Though not very large in amount, the question of law is interesting and somewhat complicated. It is a case where a very successful fraud has been perpetrated, and the question is: which of two innocent men shall stand it? The case came before the court of common pleas upon an agreed statement of facts, as follows:

Brockhaus & Bro. were farmers, living in Green Township, this county, and occasionally brought hay to market for sale. C. Klein & Co., the defendants, were a firm of millers here in Cincinnati, who employed teams, and had occasion to buy hay from time to time. At the time of the alleged sale in this case, a stranger came to the house of C. Klein & Co., representing that he had a load of good timothy hay for sale, on its way to a market, which he would like to sell. The defendants, Klein & Co., said that they usually bought their hay from one man, but if the hay was of good quality and the price was satisfactory, they would take it provided it was delivered to them before 12 o'clock of that day.

This stranger then immediately went into the Sixth Street Market Place, and found there one of the plaintiffs, who had a load of hay for

sale, and told him that Klein & Co. would take that load of hay, and to bring it and deliver it at their place of business at \$22 per ton. Brockhaus, one of the plaintiffs, drove his load of hay to defendant's place of business, and this stranger walked by his side. As soon as they reached Klein & Co's establishment, both Klein and his partner were out in front and examined the hay, and said it was satisfactory as to quality, and that they would take it. At that time there was a load of corn being delivered at the house of Klein & Co., and Brockhaus waited until the load of corn had been unloaded, when he drove up to the building to unload the hay, this stranger meantime standing down by the side of the building, and at one time went into the office. When the hay was partly unloaded, this stranger, who was standing by the building, told Brockhaus to let him have the weigher's certificate, and he would go into the office there, that the money might be ready for him as soon as the hay was unloaded. Brockhaus delivered it to him, and he took it and went into the office, agreed upon the amount, took the money for the price of the hay, and left. Meantime Brockhaus unloaded the hay. After the hay was unloaded he went into the office to collect the money. Mr. Grotlisch, one of the firm said: "We bought no hay of you; we don't owe you anything." "Certainly," said Brockhaus, "that is my load of hay." "We did not buy that load of you, we bought it of this other man." "Very well," says Brockhaus, "give me my hay back again." They said: "No, we bought it." Brockhaus, upon that, went away, and brought this suit for the value of this load of hay.

This man was a stranger to both parties; Brockhaus was a stranger to Klein & Co., and Klein & Co. were strangers to Brockhaus. The court below found for the defendant, and to reverse that judgment this petition in error is filed.

I think it may be taken for granted, that to constitute a sale of personal property, there must be a subject of sale and an agreement between the parties, a meeting of minds, and certainly an agreement as to who are the contracting parties, who is the vendor and who is the vendee, between whom the property passes. Now it seems to me, when you apply this test to the agreed statement of facts, there was no sale in this case; not by Brockhaus to this stranger, for the reason that this stranger did not purport to buy for himself; he went into the market and said that Klein & Co. wanted this load of hay. He did not pretend to buy for himself, but for Klein & Co., who he said, would take it at a certain price, and if there was no sale to him, the well-known principle applies, that a man cannot give a title to personal property, when he has none himself.

He could not sell it to the defendants. Nor was it a sale from Brockhaus to Klein & Co., because there was no agreement between Brockhaus and the defendants, as they well said to him when he demanded his pay: "We have bought no hay of you, we have made no contract with you;" and, as I said, there must be a contract between the parties, to constitute a sale. Although the hay may have been delivered by Brockhaus, it was delivered on no contract made between them, or by any person authorized to go between them, for the go-between was not an agent of either party, but simply a swindler. Therefore it seems to me, there was no sale to the go-between, by which a valid title to the property could pass, and there was no sale to the defendants, because there was no contract of sale between plaintiffs and defendants. Now, this position is sustained by some recent decisions of courts of the highest authority. In the case

of *Hamet v. Letcher et al.*, 37 O. S., 356, a case somewhat similar to this, and decided since this case was tried below, Letcher & Co. were persons engaged in buying and shipping hogs. Hamet was a farmer having hogs for sale. A man named Rohner came to Hamet, saying that he was the agent of Letcher & Co. Letcher & Co. being persons of well-known responsibility, Hamet agreed to sell the hogs to Letcher & Co., and delivered the hogs to Rohner, supposing he was the agent of Letcher & Co. Rohner having got possession of the hogs, sold them to Letcher & Co. as his hogs and got the money for them. Such being the fact, Letcher & Co. refused to pay Hamet for the hogs. Hamet brought suit in the court of common pleas for the value of the hogs. Judgment was rendered against him. The case was taken to the district court, and the judgment of the court of common pleas affirmed. The case was then taken to the supreme court and seems to have been very carefully considered by that tribunal. The decision was rendered by Okey, C. J. It was claimed by the defendant, that this cause was included in that class of cases, where a person, having obtained possession of goods by fraud—possession having been voluntarily given—he could make a good title by sale to an innocent purchaser.

But Judge Okey says very properly: "But this was not a sale to Rohner in his own right; he made no proposition to buy in any other way than as agent. Hamet did not agree to sell to any other than Letcher & Co., who never agreed to buy of him."

This doctrine applies here. This go-between never agreed to buy for himself. He professed, when he went to Brockhaus, to buy for Klein & Co. As a matter of fact he was not their agent. "This, therefore, was not a contract voidable merely, but an agreement wholly void; and, under the circumstances, the property in the hogs never passed from Hamet. Hence, applying the maxim, that no one can transfer a greater right or better title than he himself possesses, it necessarily follows, that Letcher & Co. are liable as for a conversion;" and again.

"The circumstances that Hamet intended that Letcher & Co. should have the hogs is of no importance. He never intended they should acquire title from any other than himself, nor do they make any claim under any purchase they made from him." The supreme court reversed the judgments of the court of common pleas and district court, and gave judgment for the plaintiff for the value of the hogs. In the opinion Okey, C. J., cites the interesting case of *Lindsay v. Cundy*, 3 Appeal Cases, 469, decided by the House of Lords, and similar to the case then before the court.

To illustrate the same principle there is a recent case: *Boston Ice Co. v. Potter*, 123 Mass., 28. This Ice Company was a firm delivering ice every day to its customers. Potter was a customer, and being dissatisfied with the Ice Company, told them that he would have no more dealings with them, and afterwards dealt with another company called the Citizens' Ice Company. Shortly afterwards the Boston Ice Company bought out the Citizens' Ice Company, and got a list of its customers, and proceeded to furnish defendant with ice during the season. Defendant received the ice as usual and knew nothing about the change until a bill was brought in, which he refused to pay. Suit was brought for the ice delivered. The court held that a person could not be made a party to a contract without his knowledge, and was not liable on a contract of that

kind. Not having contracted with the Boston Ice Company, it could not recover against him.

The court cite the recent case of *Boulton v. Jones*, 2 H. & N., 564, where plaintiff had bought out the stock in trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst. When payment of the price was afterwards demanded, defendant refused, on the ground that he had a set-off against Brocklehurst, and had not contracted with the plaintiff. The court held that Jones was not bound to take the goods.

It seems to us in the present case, that defendant having obtained possession of that load of hay, and refused to surrender it, was bound to pay for its value. Therefore the judgment below will be reversed.

It was urged in the argument in this case, that the plaintiff below contributed to the fraud on Klein & Co., and therefore should be estopped from recovering in this case: that in delivering this weigher's certificate to a stranger, he thus contributed to the fraud. Now it seems to me that a weigher's certificate, stating the weight, was no authority to receive the money, nor receipt for it,—no authority for defendant to pay the money to the holder. It did not purport in terms to give any authority to receipt for the money or to receive the money, nor did it contain any direction to Klein & Co. to pay the money to the person having it. Then was there such negligence on the part of Brockhaus as would contribute to this loss? Looking into all the facts and circumstances, it appears that this weigher's certificate was delivered to a man standing by defendant's place of business, who he supposed was their agent. The same man had come into the Sixth Street Market and represented himself as acting for defendant. He was standing by defendant's office, he went into the office once whilst Brockhaus was there, and certainly it seems to me there was no contributory negligence simply from the fact of handing him that weigher's certificate, when he said he wanted it for the purpose of enabling the defendants to have the money ready when the hay was unloaded. It is a case where a fraud has been perpetrated upon one of two innocent parties, and the loss must be sustained where it fell. It fell upon the defendants, who paid the money on a false representation, and they must sustain it.

As this is before us on an agreed statement of facts, we reverse the judgment and remand the cause to the court of common pleas, with directions to render judgment for the plaintiff for the value of the hay, which was to be assessed at \$20 per ton and interest.

Reemelin & Reemelin, for plaintiffs in error.

Emil Rothe, for defendants in error.

PARTNERSHIP—PLEADINGS—WORDS

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[Superior Court of Cincinnati. General Term, 1882.]

CHARLES C. KEELER v. JAMES H. SNODGRASS and JULIUS FRIEDERBORN, doing business as Snodgrass & Co.

1. When, after a firm has been dissolved and all the assets disposed of, a member thereof by his separate petition and proceeding in bankruptcy obtains a discharge, such discharge is effectual as to partnership as well as individual debts.
2. The phrase "fiduciary character" in the bankruptcy act of 1867, does not include the relation of factor or commission merchant to his principal or consignor.

FORCE, J.

This case comes up on reservation on demurrer to the third defence in the answer.

The plaintiff filed a petition, alleging two causes of action. For the first cause of action he states that, the defendants being storage and commission merchants, he shipped to them for storage 23,250 pounds of dried apples, that the defendants afterwards, with intent to defraud, converted to their use 6,900 pounds of the apples, and failed and refused to account for them or their value. For a second cause of action he states, that he shipped to the defendants for sale on commission 23,250 pounds of apples, and that the defendants with intent to defraud, converted to their own use the proceeds of 6,900 pounds.

The defendant, James H. Snodgrass, filed his separate answer, containing what is called three parts, but each part constitutes a separate defence. The first part is a denial in detail of the allegations of the first cause of action. The second part is a denial in detail of the allegations of the second cause of action. The third part constituting the third defence, begins, that this defendant "hereby referring to all the statements made and contained in this answer to the said first and second causes of action, and making all of said allegations a part of this part of this answer as though copied herein, alleges further, etc."

The further allegations aver in substance that the firm formerly composed of the two defendants, was long since dissolved: that their entire assets were long since wholly disposed of; that thereafter the defendant Snodgrass filed his separate petition in bankruptcy, wherein were considered the claims against the old firm as well as against himself individually, his joint as well as his several, his partnership as well as individual obligations; that he was finally discharged and received a certificate in the usual form. To this third part or third defence, the plaintiff demurs.

The first point to be considered is the effect of the clause incorporating into this defence the matters contained in the first and second defences by reference, and not by copying them in full.

The courts of the different states are not agreed as to the effect or the validity of such a reference. It seems to be held sufficient where a reference is sufficiently explicit in *Pomeroy on Remedies* section 716 and *Bates on Pleading*, etc., Vol 1, pp. 210-211, and it seems to be sufficient in Ohio where the reference is sufficiently explicit.

If this reference in the present case is to be taken literally as incorporating into the third defence the entire body of the first and second defences, the third defence is of course good on demurrer; since it then would contain a denial of all the allegations of the petition. If it is held that a reasonable interpretation of the reference makes it include in the third defence the portion of the first and second defences which is appropriate to the particular matter set forth as a third defence, then the reference will include a specific denial of the plaintiff's allegation of fraud and intent to defraud. It is objected that the discharge in bankruptcy is not valid, because it was a discharge granted in the separate bankruptcy proceedings of Snodgrass alone, not of Snodgrass and Friedeborn, and therefore that it discharged him of his individual debts only, and not of his partnership debts. The cases are not entirely agreed as to the effect of such a proceeding in general; but the clear preponderance of authority is that in a proceeding by a person alone in bankruptcy, the discharge obtained, is a discharge against his joint as well as his several obligations, his part-

nership as well as his individual debts. It is not necessary to refer to cases, yet it is appropriate to refer to the masterly opinion of Judge Lowell in *Wilkins v. Davis*, 15 Nat. Bankruptcy Rep., 60.

The cases are however entirely agreed that a person petitioning alone after dissolution of partnership and when there are no assets in existence, is by the order of discharge, discharged from all debts, joint and several, partnership and individual. That is sufficient for the present case.

It is claimed also that as the defendants were commission merchants, that the debt complained of was a debt created in a fiduciary character and is therefore excepted from the discharge. The clause in the act of 1867 incorporated into the Revised Statutes is that: "No debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer or while in a fiduciary character shall be discharged under this act." It is claimed that the variation in the connection in which the word "fiduciary character" is used in the act of 1867 from the connection in which the words "fiduciary capacity" were used in the bankruptcy act of 1841, enlarges the meaning of the word "fiduciary," so that it is not confined to technical trusts as under the act of 1841, but embraces such relation as a factor, commission merchant, etc. If that is the true construction of the statute, of course the discharge obtained by Snodgrass is not a discharge from the claim set up in this action. It was held in the Southern district of New York in two cases. *In re Seymour*, 1 Nat. Bankruptcy Rep., 29, and *In re Kimball* 2 Nat. Bankruptcy Rep., 204, affirmed in the circuit court, p. 354, that this is the true construction, and that under the act of 1867, debts of a factor or commission merchant to his consignor are not discharged by proceedings in bankruptcy. But this interpretation has been disaffirmed and the ruling made that the phrase "fiduciary character" in the act of 1867 means only technical trusts, in every reported case decided in the National courts since those two cases: *Grover and Baker v. Clinton*, 5 Biss., 324, in which case Justice Davis of the supreme court sat with Judge Hopkins, the District Judge; *Owsley & Co. v. Corbin & Co.*, 2 Hughes 433, decided by Chief Justice Waite; *Kieme v. Graff*, 17 Nat. Bankruptcy Rep., 319, a decision in the Eastern district of Pennsylvania; and in *re Smith*, 9 Benedict, 494, by Judge Choate of the Southern district of New York.

The state courts are not uniform in their decisions. The supreme court of Massachusetts in several decisions have made the same ruling with this last case, and Chief Justice Gray of that court, who pronounced the opinion in one of the cases, is now associate justice of the supreme court of the United States. When the Judge of the Southern district of New York in the case in *re Smith*, overruled the two previous decisions pronounced by Judge Blatchford, and their affirmance by the circuit court. Judge Blatchford had become and was the circuit judge of that circuit. It cannot be supposed that Judge Choate sitting in district court would undertake to overrule the earlier decisions of Judge Blatchford without the known concurrence of Judge Blatchford, and we must suppose that Judge Blatchford concurred in the overruling of in *re Seymour* and in *re Kimball*. And Judge Blatchford is now a justice of the supreme court of the United States. One further remark.

The case of *Neal v. Clark*, 95 U. S., 704, decides that the word "fraud" as used in the clause under consideration, means positive fraud, or fraud in fact, and while the case does not touch the clause relating to fiduciary character, yet in the cases, decided since *Neal v. Clark*, the courts have

held that the reasoning of the court in *Neal v. Clark*, overrules the decisions in *re Seymour* and in *re Kimball*.

We must hold therefore that the National courts interpreting this clause of an act of congress, hold that the words in the bankruptcy act, "fiduciary character," do not include debts created in the character of a factor or commission merchant; and, as the National courts follow the state courts in the interpretation of state laws, so the state courts follow the National courts in the interpretation of the acts of congress.

We have been reminded that this court in *Gay v. Faran*, 2 Cin. Sup. Ct. Rep., 426, ruled otherwise, and held that a debt of a factor or commission merchant is not discharged by a discharge in bankruptcy. At the time when that decision was made, the only decisions in the National Courts that had been reported were the two, in *re Seymour* and in *re Kimball*, and this court followed the interpretation made by the National courts in those cases.

We do now, as the court did then, follow the interpretation of the National courts, and, if in form we differ from the ruling in *Gay v. Faran*, in substance we follow it. The demurrer is overruled and the case remanded for trial.

E. R. Donohue, counsel for plaintiff.
Sayler & Sayler for defendants.

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FIRE INSURANCE—TAXATION—WORDS.

[Superior Court of Cincinnati, General Term, October 23, 1882.]

†AMAZON INSURANCE CO. v. W. S. CAPPELLER, Auditor.—ENTERPRISE INS. CO. v. SAME.

1. A fire insurance company, in making return of its credits for taxation, has no right to make any deduction on account of outstanding risks. The estimated amount of premiums "unearned" or "reinsurance fund" is not a "legal bona fide debt owing" by such company within the meaning of section 2730, Revised Statutes.
2. When such deductions have been made openly and by name upon the face of the returns which were otherwise full, true and correct, they are not false returns within the meaning of sections 2781-2. The auditor has no authority to add to the taxes of the current year any taxes on account of such deductions in former years, but it is his duty to correct the duplicate for the current year by making it correspond with the return for that year, ignoring such improper deductions.

HARMON, J.

Plaintiffs sue to enjoin defendant from placing upon the tax duplicate against them certain amounts which he claims to be due as taxes upon sums which, in their returns for the current and preceding four years, they have without authority of law deducted from the legal claims and demands due and to become due them in making up the item of "credits." The amounts so deducted by plaintiffs respectively are what are variously known as "unearned premiums," "reinsurance fund," and amounts to be returned in case of cancellation of policies."

These two out of a large number of cases pending have been reserved upon demurrers to the petitions to settle the questions arising, which are important not only because of the large sums of money now involved, but also because of the continuing effect of their decision upon the taxation of insurance companies throughout the state.

The questions are two: First—Were the deductions aforesaid such as plaintiffs were authorized to make? Second—If they were not, what authority has the auditor in the premises?

†This judgment was affirmed by the supreme court. See opinion, 38 O. S., 560.

The decision in *Exchange Bank v. Hines*, 3 O. S., 1, approved in *Latimer v. Morgan*, 6 O. S., 279, would be conclusive in favor of the auditor upon the first question, if we should consider the cases from a constitutional point of view; but they have been presented upon both sides as depending merely upon the proper construction of the statute relating to taxation, and we are able to so dispose of them. We are the more willing to take this course because of the remarks concerning *Exchange Bank v. Hines*, made by the learned judge who delivered the opinion in *Payne v. Watterson*, 37 O. S., 121.

The constitution, section 4, article XIII, requires the property of corporations to be taxed "the same as property of individuals," and by the terms of the statute the "credits" which corporations are required to return for taxation, Revised Statutes, sections 2734-7 and 2744, are "credits" as defined in section 2730, viz.: "The excess of the sum of all legal demands, etc., due or to become due to, over and above the sum of legal bona fide debts owing" by the person making the return.

It is not contended that any other deduction is anywhere authorized, and the inquiry therefore is simply this—were the items in question, the amounts of which are admitted to have been correct for present purposes, debts owing by the respective plaintiffs at the times of their several returns, within the meaning of the statute.

The position taken by the counsel for plaintiffs, is that when an insurance company receives, at the time of issuing a policy, the entire amount of premium thereon, a "legal bona fide debt" is thereby created, "owing" to the insured the amount of which constantly diminishes as the policy runs, but is at any given time such part of the entire premium as the time the policy then has to run is of its entire term. This amount, estimated upon all policies in force at the time of the tax return, constitutes the item deducted by plaintiffs in each of their returns, as aforesaid.

In other words, the proportion of premiums said to be "unearned" or, what is the same thing, the amount it would take to re-insure outstanding risks, or the aggregate of surrender values of policies in force at any given time, is claimed to represent the amount at that time of a number of contingent liabilities, estimated upon the same actuarial data used in determining the premiums to be charged in the first place.

It may be conceded at once that the fact of its having outstanding risks which either by the occurring of fires, etc., or the surrender of policies, may require an insurance company to make payments, is one which it must take into account in ascertaining its real financial standing at any time, which one about to purchase its entire business, property and assets, would likewise consider as reducing the price to be paid, and which might properly be regarded in making its return for taxation under a system like that in New York, where such corporations are taxed under a different principle from that applied to individuals, i. e., upon what a general balance sheet shows them to be worth. See *People ex rel. v. Ferguson*, 38 N. Y., 89. But they are nevertheless only liabilities purely contingent. Nor is their contingent character taken away by the fact that experience, and the calculations of actuaries have fixed a rule for ascertaining with tolerable certainty their present worth, if that be a proper term to apply. The estimation in money of the chances of their becoming debts does not make them debts in any ordinary sense of the word, any more than the calculation upon the theory of probabilities of how many policy holders may be expected to suffer loss or surrender their policies, changes any particular ones among them from mere policy holders into creditors. The fact remains that none of the losses insured against may ever occur; that none of the outstanding policies may ever be surrendered. So that the proposition counsel for plaintiff must maintain is that the statute has used the word "debts" in a sense which includes the estimated probabilities of contingent liabilities becoming fixed.

If the mere word "debts" had been used, the meaning of the legislature might not be so clear as we think it is now, though the word is one which hardly needs definition. A "debt" is a sum of money due by certain and express agreement, 2 Black. Com., 154; "all that is due a man under any form of obligation or promise," *Bouvier's Law Dictionary*; or, if the popular rather than the legal sense is to be taken, "that which is due from one person to another, whether money, goods or services," *Webster's Dictionary*.

But the legislature, by using the words "legal," "bona fide," and "owing," clearly intended to limit the word "debts" to such actual, fixed, certain liabilities as, if not due, lack only falling due to be enforceable by action. And if it be said that, put in another form, the proposition of plaintiff's counsel is that such companies owe their policy holders insurance of the value of such unearned premiums, and that this is a debt within Webster's definition, the answer is that such meaning of the statute is excluded by the use, with reference to claims due and to become due, and the

omission, with reference to debts owing, of the clause "whether for money or other valuable thing, or for labor or services, etc."

The use of that clause as to credits and not as to debts adds greatly to the force of an argument which would be forcible without it—that there cannot be a debt without a corresponding "credit," a debtor without a creditor. In other words, if plaintiffs may deduct the aggregate of unearned premiums as debts, each of their policy holders must return the unearned portion of the premium upon his policy as a credit, a conclusion for which none, we think, would contend.

Again, the rule of equality in taxation enjoined by the constitution would be violated if such estimates of contingent obligations were permitted as to corporations when they are not possible as to individuals. Suppose statisticians should ascertain the average percentage of defalcation, and we believe there is a company in Canada which insures employers against embezzlement upon some such rule, would one who is surety upon a number of official bonds have the right to estimate the chances of being called upon to respond thereon and deduct accordingly in returning his credits for taxation? And we will say here that in our judgment the provision of section 2730, that there shall not be taken into account as such debt "any greater amount or portion of any liability as surety than the person * * * believes that such surety is in equity bound and will be required to pay or to contribute, in case there be no securities," does not refer to mere liabilities in posse, but only to such as are in esse. In a large class of cases, such as official and other bonds conditioned for fidelity, etc., there is no liability from mere suretyship, but simply a conditional obligation, which becomes a liability only upon condition broken. The object and meaning of the provision just quoted was not to prevent the deduction of such merely possible liabilities. No enactment was necessary to exclude them from the meaning of "legal bona fide debts owing." The object and meaning were to prevent each of several sureties whose liability attached at once, from the nature of the obligation, as in case of a promissory note, or has been fixed by breach of condition, from deducting its entire amount as, but for this provision, he might do, because the entire debt is in law owing by each.

The fact that by Revised Statutes, section 3648, fire insurance companies are required, in estimating their profits for the purpose of declaring dividends, to reserve therefrom "a sum equal to fifty per cent. of the whole amount of premiums on unexpired risks and policies, which is hereby declared to be unearned premiums" does not, in our judgment, affect the question at issue. The legislature is here, from motives of public policy, merely providing for the greater security of persons whose property is insured. This provision no more makes such "unearned premiums" debts than the one following in the same section, which requires such companies also to reserve in such estimation of profits all sums due the company on bonds, book accounts, etc., of which the part of the principal or interest has been paid during the preceding year, makes the sums so due cease to be credits. If this section authorizes such companies to deduct the one as debts, it also authorizes them to omit the others as credits.

The same is to be said with reference to the Revised Statutes, section 274, providing how the superintendent of life insurance companies shall estimate their assets, in so far as that section is claimed to relate by analogy to the case of fire insurance companies.

The fact that the legislature has seen fit to provide some security for the payment of contingent liabilities upon policies of insurance does not show that it considered them "legal bona fide debts owing" within the meaning of the tax law. On the contrary, the danger it was providing against arises from the very fact that such liabilities are not debts and not owing, so that those who hold them have no remedy while careless and dishonest companies forget or ignore the fact that they may at any moment become legal debts owing, and so fail to make provision for them.

Section 3664, which requires the insertion in all fire policies of a clause providing for cancellation at the owner's option, does not change the character of the company's obligation to refund when so inserted. It is contingent until the option is exercised, just as its obligation to pay in case of fire is, until the fire occurs. When the option is exercised, when the loss occurs, a "legal bona fide debt" becomes "owing." Until then the company is merely one of the parties to a contract of insurance, and has no right to make any deduction on account thereof, in returning its credits for taxation.

We are advised that the court of common pleas has decided otherwise as to life insurance companies in the case of the U. C. Life Ins. Co. v. Fenton, but we can, as to fire insurance companies at least, come to no other conclusion than that we have announced, which is supported by the reasoning of the Court in *People ex rel.*

Glens Falls Fire Ins. Co. v. Ferguson, supra. As to the case of the Ala., Etc., Life Ins. Co. v. Lott, 54 Ala., 499, in which it was held that similar items might be deducted from credits under a statute permitting the deduction of "the indebtedness of the tax-payer," its correctness and its equal application to the case of a fire insurance company might be conceded without affecting our decision. The court assumed, without discussion, that in the Alabama statute the term "indebtedness" was as broad as the term "credits," which was defined by that statute much as it is by ours. But we cannot go to the length of holding that the general unqualified term "indebtedness" is equivalent to "legal bona fide debts owing."

The authority of the auditor in the matter remains to be considered.

It is admitted upon the record that plaintiffs made all the returns in controversy directly to the auditor upon blanks furnished by him; that such returns set forth truly and in detail the amounts of the various claims and demands due them, and also in like manner set forth the debts to be deducted, including, as distinct items termed "re-insurance," the amounts upon which it is now attempted to tax them. It is likewise admitted that such deductions were openly made upon the face of the returns; that the auditor placed upon the duplicate each year only the sum so found, and that plaintiffs were duly assessed and have paid taxes thereon except for the current year.

It is very plain, therefore, that these were not false returns authorizing the auditor to proceed under sections 2781-2782. They were full, true and correct in all their statements. The auditor committed an error of law in not ignoring these deductions and placing upon the duplicate the amount of credits returned without regard to them, and his power to now correct such error must be sought elsewhere than in the sections relating to false returns. It must be found in some enactment, for his only powers with regard to taxation are those conferred by statute.

Section 1038 (see also section 2800), requires him to "correct all errors which he discovers in the tax list, and duplicate in the amount of such taxes and assessments," etc. It is manifest from the entire section that this refers to the pending duplicate only. Throughout the tax laws errors in the duplicate of the current year and additions to it of amounts omitted from previous duplicates are plainly distinguished; see sections 1040 and 2803, (amended, 78, O. L., 47). Correcting an error in an old duplicate would avail nothing, so that could not have been the power intended to be given. It is not an error in the pending duplicate that something was omitted from a former one unless it be of something which the auditor is empowered to add to it. We are not able to find any language conferring upon the auditor the power to add to the taxes of the current year personal taxes omitted by his own mistake in former years. This court decided, in *Foster v. Fenton, Treasurer*, 5 Am. Law Rec., 523; (s. c. 5 Dec. R., 427), that section 1036 gives him power to add real taxes so omitted, but that section refers, in that regard, to real taxes only; so that we need not now enquire as to the correctness of that decision.

We find, therefore, that as to the sums which the auditor is about to place upon the duplicate on account of former years, the plaintiffs are entitled to the injunction for which they pray; but that, as to the increase which he is about to make in the taxes for the present year, without penalty, by correcting his error in transferring the amount upon which plaintiffs are to be taxed from their returns to the duplicate, he is not only exercising a power conferred, but discharging a duty enjoined by the law.

Decree accordingly.

Force and Worthington, JJ., concur.

Foraker & Black, for plaintiffs.

Charles Evans, contra.

CONTRACTS—COUNTERCLAIM.

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[Superior Court of Cincinnati, General Term, 1882.]

LEOPOLD BURCKHARDT v. FREDERICK BURCKHARDT.

1. In an action for breach of contract, though the breach be proved, if the only evidence as to the amount of damages rests upon a false hypothesis, and the error caused thereby cannot be ascertained, there is a failure of proof of damages.

See also decisions of superior court, 5 Dec. R., 185; (s. c. 3 Am. Law Rec., 418 and note) and 14 B., 108. See also statement of the case above.

2. The seller of the good will of a business relinquishes the right to represent afterwards that he is continuing the old business.
3. Where upon a counter-claim in equity a breach of contract is established, the court may order the plaintiff to pay a part of the costs, though the defendant furnishes no proof of actual damage.

WORTHINGTON, J.

On October 25, 1871, the firm of Burckhardt & Co., composed of Leopold and Frederick Burckhardt, was dissolved, Leopold transferring to Frederick all his interest in the real estate, fixtures, chattels and good will, but reserving the right to carry on business under any name except "Burckhardt & Co." and receiving as consideration \$83,000, payable one-third in cash, and the residue in notes secured by mortgage.

In January, 1872, Leopold Burckhardt began business on his own account, under the name of Leopold Burckhardt & Co., and competed with the old house of Burckhardt & Co., in part of their business.

In November, 1872, Leopold brought this action against Frederick to foreclose his purchase money mortgage, claiming a balance of \$48,-903.97, with interest.

By this answer, Frederick admits this amount to be due, but asks to recoup \$35,000 damages for breach of the contract in the sale of the good will, committed by Leopold by his manner of conducting his business after the dissolution.

The case was reserved to general term, and a hearing had in 1875, the opinion then given will be found in 3 Am. Law Rec., 418; s. c. (5 Dec. R. 185).

The case was then referred to a master, judgment rendered on his report, proceedings in error instituted in the supreme court, the judgment given here reversed and the cause remanded to us in general term for further proceedings. See Burckhardt v. Burckhardt, 36 O. S. 261, where, and in the prior opinion of this court, fuller statement of the facts will be found.

Since then, the case, on motion of defendant, has been again referred for further proof as to damages; and now, on the coming in of the master's report, stands for final decree.

The additional evidence now reported, so far as it tends to support the claim of the defendant, may be summed up as follows:

1. The value of the good will of Burckhardt & Co. at the time of the dissolution was \$70,000.
2. The effect of Leopold's acts which are complained of as unlawful, was to destroy the good will, and render it of no value.

The master had reported on the former hearing that the trade of not more than four-fifths in value of the customers of Burckhardt & Co., had been solicited by Leopold, and that the effect of this solicitation by way of diversion of trade, or loss of profits did not appear. He now re-affirms this finding, and says that if in view of this finding the evidence offered on the present reference be incompetent or insufficient, then there is a failure of proof as to damages. The sufficiency of this evidence is the first question we will consider.

Exactly what duties are assumed by the vendor of the good will of a business is a question upon which there is some difference of opinion. Some things, however, have been definitely settled, and among others, that the vendor, in the absence of any covenant to the contrary, may carry

on a similar business, and may deal with the old customers, provided he does not solicit their trade. *Leggott v. Barrett*, L. R. 15 Ch. Div. 306.

It must be conceded that the essence of the value of good will lies in the expectancy that old customers will continue to deal with the successors of the old house. This being true, when it appears as a fact that one-fifth in value of the customers of *Burckhart & Co.*, were in no way solicited by Leopold, it is at once apparent also that the witnesses in stating that the good will was rendered entirely worthless by Leopold's acts must have proceeded upon some false hypothesis; either the witnesses misunderstood the meaning of good will, or else the acts which the witnesses regarded as grievances were not all unlawful. For if the unlawful attack was directed only against that which gave four-fifths of its value to the good will, it could not have effected the destruction of the entire value. Nor is there anything upon the record which will enable us in estimating damages to make allowance for the error into which the witnesses have fallen. It is true that it appears that the trade of four-fifths in value of the customers was solicited; but it is not solicitation, but successful solicitation, that gives damages; *Burckhardt v. Burckhardt*, 36 O. S., 261; and what proportion, either in amount or comparative value, of the trade that was attacked was diverted, does not appear.

We understand the rule to be well settled that in actions for damages caused by breach of contract the burden is upon the plaintiff to prove the extent of his damages; possibly where the injury is really an attack on reputation without pecuniary loss, damages may be assessed by way of vindication, as in *Rolin v. Stewart*, 14 C. B. 595. But where the breach can have caused no loss of that kind, but only pecuniary loss, and the amount of that loss is not shown, even approximately, we take it to be clear that only nominal damages can be given, and this only to indicate the right, and to effect the question of costs. *Feize v. Thompson*, 1 Taunt, 121; *Blake v. Robertson*, 94 U. S. 728. Counsel for defendant very frankly admit that they have been able to find no authority which furnishes an exact precedent for the method of proof they have attempted to enforce. But they refer us to certain classes of cases which they claim are analogous. One of these is, that in an action for deceit in cases of sales, the measure of damages is the difference in value between the article sold and the article as represented, of which *Page v. Parker*, 43 N. H., 363, is an example. Then they say that here Leopold sold the good will; he thereby represented that the old customers would not be solicited by him; the measure of damages therefore is the difference in value between the good will without and with solicitation.

Assuming for the sake of the argument (upon which, however, we express no opinion) that a voluntary sale of the good will carries with it a promise not to solicit old customers, yet to follow the argument of defendant's counsel would require us to disregard the decision of the supreme court in this case, for they held that not solicitation, but effectual solicitation, gives the measure of damages. The fallacy of the argument of counsel lies in this; the cases are not analogous; in the one case this is a misrepresentation as to an existing fact; in the other there is no misrepresentation at all, but a breach of a promise. The measure of damages for a breach of promise annexed to a transfer of property is not the difference between what the property would have been worth with and without the promise; but the damages suffered by the breach—in this case, as the

supreme court has decided, the diversion of trade by the solicitation. If there was no diversion, the damages could be only nominal.

Another case that has been cited as analogous is that of the *M. K. & T. Ry. Co. v. Fort Scott*, 15 Kan., 435. There the city had made certain payments to the railway company in consideration that the latter should construct its road through the city and locate its shops there. This the company failed to do. In considering the question of damages, the supreme court of Kansas said, for the future guidance of the court below, that if the portion of the consideration apportioned by the parties to this branch of the contract was ascertainable this would furnish one measure of damages. With this we have nothing to do, for our supreme court, upon this record, have held that that portion is not ascertainable here.

The supreme court of Kansas said also, that the value to the city of having the track pass through it, and the shops located there, might be a measure of damages; which, put negatively, is the loss of value, or damage to the city from not having the track and shops located there. But as applied to this case, this means the damage to Frederick from Leopold's not having refrained from soliciting old customers; and this must be the same as the damage he did by such solicitation.

The case of *Walker v. Johnson*, 12 Rep., 242, also relied upon by counsel for defendant is, we think, fully in accord with the views we hold. The case was trover for converting part of a wagon, and the court after stating that if the taking of that part wholly destroyed the value of the wagon, the measure of damages would ordinarily be the value of the wagon, add: "But if the part not taken was of any value after the severance, though of no value for the use for which it was intended, to-wit: as a wagon, the owner was not deprived of the entire value. His damages should be to the extent only of the actual injury; that is, to the value so far as he was deprived of it."

So here the defendant's damages should be to the extent only of the actual injury—the value, not of the entire good will, but of that part of it which was taken away from him; in other words, of the trade which the plaintiff unlawfully diverted.

These are fair samples of the cases most relied on. Without stopping to discuss the others in detail, it is sufficient to refer to them and say we see nothing in any of them to cause us to alter our conclusions. They are *Heichew v. Hamilton*, 4 Gr. (1a), 317; *Dethless v. Tamsen*, 7 Daly, 355; *Coffee v. Meigs*, 9 Cal., 363; *Morse v. Hutchins*, 102 Mass., 439; *Foulke v. Harding*, 13 Pa. St., 242; *Woodward v. Thacker*, 21 Vt., 580; *Mitchell v. Rhead*, 84 N. Y., 556.

We are forced therefore, to the conclusion that the evidence offered upon the last reference fails to show the defendant entitled to substantial damages; and no reason has been suggested to us why, upon the entire evidence, we should differ from the master's conclusion, that if the evidence offered on the last reference to be insufficient, there is no evidence upon which a finding of more than nominal damages can be based.

If it appeared here that the defendant had done all that he could to prove to what extent he was damaged, that he could not have made his proof more specific than he has, and that the knowledge of what mischief had been done, was confined to the plaintiff, who refused to assist the inquiry, then possibly, under the authority of *The Duke of Leeds v. The Earl of Amherst*, 20 Beav., 239, we might be justified in guessing at the sum as nearly as we could, being sure, in the language of the court in

Heichew v. Hamilton, 4 Gr. (Ia.), 317, to make it large enough to teach the plaintiff that honesty is the best policy. But when we find, as we do here, that the defendant, instead of going to the facts, is relying upon the conjectural opinions of experts, and that his books show his profits during the period the plaintiff was competing with him, in those lines of trades in which the plaintiff did compete, to have been fully as large as they were in the years immediately preceding and succeeding the competition, we see no reason to take that course.

It was urged in argument, that unless a general estimate can be made from such testimony as this, it is impossible to assess damages in cases of this kind; that to trace the loss of trade caused by the solicitation of individual customers is practically impossible.

We do not wish to be understood as holding that such specific evidence is the only method of proof. But if it were, it would be no reason for adopting the method of computation contended for here,—to let the witnesses testify as to facts upon their view of the law, that is, as to fact and law, and then to eliminate their errors of law, and guess at their probable statement of facts under the true rules. It is for the very reason that the proof of the damages actually sustained in this class of cases is difficult, almost impossible,—in other words, that the remedy at law is so inadequate, that equity will interfere in the first instance, and by injunction prevent the suffering of any damage. And he who will not seek the ounce of prevention, should not complain if afterwards he finds the burden of the pound of cure severe.

As the plaintiff is seeking to foreclose a lien for a given amount, and as the defendant admit that amount to have been due, and shows no reason for abatement, it follows that there must be a decree for the plaintiff for the amount claimed.

But one question remains, and that is, as to the costs. This being an equitable action, the awarding of costs is within the discretion of the court; Revised Statutes, section 5351. And while ordinarily costs are given as of course to a successful complainant in equity, yet there are certain well recognized exceptions to this rule. If the successful party has been guilty of any violation of the legal rights of his adversary, or if his conduct has been such as to give his adversary reasonable ground to resist his claim, the court may in its discretion, not only leave him to pay his own costs, but may compel him to bear all or part of the costs of the litigation; 2 Daniels' Chancery Practice, 1382, et seq., *Turquand v. Marshall*, L. R., 4 Ch. App. 387; *Bradley v. Chase*, 2 Me., 511; *Saunders v. Frost*, 5 Pick., 271; *Clark v. Reed*, 11 Pick., 449.

We think the evidence before us shows that the plaintiff did violate the defendant's rights. In what particulars, it is not necessary for us now to state in detail. It will be sufficient for our present purpose to mention two instances.

Among the things settled as to the law of the sale of good will is, that the vendor renounces the privilege of asserting that he is continuing the old business. He may begin a similar business, but he can in no way countenance or encourage the idea that it is the same business that was carried on by the old concern; *Cruttwell v. Lye*, 13 Ves., 334; *Churton v. Douglas, Johns*, (Eng.) 174; *Leggott v. Barrett*, L. R., 15 Ch. Div., 306; *Walker v. Mottram*, L. R., 19 Ch. Div. 355. The reservation in favor of Leopold in this contract, giving him the right to do business under any other name than that of Burckhardt & Co., in no way modifies this prop-

osition as applied to this case. He retained the right to do business, possibly a similar business, but certainly not to represent that he was continuing the same business the good will of which he had sold.

Yet we find that on January 24, 1872, the following letter was sent from his new house to an old customer of Burckhardt & Co.:

"Messrs. Browning & Sloan.—Indianapolis, Ind.

Gentlemen: Enclosed we hand you our card, which will advise you of a change in the old firm of Burckhardt & Co., by the withdrawal of L. Burckhardt, Esq., the senior member of said firm. We are now prepared to furnish all of our old customers with best brands of lubricating and burning oils at lowest market prices. * * * We respectfully solicit a share of your patronage, and will be pleased to hear from you by return mail."

This letter seems to us open to but one interpretation,—that Leopold was continuing the business of the old firm; otherwise the words "our old customers" have no meaning.

On the same day was written and sent the following to another old customer:

"Messrs. Ewin, Pendleton & Co., Nashville, Tenn.

Gentlemen: Enclosed we hand you our card, which will advise you of a change in the old firm of 'Burckhardt & Co.,' by the withdrawal of L. Burckhardt, Esq., the senior member. We are prepared to furnish our customers and the public generally, with all kinds of burning and lubricating oils at lowest market prices. * * * You will recognize the writer as the correspondent of the old firm, and the person who visited your house in 1870. We respectfully solicit a share of your patronage and will be pleased to hear from you by return mail."

We cannot better characterize these letters than by using almost the identical words of Sir W. Page Wood, V. C., with reference to very similar letters in *Churton v. Douglas, Johns*, 195. Leopold virtually says: "Here are the men, whom you have known so long engaged in the old business, who have managed Burckhardt & Co.'s business so well; they have had every opportunity of acquiring a knowledge of the business, and their application to business is so well known, that it is unnecessary to say anything more. And there is not a single indication in either "letter of the business to be carried on under the firm of" L. Burckhardt & Co. "being different from that he had sold to" Frederick. Even if we admit, the plaintiff "has not contracted against setting up business in opposition to the business sold by him to" Frederick, "yet he must set it up fairly and distinctly as a separate business, and not as the old established business which he has sold." And it seems to us that these letters, though attempted to be guarded, were intended to convey the impression that Leopold in the new house was continuing a portion of the old business.

Nor does the fact that the recipients of these letters did not gather from them the idea that L. Burckhardt & Co. were the successors of Burckhardt & Co., but inferred that L. Burckhardt & Co. were a new house, at all weaken our confidence as to the intended meaning of the letters. The objection is not that the letters represent that L. Burckhardt & Co. are the successors of Burckhardt & Co., but that they gave out that L. Burckhardt & Co. are continuing a portion of the business of Burckhardt & Co., just as if Burckhardt & Co. had dissolved without any agreement as to the good will, leaving the former partners free each to start in business for himself, and to urge the old customers to continue their trade

with him, because of his connection with the old house, and of the good will they felt towards it.

The plaintiff, in conducting his new business, endeavored to reap as much benefit as he could from the good will which he thought the customers of Burckhardt & Co. felt towards that concern; to divert himself as much of the trade as he could without overstepping the limit of action imposed upon him by law. He intended to go to the very verge of the field the law allowed him to pasture upon. He has, however, gone farther; he has stepped beyond the confines of the land that was free to him, and has trespassed upon the defendant's ground. His conduct, if this were an action at law by Frederick for breach of contract, would subject him to nominal damages in any event. We cannot approve his course of action; we think it such as to have given the defendant reasonable ground to make his claim for an abatement of the price by way of recoupment; and as the plaintiff has provoked this litigation, he should bear a part of the costs of it.

The costs incurred since the receipt of the mandate from the supreme court, were made at the instance of the defendant to enable him to make specific the amount of his damages. This he has failed to do, and we think those costs should be borne by him: The costs incurred prior to the filing of the petition in error will be divided equally between the parties.

Force and Harmon, JJ. concur.

King, Thompson & Maxwell, for plaintiff.

Stallo, Kittredge & Shoemaker and Sage & Hinkle, for defendant.

NEGLIGENCE—DAMAGES.

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[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

KUCHENMEISTER v. O'CONNER.

1. The jury should first find as a fact, whether the negligence was so gross as to show reckless indifference to life, or wantonness, or ill-will, and they may then add exemplary damages, and a charge that if defendant was guilty of negligence so gross as in the judgment of the jury to call for punishment, exemplary damages may be awarded, is misleading, as they are not of their own minds to first determine whether a man ought to be punished.
2. The court cannot weigh the damages, and the defendant has a right to have the amount passed upon under a proper charge. But a misleading charge on the subject of exemplary damages will not be held to be unprejudicial because the amount awarded by the jury appears to be no more than compensatory.
3. It is error to charge the jury that contributory negligence of the plaintiff would not be a defense, if defendant became aware of plaintiff's danger in time to have avoided it in any way. This imposes too high a degree of care on defendant; he is responsible only if he could have avoided the injury by the exercise of ordinary care.

ERROR to the Superior Court.

SMITH, J.

O'Conner brought suit in the court below to recover damages against Kuchenmeister by reason of negligence. The defendant was engaged in tearing down part of the building of the Gambrinus Brewery on the corner of Sycamore and Abigail streets, and the plaintiff, a boy about ten years at that time, alleges that he was walking along the sidewalk, and through the carelessness of defendant in not furnishing proper warnings

and guards, the plaintiff was injured. To recover damages for this injury the suit was brought. The defendant denies negligence. The question was submitted to a jury. Much testimony was presented, and under the charge of the court the jury rendered a verdict for plaintiff, finding the damages at \$1,250. A motion for a new trial was made, the motion was overruled and judgment was entered upon the verdict. To reverse that judgment the petition in error is filed in this court.

The error urged on the hearing before us was that the court erred in its charge to the jury in authorizing the jury to give exemplary or vindictive damages, if they found it to be a case of gross negligence by plaintiff in error. It is stated in *Roberts v. Mason*, 10 O. S., 277, that in a case involving fraud, malice or insult, the jury may, in addition to compensatory damages add, by way of punishment what we call exemplary damages, and I suppose it may be said still further, that in a case of negligence where the negligence is so gross as to show a reckless indifference to the rights and safety of other persons, regardless of all social duties, or is willful, the jury may be authorized to add exemplary damages. But we are of the opinion that upon the evidence presented in the bill of exceptions, this is not a case warranting exemplary damages. The testimony shows that defendant is engaged in the business of taking down buildings. At that time he had a permit from the board of public works to take down a building on corner of Abigail and Sycamore streets. He had been engaged for several days in the work, and claims that the streets were properly blocked; that rubbish was scattered about, and from time to time warning had been given. The testimony shows that boys in that neighborhood went into the building for the purpose of getting kindling wood. At the particular time, when this boy was injured, there is much dispute whether or not the street was properly blocked. It is claimed on the part of the boy that he was going upon an errand, along side of Sycamore street, and seeing no obstructions, walked along upon the sidewalk opposite the building, when some bricks fell and injured him quite seriously. One knocked him down and bruised his skull seriously; another fell upon his eye, and totally destroyed the sight of that eye. There is also testimony going to show that at this time this sidewalk was blocked by a couple of beer barrels and a piece of scantling stretched across. There is much testimony in the case and much conflict; but after a careful reading of it we see nothing in the record to authorize exemplary damages. Therefore the court below erred in giving any instructions at all upon the subject. We also think the court erred in the form of instructions. They were as follows:

After charging generally and correctly we think, that if the defendant failed to use ordinary care, he was liable to pay such damages as would fairly compensate the plaintiff for the injury sustained but no more, the court say:

"But from motives of public policy the law provides that in a case where a man does a thing which is reprehensible which he does maliciously or wantonly, or whether he is guilty of negligence so gross as, in the judgment of the jury, to call for punishment, the jury may be more liberal in their estimate of damages for the purpose of making an example and deterring others from doing likewise, but that is entirely in the discretion of the jury. The jury may do that, or not, as they please. But they cannot please, of course, unless they find such a case as I have just mentioned."

This is not a case of malice or wantonness, but in the terms of the charge the court makes the jury determine whether or not it is a case of exemplary damages, or not, for it says: "If the negligence is so gross that in the judgment of the jury they would be, etc., then the jury should award exemplary damages. So that the jury is to determine the degree of negligence which entitles the plaintiff to exemplary damages. We understand the law to be this; that if the jury find, as a fact, from the evidence, that the defendant is guilty of negligence so gross as would show a reckless indifference to human life or human safety, or to indicate recklessness or wantonness or ill will, then they are at liberty to add exemplary damages. But they are not, of their own minds, to determine whether a man ought to be punished.

We think, therefore, even if it were a case of exemplary damages that the charge of the court was too broad. It gave the jury too much latitude; it left it to their own sense of discretion, without confining them to the rule of law which authorizes exemplary damages to be given. *Pickett and wife v. Cook*, 20 Wis., 358, 2 Sedgwick on Damages, 327; *Sherman's Redfield on Negligence*, section 600.

There is another objection in the charge of the court which was liable to mislead the jury. On the question of contributory negligence and the degree of care the defendant was bound to exercise.

Having spoken of contributory negligence on the part of the boy, the court says: "If the boy was negligent up to a certain point, and defendant became aware of the boy's situation in time to have avoided the danger in any way, then the fact that the boy was negligent in getting into that danger, would not make any difference."

We think that was too severe against the defendant. The law requires only the exercise of ordinary care by the defendant, and if under the circumstances the defendant, by the exercise of ordinary care, could have avoided the injury, he was responsible; but the court here imposes a higher degree of care by saying if the defendant saw the boy's situation "in time to have avoided the injury in any way, and failed to exercise that care, the defendant is responsible." We think that was a charge tending to mislead the jury as imposing upon the defendant a higher degree of care than the law requires in cases of that kind.

But it is urged by defendant in error that to this charge no exception was taken at the time. The whole case is before us. It is brought up to review the error of the court below in not granting a new trial.

By the cases of *Marietta R. R. Co. v. Strader*, 29 O. S., 448, and cases there cited, it is said: "Where the ground of error is the refusal of the court to grant a new trial in case where the verdict is alleged to be against the law or evidence, and a bill of exceptions is taken under the act of April 12, 1858, which embodies the charge of the court as well as all the evidence, the court, in determining whether a new trial ought to have been granted, will look to the charge, in connection with the evidence, with a view of determining under all the facts and circumstances of the case whether substantial justice has been done, or a new trial ought to be granted."

Now, we cannot say but the jury were misled by the charge. In one contingency it imposed a higher degree of care on the defendant than the law requires, besides permitting exemplary damages to be given. The jury may have been misled by the charge, and therefore the defendant is entitled to a new trial.

It is urged by the defendant in error that the whole record shows that the damages awarded were no more than plaintiff was entitled to by way of compensatory damages. The testimony shows that he lost an eye and otherwise was badly bruised, and \$1,250 was no more than plaintiff was fairly entitled to under the circumstances, by way of compensation.

If the law authorized us to determine what damages should be awarded in cases of that kind, we might agree with the defendant in error, that he has received none too much; but this is not our province. The defendant has a right to have the jury pass upon the amount of damages, under a proper charge of the court.

We see no other alternative but to reverse the judgment and send it back for a new trial.

D. Humphreys, for plaintiff in error.

Hagans & Broadwell, for defendant in error.

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DEED—HUSBAND AND WIFE.

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

CATHERINE COOK v. JOSEPH NIEHAUS.

1. Where a deed of land in fee to a married woman is placed in the hands of a third party to await simply the happening of some contingency or event, and then to be delivered to her, an interest from the first delivery vests sufficiently to constitute her the owner of a separate estate within section 3108, Revised Statutes.
2. It is not error for which a judgment will be reversed if the court in a special finding of facts, refuses to find certain facts arising upon the evidence, which, if found, would not have necessitated the rendition of a different judgment.

ERROR to the Superior Court.

JOHNSTON, J.

Niehaus was the plaintiff below. He commenced this action there to recover of Catherine Cook, a married woman, the sum of \$500, on a note made by her, payable to Niehaus' order, dated April 17, 1876. He averred in his petition that she was a married woman, and at the time that he loaned this money to her she was the owner of a separate and independent estate, describing the land as situate partly in this city. He averred that it was her intention at the time to bind that estate and that he dealt with her upon the faith and credit thereof; that while the title was in her by deed, vesting a fee simple estate, that for the purpose of warding off creditors and for the purpose of preventing them from ascertaining just the situation of the estate, she had before and at that time been withholding the deed from record, and he prayed for a judgment personally against her, and also asked that the court might decree that the specific real estate described might be sold to pay it. Mrs. Cook answered, denying all the allegations of the petition excepting that she made the note and delivered it to Mr. Niehaus, but she denies that she intended thereby to bind her separate estate, if any she had at that time, and asked to be dismissed. The case was submitted to the court, and the court was asked to make a separate finding of the facts and of the law in entering judgment. The court found for the plaintiff and rendered a personal judgment against Mrs. Cook for the amount of the note with interest. The court found, as a conclusion of fact, from the testimony,

that at the time she executed this note, she thereby intended to bind and did bind her separate estate, and that at that time she was the owner of a separate estate, having acquired it through a certain contract entered into in January, 1873, between herself and her children and husband, and by virtue of certain deeds signed, acknowledged and delivered under and in accordance with said contract. This, then, occurs in the finding: "And the court refuses to pass upon the question of fact raised by the evidence, whether such deeds were delivered by the respective grantors therein to the respective grantees, or whether they were delivered by the respective grantors therein to Joseph S. Cook in escrow to take effect upon the settlement of William C. Cook, one of the parties thereto, with his creditors, on the settlement of his estate under the assignment laws of Ohio by virtue of which he had theretofore made an assignment, because the court finds that in either case she obtained an interest in the premises set-off to her by said agreement and deeds which became her separate property, and which she held when she gave plaintiff said note, and still holds." There was no decree following the judgment ordering a sale of her said separate estate. The grounds for a new trial were as follows:

1. "That the finding of law and judgment are against the law upon the facts as found."

2. "The court erred in refusing from the evidence submitted to make the finding as to whether the deeds referred to in the finding were delivered in escrow."

3. "The court erred in holding that if the deeds were delivered in escrow, such delivery in escrow and contract of January, 1873, were sufficient to invest the defendant with a separate estate."

4. "The judgment should have been for defendant, and not for the plaintiff, through reasons apparent upon the face of the record."

These are substantially the errors assigned in the petition here.

No objection, it will be observed, was made by Mrs. Cook to the form of the judgment in this case. She did not claim to be aggrieved by reason of the fact that the court had failed, after rendering a personal judgment against her, to proceed to order her separate estate to be sold. She could not very well complain, as the failure of the court to proceed to order separate property to be sold was not prejudicial, but rather beneficial to her. If either party could have complained, it was the plaintiff below. He did not complain of it, so that so far as the form of the judgment is concerned, being a personal judgment without a decree to sell separate estate, so far as that is concerned, both parties to the record seem to be satisfied, and in that respect take no exceptions to it. The record brought up is a full record, containing all the evidence before the trial court. The main question for consideration is, did the court err to the prejudice of Mrs. Cook in refusing to set out in the finding of facts, whether or not the deed made to her under and by virtue of the contract of 1873, was delivered to her by the grantors direct, or was delivered to her husband in escrow. She complains that the court erred in not finding in accordance with the request upon that fact. She further complains that the reason why the court refused to find upon that fact was not a good reason, or, in other words, that the result, if he had found that question of fact, would not have been that she, in law, was possessed, at the time she made this note, of a separate estate; that on the contrary, a delivery of the deed in escrow vested her with no interest whatever.

It is not the office of the court, in finding the facts separately from the law, to set out the evidence from which he adduces his conclusions of fact. He may make the finding of facts as lengthy or as brief as he may see proper, provided it covers all the issues presented for determination by the pleadings. If, upon examining the findings of fact and the judgment rendered thereon, the reviewing court finds it capable or possible to sustain the judgment, it is its duty to do so; 25 O. S., 255, *Jack v. Hudnall*. The question presented is whether or not there is a sufficient finding of facts in this case to sustain this personal judgment against Mrs. Cook. It was decided in *Coveny v. Hale*, 49 Cal., 552, that if the finding of facts presents the ultimate facts, and they are sufficient to sustain the judgment, the judgment will not be reversed for want of a more complete finding of facts. If the ultimate facts are set forth in the finding of facts, it is sufficient. But if the ultimate facts are not set forth, and the probative facts are, from which necessarily the judgment that was rendered in the case must have followed, the judgment will not be reversed upon the ground that the finding is not sufficient to sustain the judgment. To express myself more clearly, I will read a portion of the syllabus of that case:

"The court, in finding the facts, may find either the ultimate facts or such probative facts as enable the court to declare that the ultimate facts necessarily result therefrom. A finding which is merely a recital of evidence, and does not conclusively establish the facts in issue, is not sufficient."

Now, we find from the record that the court does not find pointedly and directly, that at the time this note was given in 1876, Mrs. Cook was the owner of a separate estate; that she became possessed of it by virtue of the contract referring to it by date, and which accompanies the bill of exceptions, entered into between herself and children in 1873, and by virtue of certain deeds made, executed and delivered in pursuance of that contract, and that the debt was contracted on the faith of it. That is a sufficient finding of facts of itself to warrant the personal judgment, because it has been decided many times in this state, and the last time in *Patrick v. Littell et al.*, 36 O. S., 79, that a married woman may bind her separate estate where she makes a contract or enters into an obligation either upon the credit of that separate estate, or for its benefit, and a judgment may be rendered against her the same as if she were a feme sole, and the judgment may be collected upon execution against her separate property in the same manner as against the property of a feme sole, or a husband.

The facts are particularly set out in the record which the parties construed to be or termed an escrow, and upon which she complains the court refused to find. They have been read.

It is a question whether, if the court had found these facts as requested, the court would have been authorized to find as a conclusion therefrom, that her husband did become the depositary of this deed in escrow, or whether an escrow existed in law at all from these facts. Whether an escrow exists in any case, depends not so much upon the terms the parties may use at the time, as upon the intent with which the deed or paper is deposited in the hands of such third party.

Ordinarily an escrow is understood to be a deed or paper delivered to a third party, to be held to await the performance of some condition by the grantee.

Now, there is a distinction made between a deed delivered under such circumstances and a deed delivered to a third party to await the happening of an event, or contingency or period of time. It has been held by some very high authorities, that where, in a transfer of real estate, it is agreed between the grantor and grantee, that the deed shall be delivered to a third person to be held to await the happening of a contingency or event, that that is not depositing a deed in escrow; that that act in law does not amount to an escrow; that the party who is thus invested with the possession of a deed, is not a depositor in escrow of the deed, but is simply a trustee of the grantor and grantee, to hold the title papers, and that upon its delivery to a third party by the grantor, it becomes the deed of the grantor presently, and upon its second delivery it relates back to and takes effect as from the time of the first delivery; that where a deed is delivered to a third party, to be held until the grantee shall perform some condition, pay a certain sum of money or do something else as a condition, then such delivery partakes of the nature of an escrow in law, and the title does not pass until the second delivery, but may, to prevent injustice, relate back to the time of the first delivery. As an illustration of this proposition, there is a case in 2 Hill, 641, where a father, during his life-time executed and delivered to a third person a deed to a tract of land in favor of his son, with instructions not to deliver it to his son until after his (the father's) death. The deed was not delivered to the son until after the death of the father. Meanwhile, and before the death of the father, the son, by deed of quit claim, conveyed his, as it was termed, "right in expectancy," to another party, and the court held that that deed passed a title to the grantee, and the grantee of the son was entitled to recover the estate. It was held that the title of the son took effect by relation when the deed was left with B.

Chief Justice Shaw, in case of *Foster v. Mansfield*, 3 Met., 412, has very clearly laid down the distinction between a deed deposited as an escrow proper, and a mere delivery of it in trust.

"Whether, when a deed is executed and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often a matter of some doubt, and it will generally depend rather on the words used and purposes expressed, than upon the name which the parties give to the instrument. Where future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently." And to the same effect is *Wheelright v. Wheelright*, 2 Mass., 451.

The effect of these decisions is to hold that during the time the deed is in the hands of the party who may be considered in the light of a trustee, that an interest has passed. In the case in 2 Hill, it was held the title vested so that the son, before the death of the father, could pass a good title by quit-claim deed.

We are not without authority in this state. *Farley v. Palmer*, 20 O. S., 223. The term escrow is not used in the opinion, but it sustains the doctrine that while even a deed may be delivered to a third party to be held to await the performance of some condition by the grantee, that an interest in the estate does pass from the moment of the delivery of the deed to a third party.

The syllabus is:

"That where a husband and wife join in a contract for the sale of her land, and in pursuance of the terms of the contract their joint deed for the land, executed and acknowledged according to law, is placed in the hands of a third person, to be delivered by him to the purchaser, upon his paying the purchase money, the husband and wife may enforce a specific performance of the contract on the part of the purchaser."

The question primarily involved was as to whether a married woman could enforce specific performance against a purchaser of her estate, he trying to avoid the sale on account of a lack of mutuality, claiming that, inasmuch as she, a married woman, was not bound by the contract of sale, that he was not.

The testimony disclosed that while they entered into the contract of sale, in writing, it was followed by a delivery of the deed into the hands of a third party, to await payment of a part of the purchase money by the grantee. The court say:

"And now it is contended that Farley was not bound by the contract on the alleged ground that as Mrs. Palmer, being a married woman, was not bound, there was no mutuality of obligation. We think otherwise. Mrs. Palmer was bound. She had no power to revoke the deed. The person holding the deed was the agent of both parties, and his delivery, according to the terms of the contract, without her consent, or even after her death, would have been good. Indeed, the authorities show, that upon fulfillment of the condition by Farley, the title would have vested in him ipso facto without further delivery. The contract was executed on the part of Mrs. Palmer—the title had passed from her—subject only to the performance of the condition on the part of Farley."

Undoubtedly there was an equitable right created in favor of Farley, an equitable title in the property, and if the husband and wife had interfered or sought to prevent the third party from delivering the deed, Farley could have compelled delivery to him on tendering the money.

It is the opinion of the majority of the court, that if the court had found as requested, as to the delivery of the deed to Joseph S. Cook, to await the settlement of their son's assignment in the probate court, even if the court had found so, that it would not have led to a different judgment. The very facts stated upon which she sought a finding would, as matter of law, have vested Mrs. Cook with an interest or estate in the property.

If only an equitable estate, that would have been sufficient to have sustained the judgment in this case. It is not necessary, in order that a wife may bind herself, so that a personal judgment may be recovered against her, that her separate estate shall consist at the time of a fee simple. Our statute defines the separate estate of a married woman to be as follows: Section 3108, Revised Statutes: "An estate or interest, legal or equitable, in real property belonging to a woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise or inheritance, etc., * * * shall be and remain her separate property."

An estate or interest, legal or equitable, is sufficient to constitute, under the statute of our state, a separate estate in a married woman. Now, the character of the estate is as follows: Her father, Thomas Williams, died leaving a last will and testament, in which he devised to her and her brothers and sisters an equal moiety of his estate for life, remainder over

to her children. In 1873, in January as the record discloses, they met together for the purpose of arranging this life estate and estate in remainder, so as not only the mother, but the five children who had all become of full age, would be enabled to own and dispose of absolutely one half of the estate that had been devised for life to the mother. It seems that they met together, and this contract purports to convey the life estate of the mother, first to the children in one-half of the estate devised to her, and then they in turn agreed and undertook to convey to her one-half of the estate in fee simple so released by her. The contract amounted really to "a conveyance of itself, and was executed and acknowledged and attested as a deed under the statute."

The contract then proceeded to provide, that they must, within six months, execute deeds to each other, through an amicable partition, and in the event they fail to do that, then they shall call upon three commissioners, who, within nine months, shall divide it equally among them, and in the event that they do not select or divide amicably or procure commissioners, then either party might apply for partition under the statute.

The evidence discloses that a few months after this agreement was made, these deeds were executed by amicable arrangement between the parties, and the portion the mother was to receive was conveyed to her by deed duly acknowledged and attested, and which the court found was delivered to her.

Looking at the evidence accompanying the finding of facts, it fully sustains the findings. The matter of an escrow has really no testimony of any distinct value to support it. Our surprise is that the court below hesitated to find upon it. He must have found against it, for the clear weight of the evidence is that the deeds were all delivered to the respective grantees as soon as executed and acknowledged; they were kept off the record to ward off the claims of creditors—to conceal the transaction. But granting that the court did err in not finding upon this fact, what then?

It is well settled by our supreme court, that even if error had been committed by the trial court, it is not the duty of the reviewing court to reverse, unless it is an error prejudicial to the party complaining. Every intendment, every presumption is to be resolved in favor of the judgment, and if the record presents a state of facts that will in any way authorize the court to sustain that judgment, it is the duty of the reviewing court to do so, and not reverse for errors which, had they not intervened, could not have altered the result. Especially should there not be a reversal when it is manifest, as in the case at bar, that the right conclusion has been reached.

In the opinion of the majority of the court the finding of facts presented by the record is sufficient to sustain the judgment of the court below, and the judgment upon the facts as found is in accordance with law, and should be affirmed.

Judgment affirmed accordingly.

Powell Crossly, for plaintiff in error.

T. Q. Hildebrandt and Symmes & Symmes, for defendant in error.

SMITH, J., dissenting.

I cannot concur with the judgment that has been pronounced. This was a petition filed by the plaintiff to subject the separate property of a

married woman to the payment of a note. It alleges that the plaintiff is the owner and holder of the note, and that at the time the note was given defendant, Mrs. Cook, was seized and possessed as her separate property of certain premises therein described, saying that she acquired that separate estate by virtue of a conveyance in fee from her children to herself, and praying that the real estate described in the petition should be sold for the purpose of paying the judgment. The answer denies that she was the owner of the separate estate therein described. Here there is a clean cut issue between plaintiff and defendant, plaintiff alleging that Mrs. Cook was seized of a separate estate which was acquired by conveyance of her children to herself before the giving of this note, which is denied by the answer. To sustain the plaintiff's petition, the plaintiff offered in evidence the will of Thomas Williams, deceased, the father of Mrs. Cook, by which he devises one undivided eighth (which was afterwards changed to a seventh by the decease of one of her brothers), of all of his estate to her for life, with remainder in fee to her children. This will was probated long before the act of 1861, commonly called the "Keys act," and therefore by this will Mrs. Cook derived no separate estate but a general property. She had a life estate in the premises described which was her general estate, and therefore not the foundation for the promise of a married woman. The plaintiff offered in evidence the contract entered into between Mrs. Cook and her husband on the one side, and her children on the other, made in 1873, whereby Mrs. Cook agreed to convey to her children an undivided half of the life estate of all this property in consideration that the children convey to her the undivided half of the remainder in fee of the residue. The result of that would be that Mrs. Cook would be the owner of an undivided half of the entire estate, life estate as general property, remainder in fee as separate property, and the children owners of the other undivided half. This contract provided that a partition should be made so that each should own his portion in severalty. Plaintiff also offered in evidence that certain deeds were made in pursuance of said contract by which Mrs. Cook should convey to the children and the children to Mrs. Cook. The testimony shows what deeds were signed, sealed and acknowledged. The real question of fact in the case was whether the deeds were delivered. That was the real question upon which testimony was submitted to the court. It was claimed by the defendant that they were not; that they were delivered to Mr. Cook to be held as an escrow, and to be delivered to the several grantees upon the happening of a certain contingency; to-wit, the settlement of his son's estate in insolvency. It was claimed by the plaintiff that the deeds were delivered in fact to the several grantees, and therefore the estate passed. It seems to me that it was an important fact in the case, whether or not these deeds were delivered. The court below passed upon it in this way, and here is where I think it erred. After finding that she (Mrs. Cook) executed the note and intended to charge her separate estate, the court further finds: "that she did charge with the payment of the debt, her separate estate consisting in part of the real estate described in the petition and became possessed of the same as such estate by virtue of a certain agreement in evidence, between herself and husband, Joseph S. Cook, and the children of their marriage, and the execution, acknowledgment and delivery in pursuance of said agreement of the various deeds therein provided for. If this finding had stopped there, it would have been conclusive. "It finds that there was a delivery of the deeds and the estate

passed by virtue of such delivery." But it seems that this was not the finding. For in the next sentence the court refused to pass upon the question of fact which I think is the only disputed fact in the case, to wit, whether such deeds were delivered by the respective grantors therein, to the respective grantees. Having found apparently that the deeds had been delivered, the court, in the very next sentence, refused to pass upon the fact whether they had been delivered by the respective grantors to the respective grantees, or whether they were delivered in "escrow to take effect on the settlement of the son's estate under the assignment in insolvency," because the court finds that in either case she obtained an interest set off to her by said agreement and deeds, which became her separate estate.

The mere signing and witnessing of the deed, if there is no delivery, amounts to nothing. There may be a delivery to the grantee which passes the title to an estate. There may be a delivery in escrow, which is the delivery to the third person, to be delivered to the grantee upon the happening of a contingency that may transfer an interest; but it is not the transfer of the title. It may transfer an interest which may ripen into an estate upon the happening of a contingency, but until the contingency happens, no estate is transferred to the grantee. I understand that to be a well settled principle of law. Applying it to this case, the court refused to find whether there was a delivery to the grantee or there was a delivery in escrow. It leaves it in doubt. This important question of fact which determines the title, is not passed upon by the court. It says she obtained an interest by virtue of the contract and deed made in pursuance thereof. The contract conveys no interest. It is a contract between a married woman and her husband on one part, and her children on the other, and by *Murdock et al. v. Lantz et al.*, 34 O. S., 589, and cases there cited, it is held, a contract signed on one side by a married woman and her husband and on the other side by a person able to contract can not be enforced. Therefore the contract itself gave no right. Then her alleged separate estate must rest upon these deeds. The deeds passed nothing except by delivery, and the court declines to find whether they were delivered any way, whether as an escrow or whether to the grantees, but does say they were delivered.

Now, it seems to me there was either a conflict in the finding, or an uncertainty in the finding of fact in which the court committed an error to the prejudice of the defendant. It may be said that Mrs. Cook has suffered no wrong by this finding; that if she had any separate interest in the property which might hereafter ripen into an estate, it was a sufficient foundation for a promise, and as nothing but a personal judgment was entered, she has suffered no wrong by such judgment. But it seems to me, a person always suffers injury when there is any uncertainty as to a judgment against her. If the judgment depends upon a finding of fact, then she suffers wrong in the court not determining what the fact is upon which the question of law depends. By reference to the pleadings, the issue raised is, what was her separate estate, not merely whether she had a separate estate. The petition alleges that she had a certain kind of an estate which was an estate in fee derived by a conveyance from her children which was her separate estate, and the judgment is a general judgment upon these pleadings.

I think also, an injury is done in this respect. A judgment is conclusive between the parties as to all issues raised and determined, and may so be pleaded in any subsequent proceeding.

What is concluded by this judgment? The petition alleges in effect that she is seized in fee of property. The answer denies it, and the judgment is general for the plaintiff.

Then again, as this question of her separate estate is raised by the pleadings, supported by evidence, and the matter is now in litigation, it seems to me all the questions ought to be settled in this case, and not leave it for the judgment creditor by another suit, to ascertain what the interest is. I think it is now left in uncertainty. I think the judgment entered upon the finding where the court refuses to find the important question of fact or where it shows a conflict or uncertainty as to what the fact is, is error on the part of the court.

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LANDLORD AND TENANT.

[Hamilton District Court, October Term, 1882.]

CATHARINE McNEAL v. THOMAS J. EMERY'S SONS.

Johnston, Moore and Smith, JJ.

Where, in the absence of an express covenant, either that a building rented is in a safe condition, or to make repairs, a parent of the tenant residing with her, is injured by a door-knob, either defectively attached or out of repair, and the petition not containing any averment that the building or any part thereof, at the time of letting, was a nuisance, such injured party cannot maintain an action for damages sustained, against the landlord.

ERROR to Common Pleas.

JOHNSTON, J.

The plaintiff here was the plaintiff below. The action was commenced to recover \$5,000 damages, for injuries alleged to have been received by the plaintiff at a house belonging to these defendants, upon Fifth street in this city. She alleged in substance, that her daughter, Rosa McNeal, had rented the premises of the defendants, in August, 1881; that she was there as a member of the family of her daughter; that the defendants at that time, and before, had been engaged in the business of constructing buildings upon their property for rent. She avers that in the month of October, 1881, while in the exercise of her lawful rights and privileges, in going out of the front door, on account of the negligent manner in which the defendants had constructed the dwelling, and supplied the front door with a knob, in closing it the knob came off and she was precipitated upon the pavement, and falling upon her left elbow, fractured it; that she was painfully injured, and was for a long time confined to her house, and was obliged to incur medical bills. Defendants demurred, upon the ground that the facts stated in the petition did not in law constitute a cause of action against them. The demurrer was, upon consideration of the court, sustained, and the plaintiff not desiring further to amend, judgment was entered upon the demurrer in favor of the defendants, dismissing the petition at costs of the plaintiff, to which she excepted.

It has been well settled in the law, that in the renting of premises by a landlord, unless there be an express covenant that the building is suitable for occupancy, and is safe, that no implied covenant accompanies the lease to that effect.

There is no implied promise or warranty that the premises are suitable for rental purposes, or are safe. It is equally well settled, that unless there be an express covenant at the time of rental on the part of the landlord to make repairs during the term, that no covenant, or promise of that kind is implied from the fact of renting, the obligation to repair during the term devolving upon the tenant, who, it is expected by the landlord, will make the needful repairs. It is not averred in the petition in this case, that any covenant, either for repairs or as to the safety of the building, was contained in the terms of the lease. The plaintiff was not a lessee or tenant of these defendants in the first place. There was no contract relation between her and these defendants at all. She, it seems, according to the averments of her petition, was either as visitor, guest or there on account of the relation of parent, in the house with her daughter, who was the tenant of these defendants, and with whom the contract of letting was made. Even where, at the time of letting, the landlord covenants to be responsible to do repair, if an injury ensues to a person other than the tenant and not occupying the relation strictly of stranger to the property, while calling upon the tenant, or while he or she is the guest of the tenant, the landlord is not responsible to that person for the injuries received. There is manifestly no privity between them. It has been well determined that such person must look to him or her through whose invitation or sufferance he or she was upon the property at the time the injury was received, for reparation.

Where there is an express covenant to repair, and an injury ensues to the tenant on account of the failure of the landlord to make the necessary repairs, the tenant being without fault on his part, that covenant enures to his benefit alone. If the tenant be engaged in the business of conducting a store or any kind of business where persons are in the habit of going to deal, or the person who is injured, is there upon the solicitation of the tenant as a guest or visitor, as already stated, and receives an injury while there, on account of the negligence of the landlord in repairing, if he is under a covenant to repair, it is decided by a well settled line of authorities, that the injured party must look to the tenant for reparation, and not to the landlord.

When a person is invited into a place of danger and receives an injury, he must look to the person for reparation upon whose invitation he went into the place of danger, and this rule or principle of law does not vary as between landlord and tenant. Our supreme court in *Burdick v. Cheadle et al.*, 26 O. S., 393, where a customer of a tenant was injured in the store of the tenant, recognized this principle. That was a case where a landlord was under an express covenant, not only to keep the premises in good repair, but had expressly covenanted to put up a certain cornice and shelving in the store-room which the tenant had rented before its completion, the landlord expressly covenanted to put them up in a safe and proper manner and keep the property in good order. After the occupancy had commenced, the business of a grocery being conducted in it, the plaintiff in the action was there buying goods, and without any fault on his part, and after the landlord had been notified by the tenant that the shelving was in a dangerous condition, it fell and injured the customer. He brought his action for damages against the landlord, and the supreme court say, that there was no privity between the landlord and this customer; that the customer was not the tenant of the landlord, nor did he occupy toward the property the relation strictly of a stranger, and so

could not recover,—that being there upon the solicitation of the tenant, he must look to him for his damages.

Now, where the landlord covenants to repair, if he suffers the property to become out of repair, and a person who occupies the relation strictly of a stranger to the property, is injured as in passing along the street,—not in the house,—but as a member of the public, is thus passing along and is injured, then the landlord is responsible to that person in damages. It is the duty of a person owning property, not to construct a nuisance upon it or suffer one to be placed thereon. Every person owning property is obliged to so use it as not to interfere with the rights of others. The maxim, *sic utere tuo ut alium non laedas*, defines the duty and obligation under which every person owning property must hold and enjoy it. Clearly plaintiff in this case did not occupy the relation of a stranger.

There is an averment in the pleading, that this building was put up carelessly and negligently by the Emery's Sons. There is no averment that they, in person, with their own hands, superintended or put up the building and knew of its insecure condition. There is no averment, or anything that would amount to an averment, that the building at the time of its rental was of itself a nuisance; especially is there no averment that at the time of the rental, this door-knob, that seems to have been the proximate cause of the injury, was of such a character as to amount to a nuisance. Undoubtedly the law is, that if a landlord build upon his premises a trap or a shell, which he either knows, or must reasonably be expected to know, when it comes to be occupied will fall down and injure the tenant, he not only becomes responsible for an injury to the tenant, who may have been deceived or duped into renting the house by the landlord, but the landlord becomes responsible also to a guest or any other person who may be upon the property at the time of receiving the injury therefrom, because that of itself, is an unlawful act, the building a nuisance, *per se*.

Now, it would seem that this building was not of itself a nuisance, nor the door-knob. Ever since in the march of progress made in building improvements, the old fashioned latch-string and thumb-latch have given way to the door knob, it has been considered a legitimate article of manufacture and sale, as an improved means of gaining access to the house or making exit therefrom. Of course, the character of door-knobs varies, as the costliness of the building varies. It may be that the knob upon the front door of this dwelling was of such a character, as that it comported well with the building. There is nothing in the petitions by which it might be inferred, that the building itself, taking all its appointments together, especially the door-knob, that it was at the time of the rental of itself a nuisance, but was simply the case of a building rented to a tenant who became liable by the terms of the letting 'o keep it in repair. The door knob becoming loose or out of repair, a guest, relative or friend being there, is on account of a want of proper care on the part of the tenant injured. Upon a full consideration of the law, of this case, we must hold that the judgment of the court below was correct. That the injured party must, if she desires reparation, look to the person who invited her upon the premises, or who permitted her to be there.

The judgment of the court below is affirmed.

H. S. Jennings, for plaintiff in error.

Perry & Jenny, for defendant in error.

JUDICIAL SALE.

267

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

RICHARD MATHERS v. J. N. KINNEY.

1. Where the master, by order of sale in a foreclosure case, is authorized to subdivide three lots, and appraise such of said lots as he thinks fit, as a whole and as subdivided, and the master, instead of observing the original lot lines, subdivides so that some of the new lots contain parts of more than one original lot, such subdivision will not be held as not following the order of the court, after acquiescence for over a year, and several orders of sale have issued, and no objection made until confirmation is asked.
- 2' Where, in a foreclosure case, after decree ordering sale of an undivided share in property, by partition in another case, certain parts of the parts of the property are apportioned to the mortgagor in severalty, the court can order the sale of those parts, instead of the undivided share in all.

ERROR to Common Pleas.

SMITH, J.

This is a petition in error from the court of common pleas, to reverse an order of that court confirming a sale. The objections are, that the court erred in confirming the sale of lots 3, 4 and 5, which were sold under the sixth order of sale in that case.

There is no bill of exceptions, and whether the sale was regular or not, must depend upon the inspection of the different journal entries and orders made in the case. The action was commenced on the 2nd of November, 1878, nearly four years ago, to foreclose a mortgage. Part of the premises covered by mortgage, were two undivided sixths of what was the Mathers' homestead, belonging to William and John Mathers, each owning an undivided sixth, derived by inheritance from George Mathers.

On the 2d of May, 1879, a decree was entered for the sale of the property.

On the 2d of July, of the same year, there was a recital that, pending these proceedings, there had been a partition among the heirs of George Mathers by which certain lots were set off in severalty to William and John Mathers. Lots 3, 4 and 5, which are the subject of controversy here, were set-off to William Mathers, and it was ordered that the master commissioner, instead of selling the two undivided sixths of the property should sell these lots which had been set-off in severalty to William and John Mathers.

On the 6th of May, 1880, the first order of sale was issued in pursuance of that decree. Upon the first and second orders of sale there was no sale.

On the 16th of September, 1880, there was an order for a sub-division and reappraisement of the property, which is the foundation of the present exception.

This order was entered upon the journal, and was in these words: "The commissioner is authorized to make such a sub-division of said lots on Walnut Hills, prior to such re-appraisement, as in his opinion will be to the advantage of the parties in interest, and he may appraise such of

said lots as he thinks fit as a whole, and also as sub-divided." He is also authorized to lay out a street, etc.

Upon that order, a third order of sale was issued on the 22d of September, a sub-division made, and a re-appraisal had in pursuance of that sub-division, and this re-appraisal and sub-division which was returned upon said order of sale treated, lots 3 and 4 set-off in partition, as one tract. subdivided them as one tract, what I mean is, that lots 3 and 4 were sub-divided into nine different lots, and these sub-divided lots were part in lot 3, part in lot 4, and some composed of lots 3 and 4 together, so that we cannot get at the sub-division of the lots without including the whole tract of lots 3 and 4. That sub-division was returned, an appraisalment was had, and a portion of the property covered by that order was sold.

On the 24th of January, 1881, there was a fourth order of sale of property not sold.

On the 14th of March, there was an order setting aside the former appraisalment, and a re-appraisal had, and on the 21st of March, 1881, a fifth order of sale was issued.

On the 11th of April, 1881, another inquisition was filed, showing an appraisalment under the fifth order of sale. In all these orders of sale and advertisements, it appears that lots 3 and 4 were advertised as "lot No. 1 of 3 and 4; No. 2 of 3 and 4; No. 3 of 3 and 4." and so on. But these lots not having been sold, on the 3d of August, 1881, a sixth order of sale was issued, with an order to re-appraise the property.

On the 23d of August, 1881, an appraisalment was had and a copy of the inquisition filed in pursuance of law. This inquisition shows that the individual lots to-wit: The sub-divisions of lots 3 and 4, were appraised for example, as lots 1, 2, 3 and 4 of the original lots 3 and 4, at \$12.00 a foot, etc.

And another appraisalment as a whole, for example lots 3 and 4 valued at \$2,500, and lot 5 as a whole, at \$875.

That inquisition was filed on the 23d of August, 1881.

On the 27th of September, 1881, a sale was made; lots 3 and 4 were sold as a whole, for \$1,780, about \$100 more than two-thirds of the appraisalment; and lot 5 as a whole, for \$655, being considerable over two thirds of the appraisalment.

On the 17th of October, 1881, there was a motion made to confirm the sale.

On the 22d of October, there was a motion made to set aside the sale as to lots 3, 4 and 5.

On the 5th of November, 1881, the sale was confirmed, and the defendants excepting to the action of the court in refusing to set aside the sale as to lots 3, 4 and 5, filed their petition in error to reverse the action of the court in that matter, the objection being, that in selling lots 3 and 4, the commissioner did not conform to the order of the court.

We think that the objection is not well taken, and the court committed no error in confirming the sale under the circumstances. It will be perceived from the statement I have made, that from the time of the sub-division made on the 22d of September, 1880, more than a year before the sale was made, lots 3 and 4 were treated as one tract, and no exception was made by the defendants to this, although there were numerous orders of sale, numerous advertisements and two or three inquisitions filed from time to time which so

treated the lots. And it seems to us that the inquisition upon which the sale took place, filed on the 23d of August, 1881, strictly followed the order which had been made to sub-divide the property, and accompanied the third order of sale.

In this appraisalment, the commissioner has followed the order of the court.

First he appraised these lots as sub-divided; for example: 1, 2 and 3 to 9 of lots 3 and 4, then lots 3 and 4 as a whole, lot 5 as a whole, and he sold in pursuance of that order.

No objection was ever shown by the defendants to this mode of sub-division, or this mode of appraisalment, until the lots had in fact been sold on the sixth order of sale, and then the only objection was simply a motion to set aside the sale. Whether the objection was to the appraisalment, to the mode of appraisalment, or to the mode of sub-division, does not appear in the motion. As I have said, there is no bill of exceptions, and if there was any testimony before the court below, it is not brought before us. Therefore, it seems to us considering no objection was made for more than a year after the sub-division was made, to the mode of appraisalment, and none in fact until after the property had been sold, and a motion made to confirm the sale, and no bill of exceptions filed, the court below in confirming the sale was right, and we have no other alternative but to affirm the action of the court below.

Hoadly, Johnston & Colston, for plaintiff in error.

Coppock & Coppock, for defendant in error.

ASSAULT AND BATTERY—DAMAGES.

268

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

JOHN HILBERT v. FRED DOEBRICKE.

It is not necessary in an action to recover damages for assault and battery in order to recover exemplary damages, that the petition should contain an averment that the act was maliciously done.

ERROR to the Superior Court.

JOHNSTON, J.

Doebricke was plaintiff below. The action was there instituted to recover damages in the sum of \$25,000, for an alleged assault and battery committed upon him by Hilbert.

The petition averred that Hilbert criminally and unlawfully assaulted him with a club, and striking him upon his arm, broke it, whereby he suffered great pain and was confined for a long time to his room.

At the time the petition was filed, he averred that there was a probability that he might not ever entirely recover, so as to follow his vocation or trade of a cooper; that before his injury he had been able to earn at his trade, \$20 to \$25 a week; that he would be obliged to incur further expense by way of medical services in being healed of his injuries.

The defendant answered denying generally all the allegations of the petition.

The cause was submitted to a jury, and there was a verdict for the plaintiff for \$1,300. A motion for a new trial was filed, the ground relied upon alone being, that the court erred in charging the jury upon the subject of exemplary damages. The motion was overruled and a bill of exceptions taken, but the evidence is not set out. The charge of the court only, is brought upon the record, the plaintiff in error relying solely for reversal upon the alleged error of the court in its charge to the jury upon the subject of exemplary or punitive damages. The only assignment of error was, that the court erred in charging the jury that they might consider and in their discretion allow also exemplary damages, the petition not charging that the injury was done maliciously. That portion of the charge made by the court below, was excepted to at the time. The question submitted therefore, to this court for review is, whether or not the petition to authorize this charge should have averred that the assault and battery was committed maliciously. The evidence is not before the court. We have a right to presume that there was evidence in the case tending to show malice in the infliction of the injury.

We have been cited to an authority in Iowa, by counsel for plaintiff in error, where the supreme court of that state, did decide directly that punitive damages were not recoverable, and that it was error in the court to charge that the jury might assess such damages unless the petition averred that the injury was maliciously done.

We find upon examination of that case, that in that state there is a special statute or provision of the Code of practice, that requires, that where a party shall seek to recover damages and expects to show the tort was maliciously done to enhance the damages, the petition shall set out the facts and aver that the injury was done with malice, or maliciously. We have no statute of that kind in this state.

All that is required of the plaintiff under our Code of practice is simply a statement of facts, constituting the cause of action. We find, upon examination of the decisions of our supreme court, that this question has in one case, if not in two, been passed upon. The first is the case of *Roberts v. Mason*, 10 O. S., 278. That was an action for personal injuries committed by defendant against the plaintiff. The question arose there whether the court was justified in charging the jury that not only might they include such damages as counsel fees, but the jury would also be authorized under the charge of the court to allow exemplary damages in any case where it should appear from the evidence that the tortious act savored of fraud or involved an ingredient of malice or insult. Now, looking at the petition in this case, we find that it averred that this act was criminally and unlawfully done. It was certainly of a very violent character, for the averment is, that the defendant assaulted and beat plaintiff with a club, so violently as to break one of his arms. And certainly within the ruling of the case cited, the tortious act must have savored very strongly of some of the ingredients of malice, certainly of insult.

In *Klein v. Thompson*, 19 O. S., 569, we have the question as to whether the petition should contain an allegation of malice, there directly decided, that action being likewise for damages for an assault and battery.

The court say, that the malicious character of the act may be shown as the basis for exemplary damages, although the petition contains no averment of malice. It is quite immaterial, so far as the civil action is concerned, for damages, what were the motives or intent with which the

act was committed by the defendant. It is not necessary to aver that the act was maliciously done, for the purpose of laying a foundation for evidence to recover either special or exemplary damages; but evidence tending to show that the act was maliciously done, is permitted for the purpose of showing the character of the conduct of the party at the time the injury was committed.

Upon referring to the various Code writers and authors upon the subject of pleadings, we have been unable to find any form prescribed where it is necessary to aver, in seeking to recover damages of this character, malice in the pleading. Greenleaf, in his work upon Evidence, section 89, expressly states that the "manner, motives, place and circumstances of the assault, though tending to increase the damages, need not be specially stated, but may be shown in evidence."

Now, we have examined that portion of the charge in this case, to which exception was taken. The court charge the jury in terms, that it was within their discretion, after awarding the plaintiff below such damages as would fully compensate him for the injury sustained, to go farther and allow him exemplary or punitive damages as a punishment to the wrong doer.

In the case of *Roberts v. Mason*, supra, it was very distinctly announced by the court, that the jury in such case, after allowing a sufficient sum to compensate the injured party, might, blending together the interests of society and of the individual aggrieved, go forward and allow in addition, a sum in the nature of exemplary or punitive damages, for the benefit of the injured party and as a warning to the defendant and others against the commission of a like offense.

There was a general verdict for the plaintiff for \$1,300. Under the circumstances of the case, taking the petition as a guide, that this assault was committed with a club, as is alleged in the petition, criminally and unlawfully, that is, without justification on the part of the plaintiff; that his arm was broken; that he would probably never fully recover, we think the verdict is not of such a character as that it ought to be disturbed as being excessive, and we must, therefore, affirm the judgment of the court below.

Judge O'Conner, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

STATUTE OF FRAUDS.

270

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

JACOB FRITZ v. FREDERICK LAMPING.

A contracted with B, to build for him a house, and furnish the materials. B, sub-contracted with C, to do the plumbing at an agreed price. After the house was partly finished, B. failed, and the work was suspended. C. refused to go on with the plumbing unless A. would see him paid. A. thereupon told him, if he would go on with his work and finish it, he would pay him. C. did so, relying on A.'s promise. Held: That A. was liable to C. for work done after the promise was made, though said promise was not in writing.

ERROR to Court of Common Pleas.

SMITH, J.

This is a petition in error to the court of common pleas to reverse a judgment rendered in that court in favor of defendant in error. The action in this case involves the application of the statute of frauds.

In the action below a petition was filed by Lamping against Fritz, alleging that he had done certain plumbing work for the defendant to the amount of \$265, for which defendant had promised to pay. Defendant denies any such promise or agreement. On the trial before the court and jury, it appeared in evidence that in the winter or spring of 1879, Fritz made a contract with one Fisher & Brother, to build a house and furnish material at an agreed price. Fisher & Bro. made a sub-contract with Lamping to do the plumbing at an agreed price of \$510; that after the work had commenced, say in month of May, the contractors, Fisher & Bro. became shaky, and it became apparent that they would not be able to complete the work, and the work was suspended for some time. It is claimed by plaintiff, that in the month of June, while the work was suspended, he went to the defendant and said to him, that unless he would pay for his work to be performed, he would stop. Whereupon defendant told him to go ahead and complete his work and he would see him paid. Up to that time, Fisher & Brother, by orders, etc., had paid about \$245, about the amount of the work then done. Lamping is corroborated by the testimony of his son. The work to be done amounted to about \$265.

Fritz denies that any such promise was made, and he presents in evidence a bill made out by Lamping against Fisher & Bro., and testifies that when Lamping presented his bill to him for payment, it was made out as a bill against Fisher & Bro., the original contractors. Upon the evidence the case was submitted to the jury under the charge of the court. The charge does not appear. We must presume, therefore, that the jury were properly instructed upon the law of the case. The jury found for plaintiff: a motion for a new trial was overruled and a judgment entered upon the verdict. A bill of exceptions was taken containing all the evidence, and to reverse this judgment, the petition in error is filed in this court, and the error assigned is: that the court erred in not granting a new trial on the ground that the verdict was against the law and evidence.

The line which separates an original from a collateral promise is sometimes pretty difficult to be ascertained. The law is clear enough. If the promise be an original promise, the promisor is bound to perform it; if a collateral or conditional promise, then the Statute of Frauds is a defence. But what state of facts will make it an original or collateral promise is the difficulty, especially where there have been three parties to the subject matter, viz.: the original contractor, the sub-contractor and the owner of the premises. When the contract was originally made, the original contractor was alone liable to the sub-contractor; but when the work was completed, the original promisor was transferred from the contractor to the owner of the premises. What made the change so as to make the owner liable as principal and release the original contractor? This question is aptly considered in an old case found in *Sinclair v. Richardson*, 12 Vt., 33, where the plaintiff having a sub-contract with one who had become insolvent, refused to proceed unless the defendant would pay him, which it was claimed he agreed to do.

The court said: "He (the plaintiff) may from a consideration that the employer has become insolvent and absconded or otherwise become

wholly irresponsible, entirely decline to proceed any further in the contract with him, preferring to lose what he has done to completing the contract and losing all. If, in this case, a third person make an entire substantive independent contract with him to perform the same service this may be enforced, though not in writing, as it is not collateral. Whether the new contract be auxiliary or independent, is a question of fact." * * * "If the terms be uncertain, equivocal or ambiguous, then it must always be left to the jury to find whether in fact the former contract was to continue or whether the whole was abandoned, and the new contract and credit substituted in its place."

It seems to me that last paragraph states the law as applicable to this case. If, from the insolvency of the principal contractor, the sub-contractor refuses to go on and complete the work, and prefers to abandon his sub-contract, and if the owner then steps in and says: "proceed with your work and I will pay you for the work you do hereafter," then it becomes a new independent contract between these two. The promisor is liable for the work thereafter done and the Statute of Frauds is not a defense. See cases *Quintard v. De Wolf*, 34 Barb., 97; *Delvin v. Woodgate*, Id., 252; 3 *Grant's Cases*, 234.

In the argument the plaintiff in error cited a recent case decided by our supreme court, viz: *Birchell v. Neaster*, 36 O. S., 381; similar to this except in one important element. In that case, the defendant had made a contract with one Everard, to build and complete a house, for the sum of \$810. Everard made a contract with Neaster to do the plastering at an agreed price. After the house was nearly finished, and the owner moved in, a little of the plastering, such as pointing up about the carpenter work, etc., remained to be done; the plasterer went to the owner and told her that he would not finish the work unless she agreed to pay him for the entire work. She promised to pay the defendant, and he completed his work. It took him less than a day to do it. She refused to pay, and he brought suit. In the court of common pleas and district court, the judgment was for the plaintiff. When the case came before the supreme court, the judgment was reversed on the ground that the Statute of Frauds in that case was a defense, and the court seemed to intimate that there the debt had already accrued, and it was a promise to pay the debt of another. The plastering was nearly, if not entirely, completed, and when the owner promised to pay the plaintiff, in case he would finish the work, it was in effect a promise to pay a debt which had already accrued, and consequently the debt of another.

McIlvaine, J., in delivering the opinion, emphasizes it as a pre-existing debt. In the case at bar, it was not a promise to pay a debt, but a promise to pay for work not performed, but to be performed, and which was thereafter performed on the strength of the promise.

There are two cases decided by the supreme court of Massachusetts, which illustrate the distinction above made. In *Loomis v. Newhall*, admr., 15 Pick., 159, the promise was to pay a debt, most of which had accrued; and that court held that the promise was invalid.

Afterwards, in *Rand et al. v. Mather*, 11 Cush., 1, the facts were similar to the case at bar, a case arising out of a building contract. The contractor failed, a sub-contractor refused to go on unless the owner would pay him, and the owner promised to pay him. The supreme court held it was an original promise for work thereafter to be performed, and gave the plaintiff judgment.

In the case at bar, the testimony shows, that the work for which the suit was brought accrued after the alleged promise was made. The jury having found that a promise was made, it seems to us the verdict and judgment of the court of common pleas were right and should be affirmed.

ASSIGNMENT—ATTACHMENT.

[Hamilton District Court, October 24, 1882.]

Johnston, Moore and Smith, JJ.

JOHN DRURY v. GEORGE H. HIGH and M. GLEASON.

The assignment, by a judgment creditor, of a judgment rendered by a justice, to a resident of another state, who garnisheed wages due the debtor, is not in violation of section 7014, Revised Statutes.

ERROR to the Common Pleas.

MOORE, J.

The facts in this case are substantially these: The plaintiff in error, the plaintiff below, was a mechanic employed by the Pittsburgh, Cincinnati & St. Louis Railway Company, in the city of Cincinnati, against whom a judgment stood in favor of the defendant Gleason on the docket of the defendant George H. High, a justice in and for the township of Cincinnati.

This judgment being uncollectible, owing to the exemption laws of this state, was assigned by Gleason to one G. O. Smith, a resident of West Virginia, where the wages of said Drury were afterwards attached in the hands of said railway company and applied to the satisfaction of said assigned judgment.

This is an action against George H. High, the justice, and M. Gleason, the latter as the owner of said judgment, for confederating and conspiring to maliciously injure the plaintiff, break up his business and employment, and deprive him of support for himself and his family, and also deprive him of his right under the laws of the state of Ohio to an exemption. The plaintiff in error in the court below alleged that the defendants High and Gleason, without reasonable or probable cause, wrongfully and maliciously caused an attachment to issue in the name of said Smith in the state of West Virginia, thereby inflicting upon him great suffering, to his damage in the sum of \$2,000, for which he asked judgment.

Under section 7014 (prior to its amendment 79 O. L., 30), the statute describes this as an offense against public policy, to-wit:

"Whoever assigns or transfers any claim for debt against a resident of this State for the purpose of having the same collected by proceedings in attachment in courts outside of this State, or whoever, with intent to deprive a resident of this State of a right to have his personal earnings exempt from application to the payment of his debts, sends out of this state any claim for debt against such person for the purpose aforesaid, where the creditor and debtor and the person or corporation owing the money intended to be reached by such proceedings are within the jurisdiction of the courts of this state, shall be fined not more than fifty nor less than twenty dollars; and the person whose personal earnings are so attached shall have a right of action, before any court of this state, having jurisdiction, to recover the amount attached and any costs paid by him

in such attachment proceedings, either from the person so assigning, transferring or sending such claim out of this state to be collected as aforesaid, or the person to whom such claim is assigned, transferred or sent aforesaid, or both, at the option of the person bringing such suit. The assignment, transfer or sending of such claim to a person not a resident of this state, and the commencement of such proceedings in attachment shall be considered *prima facie* evidence of a violation of this section."

The issue presented by the pleadings is, whether the judgment aforesaid was sent to the state of West Virginia by these defendants with the intention of combining with said G. O. Smith, the assignee, to collect the same under the laws of that latter state, knowing that the plaintiff in error John Drury, was entitled to an exemption under the laws of this state. On the trial below the plaintiff introduced in evidence a transcript of the docket entries of the West Virginia justice; a transcript of the proceedings before the Ohio justice, wherein Gleason, the defendant, had obtained the judgment against Drury, the plaintiff in error. And the deposition of Smith, the assignee, and rested his case. The transcript of the Ohio judgment recites an assignment for value of the judgment by the defendant Gleason to said Smith. The deposition of Smith, the assignee, introduced by the plaintiff below, contains evidence to the effect that the transfer was absolute; that he, Smith, paid a valuable consideration for it. That he proceeded under the attachment laws of West Virginia to collect, and did collect the amount of the judgment; that he was unwilling to state the amount of the consideration, yet it was in cash; that he had no arrangements or understanding with these defendants, High and Gleason, by which he was to collect the amount of the judgment for their benefit, but that he bought the same for his own purpose and use, and for the purpose of making a profit.

The defendants filed a motion to arrest the case from the jury. The court granted the motion, and directed the jury to return a verdict for the defendant, which was done.

The plaintiff, Drury, thereupon excepted and now presents his petition in error to reverse the action of the court below in that respect. The question, then, is, whether or not Gleason, the owner of the judgment in Ohio, sold or transferred the same contrary to and in violation of the provision of the section of the statutes before recited, or whether he confederated or combined with High, the justice of the peace, for that purpose.

The court below held that to sustain the action, there must appear some evidence tending to show that the claim was sent from this state to the state of West Virginia for the purpose of collection, and the avoidance of the exemption laws.

In the absence of such evidence it is quite certain that the owner of the judgment had a right to sell the same and the assignee had a right to take it. It not appearing that there were intervening rights in favor of creditors, or that the judgment debtor at any time demanded an exemption under the statute, and the transcript showing that the judgment debtor did not appear at the trial, but was in default; there was nothing to put Smith, the assignee, upon inquiry as to whether it was a transfer of a claim forbidden by the statute.

Therefore the court below finding that there was no evidence tending to show that it was a transfer for collection, but that it was an absolute

transfer and for value, held that the assignee had a right to enforce the judgment, and that the action of the defendants, High and Gleason, was lawful, and not in violation of the plaintiff's rights.

We think that in arresting the case from the jury and rendering judgment for defendants the court was right.

Judgment affirmed.

N. C. McLean, for plaintiff in error.

Johnson & Buntin, contra.

281 BILL OF EXCEPTIONS. - BILLS AND NOTES - CORPORATIONS.

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

O. B. GOULD v. UNION CENTRAL LIFE INSURANCE CO.

1. Where, on the last day on which a bill of exceptions can be allowed without an order of court giving thirty days, counsel called for such order, but the judge had left the bill at home and did not sign it until a week afterwards, and the clerk made an entry showing it was allowed as of a prior term, the court can make a *nunc pro tunc* order that the party have thirty days, on parol testimony, he having forgotten the circumstances.
2. Though proof of the endorsement over by the secretary of a corporation, of a note payable to the treasurer, is probably not sufficient to show title in the endorsee, without showing some authority or recognized course of business empowering him to endorse it, yet, if the opposite party completes the proof, the defect is cured.
3. A petition on a note which alleges ownership, but fails to set out the endorsements, or show title, is defective; but if issue is taken on the allegation, it is not error to admit evidence of ownership.
4. A corporation, the maker of a note payable to another corporation, cannot show that the contract by which it was transferred to the plaintiff was *ultra vires*. He cannot dispute the regularity of the negotiations by which the title passed.

ERROR to the Superior Court.

SMITH, J.

The action below was founded upon a promissory note made by Gould payable to the order of the treasurer of the Cincinnati Mutual Life Insurance Co., and the plaintiff claimed to be the holder and owner of the note. The petition was filed on the 14th of June, 1876. On the 28th November, of the same year, Gould filed an answer, first denying that the plaintiff was the owner and holder of the note, and secondly, alleging that there was another action involving the same matter pending between the same parties. Afterwards, on December 12, of the same year, Gould filed an amended and supplemental answer, alleging, among other things, that he had brought suit in the court of common pleas against the Union Central Life Insurance Co., and the petition in that suit alleged that he was the owner of 250 shares of the stock of the Cincinnati Mutual Life Insurance Co., and that by an agreement between the plaintiff and that company, the plaintiff had become the owner of the assets of the latter company, amounting to \$350,000, including the note sued on; that said agreement was fraudulent and *ultra vires* that all matters showing the transactions between the parties as to the ownership of the note and his liability thereon, and the rights of the parties by reason of his ownership of that stock and interest in the assets of said company were involved in that suit, and prayed that this suit be stayed until the determination

of that. Afterwards, in June, 1877, defendant obtained leave of court to file an additional answer within sixty days. He did not avail himself of that privilege, but some time after the expiration of the sixty days he filed an additional answer, setting forth substantially what had been set forth in the preceding answer, and adding that the preceding suit had been dismissed, and therefore praying that the same relief for which he had prayed in that action in the court of common pleas, might be granted in the present suit. This answer was filed out of time, and on motion of plaintiff below, the court struck from the files that answer and cross-petition, and afterwards, at November Term, 1879, the case came on for trial before the court and jury. After the jury had been sworn and plaintiff presented some of its testimony, the defendant asked leave of court to file an amended answer and cross petition, being the same answer and cross petition that had already been stricken from the files; the court overruled the motion, and this is one ground assigned for error. On the trial of the case, the defendant offered testimony tending to prove among other things, the allegations which had been set up in this amended answer and cross petition. The court sustained the objection to the admission of the testimony, and defendant excepted. The jury found for the plaintiff; a motion for a new trial was overruled, and judgment entered upon the verdict. This petition in error is filed for the purpose of reviewing that judgment. It is claimed in the first place, however, by defendant in error, that the case is not properly before the court; because the bill of exceptions was not signed or allowed at the trial term. It appears from the transcript that the case was tried at the November term of the superior court, 1879. The last day of the term was on the 29th of November, the 30th being Sunday. The bill of exceptions purported to be signed upon that day, but the transcript of journal entries as presented when the cause first came to this court, shows that the bill of exceptions was signed, sealed and allowed, on December 6, and entered on the journal of the subsequent term, and if this was so, the defendant had lost the benefit of his exceptions. For the purpose of remedying that defect, the defendant below, by motion to the court, obtained this *nunc pro tunc* entry, to be entered as of said November term, to-wit:

"That on motion and by consent of the defendant leave is given him to have his bill of exceptions signed by the court and filed in thirty days." and the entry allowing the bill of exceptions and ordering the same to be filed to be entered upon the journal as of the November term.

It appears from the transcript that this *nunc pro tunc* entry was made by the court below upon motion by defendant and the professional statements of various counsel engaged in the trial of the case. To the entry of this order, the plaintiff below excepted and filed its bill of exceptions containing the professional statements made at the time and showing the circumstances under which the *nunc pro tunc* entry was made, and this is brought up for review. It appears from the professional statements attached to this bill of exceptions that the trial took place early in the November term. The judge having ruled upon the question of evidence, counsel for the defendant below proposed to except to the ruling and prepare a bill of exceptions for the purpose of presenting the questions which counsel wished to raise in the case; that as early as November 21, a motion for a new trial having been argued, a bill of exceptions was in fact prepared containing all the essentials excepting the formal closing parts. This bill of exceptions and briefs were submitted to the court on motion for a new

trial as early as November 21st. The judge took the matter under advisement, and on November 29, the last day of the term, overruled the motion for a new trial, but accidentally had left at home the bill of exceptions. Then counsel called the attention of the judge to the fact that it was the last day of the term, and under section 5302, Revised Statutes, he had thirty days after the term to prepare his bill of exceptions and wanted the proper consent or order for having it done. Nothing was done until on December 6, the first week of the succeeding term, when the judge signed the bill of exceptions, and counsel took it to the clerk, offering to prepare an entry, but the clerk chose to make the entry allowing it, and instead of entering the bill of exceptions, assigned and sealed of the November term, made the entry upon the December term minutes, thus showing apparently upon the face of the record that it was signed, sealed and allowed as of the December term. This testimony showing how the accident occurred, or how the inadvertence took place, was before the court below.

But the judge also certifies in the bill of exceptions that he had no recollection as to what took place on November 29th, as stated by counsel in their professional statement, and therefore depended in making this entry upon the statement of counsel, but being satisfied undoubtedly that the statement was true, directed this nunc pro tunc entry to be made.

It is claimed by the attorneys of the defendant in error that the judge had no power to make a nunc pro tunc entry upon parole testimony. The power of the court to make a nunc pro tunc entry in a proper case is undoubted, but it has been early held that there must be something to amend by; that the records of the court cannot be carried in the bosom of the judge; there must be an entry or memorandum on which the judge can act. In all the earlier cases it seems to be the rule. In *Ludlow v. Johnson*, 3 O., 553, it is said: a nunc pro tunc order cannot be founded or cannot be made upon parole proof where there is no written memorandum to sustain it; but this rule has been relaxed. The power of the court over its minutes and records is undoubted, and if the judge is satisfied from his own personal knowledge that the record does not truly state the order of the court he can order the record amended. If he can act from his own personal knowledge, we see no reason why he cannot act upon testimony, provided the testimony is clear and convincing.

In *Freeman on Judgments*, sections 71 and 72, the power of the court to amend its entries is fully discussed and the data and evidence upon which the court ought to act. The writer classifies the States, among those which will not amend entries except upon written memoranda, and some which will amend entries upon other evidence than written memoranda, and in this classification of states he includes Ohio as one of the latter, citing the case of *Hollister and Smith v. The Judges of District Court of Lucas County*, 8 O. S., 202, which was an application by mandamus to the Judges of the District Court requiring them to amend an entry, altering a bill of exceptions. It appeared that after the bill of exceptions had been signed in the district court, one of the judges saw fit to change it so that the bill of exceptions as presented to the supreme court was not a true record of the case as presented in the district court. An application was made to the district court to amend the bill of exceptions to have it truly state the facts as they occurred. Before this application came on the constitution of the court in that county had changed. Two of the old judges had gone out of office, and two new

ones came in, so that there was only one of the three judges familiar with the facts, and the court certified to the supreme court this fact and asked instruction whether or not they should make an entry upon the form proof. It was held, that "every court in the exercise of its supervisory and protecting charge over its records, and the papers belonging to its files, has the power to direct the clerk to correct not only clerical errors, but such errors as may arise from any fraudulent or improper mutilation of its files or records. To make such correction, the court may hear evidence and act on the proof; and it is not essential to the action of the court that the judges act on their personal knowledge of the matter."

But in the case before us the court did not rest entirely upon parol testimony. There was a bill of exceptions which had in fact been signed, and purported upon its face to have been signed on November 29. There was an entry on the journal showing, that it was in fact allowed within four or five days after the trial term; and upon the parol testimony in addition to the memoranda before the court, the court made the *nunc pro tunc* entry and allowed a bill of exceptions to be filed as of the November term. We think in so doing there is no error in the action of the court.

Now, proceeding to consider the case as presented on the trial, counsel for plaintiff in error argue two defenses, first: that the plaintiff was not the owner of the note sued upon. He, therefore, had no right to recover; and second, what might be called an equitable defense growing out of Gould's alleged ownership of the stock 250 shares in the Cincinnati Mutual Insurance Co., for which said note was given. On the trial, the plaintiff, to prove it owned the note, first offered the testimony of Mr. Harris, the secretary, who testified he was the secretary of the Cincinnati Mutual Insurance Co., and the note being presented to him he testified the endorsement was in his handwriting. Upon this testimony the note was offered in evidence. The defendant objected to the admission of the note. The court overruled the objection, and the defendant excepted. It is claimed by counsel that under the allegations in the petition of this case, the plaintiff was not authorized to present the note or prove the indorsement of the note. The petition alleges that the Union Central Life Insurance Co. is the owner and holder of the note; that the note was made by Gould, a copy whereof is given, and there is due a certain amount from the defendant Gould to the plaintiff. This petition does not purport to set out the indorsements upon the note. It is claimed by the defendant, that the plaintiff must allege its title, and as the indorsement of the note to the Union Central Life Insurance Co. from the Cincinnati Mutual Life Insurance Co. does not appear, the title by which the plaintiff becomes the owner, is not alleged.

This question was discussed in the case of Sargent v. Railroad Co., 32 O. S., 449, where a suit was brought by the holder and owner of a promissory note against the maker. The note had not been indorsed by the payee to the holder. There was nothing, therefore, upon the face of the note to show that the plaintiff had legal title. It is claimed, therefore, that the petition was defective in not showing title; but the supreme court commission held, that under the Code it was not necessary to set forth the chain of title by which the plaintiff became the holder of the note as by the common law. It was sufficient to set forth a copy of the note with the indorsements, and that a certain amount was due from the maker to the holder, and then he might establish the ownership by proof.

But it may be claimed that that does not apply to the case at bar, for the reason that this note is not set out with the indorsements, and therefore the plaintiff below has failed to comply with the code. The petition is not a good petition in either aspect. At common law it is not good for the reason that it does not show title; and not good under the code, because it does not set out the indorsements with the note.

There is no demurrer to this petition. The defendant took issue at once upon the allegation of ownership, as alleged in this petition, and denied that plaintiff was the owner. It seems to us, that upon these pleadings, any competent testimony for the purpose of showing ownership, should be received.

The question then arises, was this testimony, as presented at that time, competent? The note itself was made payable to the treasurer of the Cincinnati Mutual Life Insurance Co., but that is, in effect, a note payable to the corporation. See Daniels on Negotiable Instruments, pp. 88, 89, last edition, and numerous cases there cited.

Thus the Union Central Life Insurance Co. became the owner of the paper. But the testimony offered in this case was the statement that Mr. Harris was the secretary of the Cincinnati Life Insurance Co. at the time the indorsement was made, and also that that was his signature. Then the paper itself was offered. There was no testimony at the time offered tending to show that he, as secretary, had authority to indorse that note. It does not appear in the bill of exceptions upon what ground the objection was made.

It may be very doubtful whether, as secretary, he had authority to transfer negotiable paper of the corporation. It is held, that the cashier of a bank, being the executive officer of that institution, is presumed to have authority to indorse its negotiable paper. There are some authorities which tend to show that a secretary of an Insurance Company, if he is the executive officer of that company, is presumed to have similar authority; 48 Me., 269; 47 Mo., 472; but it seems to me, from the examination I have been able to make, that the weight of authority is rather against it, and it is incumbent upon the plaintiff to show some authority, some course of business recognized by the directors, to authorize a secretary, by virtue of his office, to indorse and transfer negotiable paper. But while that may be so, it does not necessarily exclude the competency of that testimony, as far as it goes.

The execution of the promissory note by the defendant is admitted. His liability on that note to some one is admitted by the pleadings. That Harris was the secretary of the Mutual Life Insurance Co. at that time, and that he made the indorsement, is shown. While it may be true that this testimony is not sufficient to establish the plaintiff's case, as the owner of the note, still it is relevant to the issue, and we cannot say that the court erred in admitting it.

Having offered this testimony, the plaintiff rested, and defendant proceeded to the cross examination of Mr. Harris. One of the questions put to him was, whether he was not the secretary of both companies, of the plaintiff's and the Cincinnati Mutual Insurance Co. Objection was made at that time to the admission of the testimony. The defendant then stated to the court that he wished to show, in connection with this examination, the nature of the transaction by which the plaintiff became the owner of

this note; that Harris was the agent or secretary of both companies; that Gould was the owner of this stock; that the consideration of this stock was the note in suit and the various other matters set out in the second amended answer and cross-petition. Upon that statement the court rejected the testimony. If that was offered for that purpose, it seems to us there are two reasons why the court was authorized to reject it. First, it was going into the defense, and not a proper matter of cross-examination; and second, it was going into a defense not authorized by the pleadings, and therefore incompetent. But after all, it may be said it was proper, on cross-examination, as tending to show the relation of the witness to the litigating parties, but it was presented upon the ground that it was a part of the defense, and the court excluded it on that ground, and justly. Then the defendant proceeded to the cross-examination of Harris at length, and, it seems to us, showed clearly, fully and certainly enough for the foundation of the verdict, that the plaintiff had become the owner of the assets of the Cincinnati Mutual Life Insurance Co., and that the note sued upon was included in these assets.

Then defendant desired to offer testimony tending to show the transactions between the two insurance companies, that Gould had become the owner of 250 shares of stock of the former company; that this note was given in part payment for that stock; that the Union Central Life Insurance Co. had become the owner of the assets; that the arrangement by which the Union Central Life Insurance Co. became the owner of the assets of the other company was *ultra vires*, etc., also in connection therewith copies of the agreements and records of the two companies.

And the court excluded all of that testimony, and the defendant took exception. It is now claimed by the defendant that notwithstanding that answer had been rejected by the court, all of this testimony was competent under the second answer, which was on file. This second answer interposed a plea of abatement. It recited what appeared in the petition in another case, and that all the matters could be litigated in that case, and prayed that the present suit might be stayed until that suit be disposed of. But it was said by counsel that notwithstanding that was filed as a plea in abatement, yet if the substance is sufficiently broad to allow this equitable relief, then the court will not look at the form of the answer, but at the substance, and cites the case of *Elliot v. Sallee*, 14 O. S., 14.

There are two objections to this. First, this answer was filed to prevent the court from considering the matters in this case, because they ought to be determined in the case then pending; second, this first answer shows that at the time this suit was commenced, Gould was not the owner of the stock. Some two years before he had sold it, taking the purchaser's note in part payment and his guaranty against the note now in suit, and Gould did not become again the owner of the stock, until after the first answer was filed in this case, to-wit, in December, 1874.

If that was so, he cannot plead as set-off, the matters arising under the ownership of that stock. *Straus et al. v. Ins. Co.*, 5 O. S., 60.

It appears further from the bill of exceptions, that the defendant, having attempted to offer in bulk all this testimony, including the various assignments, contracts and minutes of the several corporations, which had been refused, then attempted to offer by itself the contract between the plaintiff and the Cincinnati Insurance Co., whereby it claimed the plaintiff became the owner of these assets, including this note, and the

court excluded that testimony. That, perhaps, if offered by itself, and if it tended to show that the plaintiff was not the owner of the note which was the issue on trial, ought to have been admitted; but if the admission of this contract would have done the defendant no good, then he is not prejudiced. The issue of title to the note might, perhaps, raise the question of the authority of these two corporations to make the negotiation, and to make the transfer of these assets, including this note; and except for the cases of Ehrman v. Union Central Life In. Co., 35 O. S., 324, and Curtis v. same defendants, cited in the argument, there would be much force in the argument of the defendant, that if this paper tended to show a contract between the Union Central Life Insurance Co. and the Cincinnati Life Insurance Co., beyond the authority of either of the two companies to make that defense might be raised upon these pleadings; but unfortunately for the defendant, since this case has been pending, the supreme court has passed upon those questions in the case of Ehrman v. Insurance Co., *supra*, and other cases following, where it is held by the majority of the court, that if the defendant admits the liability upon the notes sued upon, the negotiations or transactions by which the plaintiff becomes the owner does not interest him.

As stated by Judge White: "In applying the doctrine of ultra vires in a particular case, regard must not only be had to the unauthorized agreement or transaction, but also to the relation which the litigating parties sustain to it."

The litigating parties are Gould on the one side, and the Union Central Life Insurance Co. on the other, and if Gould admits his liability on the note, he is not in a position to dispute the regularity of the negotiations, by which the title is vested in the plaintiff.

In the case of Curtis v. same Insurance Co., 35 O. S., 343, it is held that it makes no difference that the note was given for stock, and he was the owner of the stock. This would not interfere with or prevent the collection of the note. These cases, cited by defendant in error, indicate, even if this contract was offered as part of the cross-examination, as tending to show how the plaintiff had become the owner of that note, it would not have aided the defendant, and therefore the court below did not err in rejecting it. It seems to us, therefore, that the judge below acted rightly in allowing a *nunc pro tunc* entry, and permitting this bill of exceptions to become a part of the record, and acted rightly in sustaining the various objections raised to the testimony offered by defendant below.

Therefore the judgment will be affirmed.

O. F. Moore and O'Connor, Glidden & Burgoyne, for plaintiff in error.

Ramsey & Matthews, for defendant in error.

RECEIVERS

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

COUNTEE v. ARMSTRONG.

A right of re-entry which gives a lien for rent and non-payment and an allegation of waste and consequent danger of injury to the reversion authorizes the appoint-

ment of a receiver; and if judgment of forfeiture is subsequently rendered, showing that the tenant had no right of possession, the receiver will be sustained on that ground.

Error to the Court of Common Pleas.

SMITH, J.

This case is brought here to reverse an interlocutory order of the common pleas court appointing a receiver pending proceedings in the case.

No bill of exceptions in that case has been filed, and there is nothing upon the record brought before us excepting the petition and amended petition on which the order is founded.

The petition is not very voluminous, but there is enough in the petition to show that Countee was the assignee of a lessee, and Armstrong the assignee of the reversion.

According to the terms and conditions of the lease he was bound to pay the taxes and rent, and if he failed to pay the rent as it became due, the lessor, his heirs and assigns, had the right to re-enter, take possession and put an end to the lease; that the defendant, Countee, failed to pay the rent as it had become due, and the taxes; that demand had been properly made on the premises when the rent became due, and that his rights under the lease came to an end. The petition alleges that he still remains in possession and refuses to pay the taxes and rent, has suffered waste, and that plaintiff, the assignee of the reversion, will suffer irremediable damages in this respect, and prays for possession, payment and the forfeiture of the lease.

The right of re-entry secures a lien for payment of rent. Stephenson et al. v. Haines et al., 16 O. S., 478. A lien which secures the payment of the rent, and the further allegation in the petition, that the defendant in possession is doing great injury to the premises, and that the plaintiff will suffer a great loss, brings the case clearly within the provision of the code, which authorizes the appointment of a receiver, and the judge of the court below was justified in appointing one.

It appears, by an answer filed in this court, that after the case was pending, the case was tried before the common pleas, resulting in a judgment for plaintiff below, which judgment is in full force. This determined that Countee's rights under the lease had come to an end, and that he had no right of possession when the receiver was appointed.

After judgment in that action, the receivership was discharged, and the amount collected by the receiver paid over to the party entitled thereto, so that in either aspect of the case, the prayer to set aside the appointment of the receiver ought not to be granted, and the judgment below is affirmed.

Simeon M. Johnson, for plaintiff in error.

Hoadly, Johnson & Colston and Caldwell & Caldwell, for defendant in error.

CORPORATIONS—LIMITATIONS.

[Cuyahoga Common Pleas Court, November 27, 1882.]

E. A. BALDWIN et al. v. ATWATER COAL CO. et al.

A contract of subscription of stockholders, though not in writing, arises from the stock-holder's implied assent to the provisions of the statute, and his liability is barred by the statute of limitations six years after the company becomes insolvent, whether or not the fact of its insolvency was generally known.

HAMILTON, J.

The petition in this case is one in equity, brought against the company and its stockholders by these plaintiffs, who had obtained a judgment which is still subsisting, the object of the petition being to subject unpaid stock subscriptions and also the individual liability of the stockholders to the payment of the plaintiff's claim and for an adjustment of the amounts due by the company to its several creditors, and for a judgment or decree determining the amount of assets on hand, ordering a distribution of them, subjecting the stockholders' liability upon unpaid subscriptions and the individual liability to the payment of the claims of the plaintiffs and all other creditors who may choose to come in and take advantage of this proceeding, the suit being brought by the plaintiffs for themselves as well as for all other creditors. One of the defenses as to the second cause of action in this case, which is to enforce the statutory liability of the stockholders, is that the administrators of one Hewitt, who were made parties to this petition in terms, are within the jurisdiction of this court, and have not been served with process, and therefore there is a defect of parties.

Another defense is that the debt sued upon in this case and represented by the plaintiffs is upon a judgment that was rendered against the company on the twenty-ninth of October, 1873: that the company at that date, and ever since, has been wholly insolvent, and that, therefore, the liability to this suit—the stockholders' liability to this suit—arose more than six years ago, and is therefore barred by the statute of limitations.

A demurrer is filed to these defenses by the plaintiffs, and also another demurrer by another party who seems to be a creditor, and it is upon the hearing of these demurrers that the case comes before the court.

As to the defense set up in the answer of Ingersoll—that the administrators of Hewitt are within the county and they have not been served with process and therefore there is a defect of parties—I think it constitutes no defense to this action; they are made parties, and they simply have not yet been served. The demurrer, then, in that respect will be sustained to that defense.

But the main issue and the main contention before the court is as to whether the statute of limitations has run against this claim; and that question is to be determined mainly, I apprehend, upon the fact of whether or not the obligation of these stockholders, which they have come under in reference to their individual liability, is a contract obligation or a statutory obligation, and if a contract obligation, whether it be one in writing. If it be in writing, then their liability, it is conceded, runs under our statute for fifteen years. If it be an implied contract or a statutory liability, then the claim is barred in six years, unless there exists something else in this case to take it out of that statute; or, in other words, unless it

be true that the statute does not begin to run upon the mere insolvency of the company, but begins to run when that insolvency is ascertained.

The constitutional provision in reference to dues from corporations is as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law, but in all such cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

There is a provision also of the statute, which was passed for the purpose of carrying out that provision of the constitution, which reads in substance: "That all stockholders of any railroad, turnpike or plank road, magnetic telegraph or bridge company, or any joint stock company organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock, for the purpose of securing the creditors of such company." It has been suggested that it is possible that it is an obligation that is created by the force of the constitution itself, and therefore not an obligation created by the statute in any sense, and therefore does not fall within the statutory provision in reference to limitations that provide that in all cases the statute shall run against all acts or all causes of action created by the statute, but that it is created by the constitution itself, and falls under the tenth subdivision in reference to the statute of limitations, which provides for a limitation of ten years in reference to all other cases not hereinbefore provided for, being an action for relief. In reference to that subject I am inclined to the opinion, from a reference to all the authorities that have been cited, and they have been very numerous, that the obligation does not grow out of the mere passage or adoption of this clause of the constitution, nor of the mere passage of the statute upon the subject, but does arise by force of a contract obligation of some sort; that it is neither in a strict sense a statutory obligation created by the statute, nor is it created by the provision of the constitution itself.

Some question has been made as to whether such a provision in the constitution is self-executing in its nature, and could be executed at all, or be of any force or validity without the statute; but it is unnecessary to discuss that question in the view that I take of the matter, for in either event it seems to me, under the uniform decisions on the subject, that it is not the mere granting of the charter, the adoption of the constitution, or the enactment of the statute, that creates the liability, but that some further act must be done by the stockholder in some way giving his assent and coming under the provision of the law; that his contract thus made was either an implied or an expressed one—that it is, in short, a contract obligation.

The most serious question, as it seems to me, in this whole case is, whether or not this is a contract in writing. It is said, with very much force, that when the statute prescribes that in order to organize the company under the statute there must be a subscription, it provides the method how it shall be done: That stock books shall be opened and subscriptions shall be taken, and that subscription being in writing, our supreme court has said: That the stockholder's liability upon his subscription, so far as it relates to the payment of amounts thus contracted to be paid, covered by the stock, is in writing. Such was the holding in the case of Warner v. Callender et al., 20 O. S., 190, they held that the

stock subscription is a contract in writing, and that the statute of limitation runs against it fifteen years after the demand and the call has been made for a payment of an assessment upon the stock, and a failure, when due by the terms of the call, to pay. It commences to run then, so that it may be that for some portion of the stock subscription, as stock, the statute of limitations may not run out for many years; it may be a subsisting obligation for twenty, thirty, forty or fifty years, even; that it depends on the assessment being made by the directors, and the call being made and the refusal to pay; then the statute begins to run against these calls.

It is further said that it is entirely immaterial what may be the form of this subscription. A party writing his name, simply taking upon a subscription book a certain amount of stock, need not write out his contract in full, and in the 15 O. S. our supreme court has signified by an expression of opinion there that the form of the subscription is immaterial, and it is immaterial whether it is upon the stock book or not. Indeed they go so far as to say that subscriptions to stock in a stock book are not at all essential, and not the only means by which companies can issue their stock. I think, therefore, even if all the terms of the contract are not written out over the subscription that the statute steps in and supplies the terms of the contract, to-wit: that they shall pay precisely as the statute designates payment, and that that shall be implied and added to the stipulations which they have put in writing, and become a part of the contract just as fully as though it had been written out in full just what the statute prescribes shall be done; and from this it is also argued that you cannot stop with mere subscriptions and payments in reference to the stock, but that it goes further and should go further and put into that contract other statements provided by statute, to-wit: The statement that they will become liable to pay their individual liability as provided by statute, and just as fully and completely as though it had been therein written; and there is a good deal of force in that suggestion. In the 11 O. S., in a case known as the boiler case, where certain boilers were ordered to be manufactured for use in a manufacturing establishment, it was held: That the parties making it for a particular use substantially guaranteed and warranted that the boiler should be suitable for the purposes designed, and that any latent defect even was covered by that warranty, though they may have acted in perfect good faith, and that such being the law of the case, there was a contract, as it is said, a stipulation of the contract added to the express terms of the contract by the law.

It is also stated by McIlvaine, Justice, in the case of *Alexander v. Jacoby*, 23 O. S., 358, where the question arose as to the construction of a bond, who might sue upon it in attachment: that in the construction of that bond we were to take as well the terms of the bond as the law under which it was authorized, and that it was to be construed the same as though the statute itself was incorporated in the bond and was of equal binding force and validity as though it had been incorporated in the bond.

It is also said, in *Parsons on Contracts*, that it is entirely unnecessary, when parties are making a contract, to put in what the law itself implies; that it will be presumed that they contracted in reference to the law, and even that if they put it in, that it is entirely unnecessary; that they would have put it in had their attention been called to it, but they must be conclusively presumed to have made their contract with reference to it. The

contract is therefore to be interpreted as though it were in and stated; but all of these questions arise out of the construction that is to be placed upon a bond rather than under any statute of limitations; and in cases where a contract is sought to be made between two parties and it is to supply any deficiency in a contract as therein expressed as between these parties. Here is a case where the stockholders are making a contract with the company in reference to the parties that are then contracting. They must contract and are bound to contract with reference to the statute governing that contract, but it is said that they also in this case are making a contract with the creditors, the future creditors of the corporation. Now is this true? The obligations of the stockholders in reference to their individual liability grow out of their assent to the coming under the operation of the statute, manifested in some way. To that extent it may be manifested by subscribing in the book, it may be manifested by taking stock without subscribing in the book. It may be manifested in any other way that indicates by their acts an assent to the terms of the statutes. But if they manifest their assent, do they also make a contract with other parties than whom they are contracting with? In every case that I have been able to find in the books, there has been some sort of a writing. It is not at all necessary to the validity of stock—or the organization of stock companies, as a general proposition, at least independent of the statute—that they be compelled to sign a stock-book; but if they manifest their assent to it, in any way become members of the corporation and accept the benefits of it, they are held bound by the provisions of the statute governing it. Now, shall it be said that because they have manifested their assent in writing, that that makes them assume all the liabilities in writing to other parties than whom they contracted with? In other words, does the written assent become a contract with outside parties? It seems to me to be extending the doctrine further than I have been able to find any case extending it, and that the liability grows up out of the assent, and so far as the books indicate upon the subject in any of the authorities that I have seen, it is entirely immaterial how that assent is made. It cannot be said, in my judgment, to be a written contract, because, in the course of the formation and for the purpose of forming the stock company, they have subscribed a stock book. It was not the intention to make a contract with anybody else; they were not professedly there for any such purpose.

Then again: When a creditor has a simple debt, without any writing about it, one way or the other, he must sue the company within six years, or he cannot recover. Are the stockholders bound absolutely to fifteen years and the company released by a failure to sue? Is it to be interpreted in that way? Are they bound substantially as sureties for the company after the company is released; but if it is an absolute contract, and a contract in writing at the time they sign it, then they are bound unconditionally. Again, it would seem that the obligation of all stockholders must be of the same binding force and effect; yet a transferee of stock never signs anything; he, therefore, has made no contract in writing, and it is difficult to see how he has in any way come under the obligation of a written contract as such. I have, therefore, reached the conclusion, and I have done so with a good deal of hesitation, that this contract is not a contract between the creditors and stockholders in writing; that it is immaterial how that assent is expressed, whether they hap-

pen to express it by letter to somebody in writing or by their dealings in any other way; anything that expresses their assent holds them, and holds them by the implied implications of the law, and such seems to be the language in every one of the authorities to which I have been cited. The first, of Comstock's Report, holds that language exactly; that it is an implied obligation. Justice Swayne, in the 92 U. S., holds the same language—that it is an implied obligation; and so in the supreme court of California they hold the same language, that it is an implied obligation; and in *Field on Corporations*, perhaps section 74 of his work, he says the question directly came before the supreme court of California, and they held there that the statute of limitations ran in favor of the stockholders after six years upon a similar contract obligation, and that it run in the same manner as it did against the corporation. Such was the holding in the instance of Comstock—that the statute of limitations ran there in six years; and such was the holding in the 3 Allen, p. 42, also, and in 92 U. S., where the same doctrine was held.

If I am correct in that, the only question remaining is: When the statute of limitations commences to run in favor of stockholders upon their individual liability, does it commence to run when the company becomes insolvent, or does it commence to run when it is known to be insolvent? The doctrine in the 17 O. S. is that stockholders may be sued whenever the company becomes insolvent or whenever the debt cannot be collected against the company by the ordinary processes of law. But it is said: How can we ascertain when that happens? A corporation is private in its character; no one has access to their books; no one knows anything about the facts; how can you ascertain or how can you take knowledge of that fact? And shall they, in their close corporation, be permitted to say that the statute of limitations is running against somebody without their knowledge of the fact that they have any cause of action against the stockholders? On the other hand it is said: You have six years in which to collect your debt against the company, you have six years in which to ascertain the fact whether you can get it or not by the ordinary processes of law. If you are negligent during that time and do not take any steps to ascertain that fact, you are responsible, and no one else; that the liability commences whenever the company is insolvent in fact.

I believe it to be a principle of the statute of limitations that mere ignorance of the fact that there is a liability does not prevent the statute of limitations running, unless there is some exception to that effect. Parsons on Contracts, page 372, holds this language: The statute begins to run whenever the plaintiff, the creditor, could bring his action, and not when he knew he could. Thus, it is said, when one promises to pay when able, as soon as he is able, the statute runs, although the creditor did not know it." And the note appended to that cites a great many authorities, and among the rest the 4 O.; and the doctrine is simply and fully stated, it seems to me, in the case in the 4 O.: That it does not depend upon the knowledge of the party one way or other, unless there is some exception to the statute's running in the statute itself; and see 13 Allen, page 42. I am, therefore, of the opinion that the supreme court, having determined the fact that the statute of limitations commences to run, whether the party knows it or not, and commences to run upon in-

solvency, that the statute in this case has run, and the demurrer will be overruled.

The case was argued for plaintiffs by A. H. Weed and Judge W. W. Boynton, and for defendants by Judge S. E. Williamson, John Hutchins and C. C. Baldwin.

FRAUDULENT CONVEYANCE—UNDUE INFLUENCE. 304

[Hamilton District Court, November 18, 1882.]

Johnston, Moore and Smith, JJ.

CHRISTOPHER SCHMELZ v. ELIZA C. MICHELSON.

1. Defendant is not entitled to a jury in an action by a creditor under section 6344, Revised Statutes, to set aside a fraudulent conveyance, the claim not being reduced to judgment.
2. A creditor who has been induced to act as the channel through which an insolvent debtor transfers his property to his wife, is not estopped to contest the conveyance, if the relations of the parties will be deemed fiduciary, and their acts the result of undue influence.

Error to the Superior Court.

SMITH, J.

The petition in error in this case is to reverse a judgment of the superior court of Cincinnati, recovered by Eliza C. Michelson against Christopher Schmelz, the plaintiff in error.

It appears from the record in this case that Mrs. Michelson, whose maiden name was Eliza Schmelz, was an orphan, brought up in the State of Pennsylvania. Her father died when she was seven years of age, and her mother when she was much younger.

When she was nineteen years old, at the instance and request of Schmelz, the defendant below, she came to this city to reside. He was her uncle, I think her sole uncle on her father's side, and she resided with him, made his house her home. After a short time she went out to service to work, coming back to assist him as he required it and making his house her residing place.

After having been here a few months, at his instance, she sent to Pennsylvania to her former guardian to send to her certain moneys which belonged to her, being \$986, to which she was entitled.

Her guardian sent this money in the form of a check payable to her order. As soon as it was received she indorsed it to Schmelz who took the money and used it, giving her no receipt, no note, no voucher of any kind.

Shortly after that he represented to her that he was likely to be annoyed by certain creditors who lived at New Richmond, and that he wished to transfer his property into his wife's name, and that as the conveyance could not be made directly to his wife, he desired that she might be the channel of conveyance, that it might be conveyed to her first and then to his wife. There was no consideration for the conveyance.

After that she had a prospect of marriage and did marry Mr. Michelson, but before that she married or about the time she married, she desired to receive the money which she deposited with Schmelz.

He made various excuses and refused to pay her. One was, that he had held it for a good while and saw no reason why he could not hold it longer and she ought to be satisfied; another was, that he would re-

member her in his will; but the third and more emphatic remonstrance was, that he had put his property out of his hands and as she had aided him in that conveyance, she could not help herself.

This petition, therefore, was filed under the 17th section of the old insolvent act, section 6344, Revised Statutes, which permits a creditor before judgment to commence proceedings before the court of common pleas to set aside a fraudulent conveyance in behalf of all the creditors.

First, there was a demurrer to the petition, the petition setting forth substantially the facts as stated. The demurrer was overruled. Defendant filed an answer denying the allegation and saying the conveyance was made in the due course of business. Upon the trial the court found for plaintiff and entered judgment setting aside the conveyance.

The first error assigned is that the court refused a trial by jury.

It is not necessary to consider that question. This is an action in chancery and the party is not entitled to a jury.

The court overruled the demurrer and refused to grant a new trial.

I suppose it is true as claimed by plaintiff in error, that ordinarily where two or more parties have united in an illegal act or in a fraudulent conveyance for the purpose of defrauding the creditors of one, the law leaves them where it finds them.

But there are certain exceptions to the rule. Sometimes for reasons of public policy, the law will permit one of the parties to sue the other, as for money lost by gambling, **although both participate in the illegal act**; and suit may be maintained to recover it back; so where usury has been paid for the use of money, the law permits a man to recover it back. These are for reasons of public policy.

Another exception is where the parties are not *in pari delicto*. Where there have been circumstances of imposition or hardship, where undue influence has been used; where there is great inequality of age or position by which one has obtained an advantage over another, and the parties are not *in pari delicto*, the law permits relief to the one least in fault. Where one of the parties stands in the relation of parent and child, guardian and ward or in some other fiduciary relation, or, as is sometimes said, *in loco parentis* to the other, then the law will permit the person injured to obtain relief.

This doctrine is laid down 1 Story Equity Jurisprudence, section 300; Bigelow on Frauds p. 339, and numerous cases cited by counsel in their brief.

Does this doctrine apply to the facts of this case? The plaintiff was an orphan just arrived at the age of majority, the defendant was her sole paternal uncle, at whose house she made her home when she was out of employment. She depended upon her daily work for her daily bread. He was a shrewd business man, having the advice of skillful counsel in conducting this arrangement. But the fact itself shows the great inequality of the parties. That he should get control of her money, and surrender to him nearly a thousand dollars of her patrimony without any note, any receipt, or any promise to restore it, speaks volumes.

It seems to me that there was a constraint or undue influence exercised over her in procuring this money, and it shows the relation of the parties existing at that time.

Neither does it appear in this case that there were any other creditors except this girl; for the plaintiff having advertised four weeks for creditors

to come and present their claims as the statute requires, not a single creditor has come in.

It seems to us very clear that the evidence presented in the bill of exceptions fully brings the plaintiff below within that class of cases where the parties are not *in pari delicto* and where the person who is least in the wrong is entitled to relief.

Judgment affirmed.

C. H. Blackburn, for plaintiff in error.

Wilby & Wald, for defendant in error.

BILLS AND NOTES—SURETIES.

306

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

LOUIS FISCHER v. H. H. PENTERMAN.

1. One who puts his name on the back of a note before it is given is an original promisor or surety in this state.
2. Under what circumstances payment of interest in advance on a note will not discharge the surety.

Error to the Superior Court.

SMITH, J.

Error to the superior court of Cincinnati to reverse a judgment recovered by Penterman against Fischer, upon a promissory note given by one Dorman to Penterman, for \$1,500, payable in one year, with 8 percent. interest to the order of Penterman, on the back of which Fischer put his name before the money was loaned, and the money was loaned upon the strength of his name. Two defences are set up; first, that Fischer was simply a guarantor, and as a guarantor was entitled to notice of non-payment by the principal. Second, that after the note became due, an extension of time was granted to the principal without the knowledge of Fisher. As to the first defense, it appears from the evidence that Fischer put his name upon the back of the note before it was given and there is no evidence to limit or qualify his liability. The law of this state is well settled that he became an original promisor or surety and not a grantor. *Seymour & Co. v. Mickey*, 15 O. S., 515; *Greenough v. Smead*, 3 O. S., 415; *Bright v. Carpenter et al.*, 9 O., 139; *Robinson v. Abell*, 17 O., 42; *Champion et al. v. Griffith*, 13 O., 228. The second defense is that after the note became due an extension of time was granted by Penterman, the holder, to Dorman, the maker. The facts which it is claimed establish this extension of time are these: The note was made on the 10th of May, 1876, for the sum of \$1,500 payable in one year, with interest at 8 per cent. At the end of the year to-wit: on the 10th of May, 1877, Dorman paid up one year's interest, nothing being paid on account of the principal. Two or three days before the 10th of May, 1878, Dorman paid another year's interest, which was indorsed by Penterman upon the note in these words: "Received interest on this note to May 10th, 1878."

This was in fact paid some two or three days—possibly a week before, and it is claimed that by the payment of this last interest and the indorsements upon the note as payment up to May 10, 1878, there was a payment

of interest in advance for the two or three days prior to May 10, 1878, which operated as an extension of time for this period, and as a legal result the surety is discharged. The court below held otherwise, and gave judgment for plaintiff. The case has been very fully and elaborately argued by counsel upon both sides, orally and by briefs. It is rare that a case is presented with so much care and industry.

What facts may operate as an extension of time by which a surety is discharged, has been very fully considered, and much discussed in the text-books and authorities. It is conceded on both sides that where there is an agreement upon a sufficient consideration between the maker and holder to extend the time of a note past due without the consent of the surety, that will operate as a discharge of the surety. But it is claimed by the defense in this case that a payment of interest in advance by the maker after the note becomes due is in itself a presumption from which such an agreement may be inferred. It may be possibly *prima facie* evidence of an extension, but as stated by McIlvaine, J., in *Vore v. Woodford*, 29 O. S., 245, it is a presumption of fact, not a presumption of law; a presumption of fact to be presented to the jury or to the court that tries the case, but like all other presumptions of fact to be considered in connection with the surrounding circumstances and all the other facts in the case. Therefore it being a presumption of fact to be considered by the court that tries the case, the court may consider this with the surrounding circumstances and especially the fact in this case, that although it was a payment perhaps two or three days before the year's interest became due, it did not profess to be a payment in advance, but a payment for the interest which had accrued during the preceding year. Therefore as the error alleged in this case is that the finding is against the weight of testimony we should be clearly satisfied that it is so before reversing the judgment. We are not so satisfied and therefore affirm it. But upon an investigation of the case so fully argued and presented in the briefs, it is not so clear that a payment, in advance under the circumstances presented in this case, does make it a *prima facie* case of extension, or such a case as would discharge the surety. There is one class of cases which seem to have followed *Oxford Bank v. Lewis*, 8 Pick., 458, and numerous other cases in Massachusetts, Maine and Missouri. In that case it appears, a note was payable in bank, and when the note became due it was extended for 60 or 90 days by the payment of interest in advance, and it was held that such payment of interest in advance was not such a case of extension as would discharge the surety. But on the other hand there is another class of cases cited by counsel, *Crosby v. Wyatt*, 10 N. H., 318; *Peoples Bank v. Pearsons*, 30 Vt., 711, and others where it was held that where interest was paid in advance and the purpose was to procure delay, or obtain an indulgence (which seems to be an element in the opinion of the court,) then such payment of interest in advance was equivalent to an agreement, and would be *prima facie* evidence of an agreement to extend the time of payment and thus discharge the surety. And therefore it may be said, perhaps, that where interest is paid in advance for a certain time with intent to make it a payment in advance and thus get an extension of time for that period, that would be evidence of an agreement. But on the other hand where by the mere fact of paying the interest in advance there is no purpose to obtain delay by it, but it is simply perhaps the overlapping of a longer period, for which the payment was intended for interest already accrued and the payment of the whole

year's interest, two or three days before the end of the year is accidental rather than otherwise it would be a harsh rule to hold that such a payment operates as an extension of time so as to discharge the surety.

A case cited and very much relied upon by counsel in the argument was *Hubbard v. Ogden*, 22 Kan., 363; but in that case it appeared that there was an agreement in the note itself, that the interest was to be paid in advance, and after the note matured, the interest was paid some three months in advance, and the purpose was obvious, to obtain an extension for the same period.

The court held that there was such a payment in advance in fact, from which an agreement to extend the time might be presumed, and therefore held that the surety was discharged.

Now, in the present case, there is no agreement to extend the time of payment. There was no purpose proved to extend the time of payment. The only fact is that some two or three days before the year's interest had accrued, the year's interest was paid, and we are asked to hold that there was an intent to extend the time of payment, or to infer an agreement to extend the time of payment for the two or three days before the 10th of May, when interest became due.

We think under the circumstances of the case, and considering the time and object of this payment, that such would be a harsh ruling. The case heretofore referred to, *Vore v. Woodford*, supra, is somewhat similar to this, but there the questions arose under the charge of the court, and the supreme court simply affirmed the judgment below, saying that the plaintiff in error had no ground to object to the charge.

The case of *Harnsbarger, adm'r v. Kinnay*, 13 Gratt., 511, is almost precisely similar to the case at bar. The syllabus is as follows:

"The principal obligor having been remiss in paying the interest on a bond promptly as he was required to do, on two occasions, when he sent an agent to pay the interest due, directed him to pay the interest up to a period when the interest would next become due. This, however, was voluntary on his part and not required by the obligee, but indorsements of the payments were made upon the bond. This is no ground of relief to the surety."

We think that was very similar to this. *Dorman*, in paying a year's interest, paid it some two or three days before it was due, but up to the end of the year, and the indorsement of the payment was made on the note, as in the other case the indorsement was made on the bond. But in both cases the payment was voluntary and not required by the obligee. It is hardly necessary to read this case, which is quite full in discussing the facts and the law, but it is so similar to this case, that it may be regarded as an authority for the decision of this case, and without discussing the various questions of the various cases presented, and to show to what extent they do or do not apply to this case, it is sufficient to rest upon this case and affirm the judgment.

Ambrose Temple for plaintiff in error.

Von Seggern, Phares & Dewald, for defendant in error.

ERROR.

[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

ANN EVANS v. DAVID JONES.

Error in fact cannot be assigned upon the record of the common pleas; error apparent upon the face of the record only may be assigned by petition in error in the district court, to reverse a judgment of the common pleas, in an action originally commenced in that court.

Error to the Common Pleas Court.

JOHNSTON, J.

Jones commenced his action in the common pleas to recover against plaintiff in error upon a promissory note. The petition was in the usual form setting out a copy of the note. The defendant demurred to the petition. The demurrer was overruled. Thereupon, at about the last day of the term, a judgment was entered by default against Mrs. Evans and her husband. At the next term of the court a motion was filed by them to open up the judgment and to be allowed to plead, especially as to the wife. She alleged in her motion, that she was a married woman during all the time the suit was pending and at the time the note was made. The motion was overruled and exception taken. This petition in error is prosecuted by her now, to reverse the judgment of the court below, for the reason that it is void as to her in that at the time she was and is a married woman, and the petition did not contain any averment that she was the owner of a separate estate, or that the debt was contracted on the faith of or for the benefit of any separate estate belonging to her. This petition in error was filed more than two years after the entry of the judgment in the common pleas. At a former term of this court, a motion was disposed of, filed by defendant in error, to dismiss the petition, ante 000. That was overruled for the reason that under section 6723, Revised Statutes, a married woman may file a petition in error after the lapse of two years, if at the time the judgment was entered, she was under coverture. We required, however, the petition in error to be verified by Ann Evans, as she alleged therein the fact of her disability, and that the debt was not contracted for the benefit of her separate estate, nor upon its credit. Our supreme court has held that a petition in error, alleging facts not apparent upon the face of the record, was a pleading of fact, and must be verified. 35 O. S., 244.

An answer was filed by defendant to the allegations of fact. There was no denial of the allegation of coverture, a waiver of her right to plead it being relied upon, and there was a reply to this filed.

The cause was submitted to this court upon its merits for decision. Construing sections 6708 and 6709, Revised Statutes, together, the right of the plaintiff in error to allege errors in fact, for reversal of the judgment, that do not appear upon the face of the record, still exists, we think, under our code of practice. A distinction, however, has been made as to the courts to which such an assignment of error may be made. It is not a right of course to assign errors in fact against the record of any court and ask for a reversal of the judgment. At common law such a right did exist, and where an error of fact occurred, it might be assigned and

corrected in the same court rendering the judgment, it being held not to have been an error of the judges, because they were not aware of the fact existing that was only brought upon the record by an assignment of error in fact. "Tidd's Practice," page 1056.

Section 6708, Revised Statutes, provides: "A judgment rendered, or final order made by a probate court, justice of the peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the court of common pleas, may be reversed, vacated or modified by the court of common pleas."

Section 6709, provides: "A judgment rendered, or final order made by the court of common pleas, or any superior court, may be reversed, vacated or modified by the district court, for errors appearing on the record."

This petition assigns an error in fact to the judgment of the common pleas court. That this married woman had the right to file this petition in error after the two years, is unquestioned.

She had the right to review the record of the court for the purpose of ascertaining whether there was anything appearing upon the face of the record to her prejudice, but she had not the right, in our opinion, to a review of facts brought upon the record through her petition in error. The record itself, as presented in this court, does not, upon its face, show any error. She was sued as though she were a *feme sole*; she had her day in court; she demurred, and after the demurrer was overruled, she took leave to answer, but did not do so. The pleading of coverture being a personal privilege, it might well be said that she waived it. Judgment was entered, therefore, against her, without it appearing that she was a married woman, but as though she were a *feme solc*.

Were this a record coming from any court inferior to that of the common pleas, as set forth in section 6708, we think she would have been entitled to a review of the errors in fact alleged in her petition.

Under our code, error in fact may in our opinion, be assigned by petition in error in the common pleas to the judgment of final order of any court or tribunal of inferior jurisdiction thereto, but in the district court error can only be assigned to judgments of the common pleas court for errors appearing upon the fact of its record. It is a judgment of the common pleas in an action originally commenced in that court, that is here for review. It not appearing upon the face of the record, that any error has intervened to the prejudice of plaintiffs in error, the judgment of the common pleas will be affirmed.

Jordan, Jordan & Williams, for plaintiff in error.

Hollister, Roberts & Hollister, for defendants in error.

ASSIGNMENT—COMITY.

[Hamilton Common Pleas Court, 1882.]

†FOURTH NATIONAL BANK v. FLEMING et al.

1. Where a foreign assignee has failed to file a copy of the deed of assignment in the probate court of a county in this state, where there is property belonging to, or credits due to, the assignor, and has failed to take possession of such property or credits before a creditor in this state has obtained a lien on said property or credits, the priority of the claim of the attaching creditor will be maintained.
2. Comity between states will not authorize the giving of greater rights to a foreign assignee than would be allowed to an assignee under a deed of assignment executed in this state.

CONNER, J.

Various questions arise in this case, but perhaps the most important one is the question of the right of a foreign assignee to claim personal property in this state against the prior attaching creditor.

The testimony in the case develops the facts that Donnelly, one of the defendants, made an assignment in Nashville, Tennessee, to Fleming, on October 8, 1881; that Stiefel, another defendant, on November 23, 1881, attached property in this city belonging to Donnelly, and on November 24, 1881, the party in whose hands the property of Donnelly was at the time of the attachment, received notice from the assignee of the assignment and a demand for the money due by him to Donnelly. The money in controversy has been paid into court and the assignee now claims that the same should be paid over to him, the assignment having been made prior to the levying of the attachment. On the other hand, it was claimed by the attaching creditor that the assignee could not claim the property, he never having filed a copy of the deed of assignment with the probate court of this county, nor taken any possession of the funds in controversy prior to the levying of the attachment.

The present insolvent law of our state provides that no deed of assignment shall take effect until the same has been delivered to the probate judge, and the indorsements made thereon of the time of such delivery. The assignee claims that by reason of the comity between states, he should never be compelled to file a copy of his deed of assignment in this county, and that by reason of the deed of assignment made in Nashville, he was immediately thereafter entitled to possession of the property of the assignor, no matter where the same might be situated, and without any actual taking possession of the same. Two cases have been decided by our supreme court which have, in my opinion, a direct bearing upon this question. The first is the case of *Fuller v. Steiglitz*, assignee, 27 O. S., 355, the syllabus of which is as follows:

"In case of such an assignment of choses in action, the law of the domicile of the assignor controls and determines what is a sufficient transfer to authorize the assignee to collect the same.

"The principles of comity between states will allow such assignee to maintain an action, in the courts of this state, against one of its citizens, to collect the same, notwithstanding such preferences, in the absence of any set-off or other defense to such action, or of any lien or charge against said claim under the laws of Ohio, by the debtor."

Judge Johnson, in passing upon this case, speaks of the general rule established by comity between states, that an assignment, valid in the state where it is made, will be recognized and enforced in all other states, even though in some cases apparent injustice may be done to the citizens of the state where the assignee is seeking to enforce his claim. Yet Judge Johnson cites with approval the cases of *Oliver v. Townes*, 14 Martin (La.), 93; *Gunlaudet v. Hall*, 35 N. Y., 657; *Ingraham v. Parker*, 13 Mass., 146, and *Story's Conflict of Laws*, where the exceptions to the general rule are stated and maintained. And he quotes with approval the following language of Judge Parker, in the case of *Ingraham v. Parker*, supra:

"A citizen, who has actually seized the debt by attachment, before it was paid to the assignee, would be protected in his lien."

†This case was reversed as to the holding as to title of attaching creditor, and affirmed in holding as to rights of the bank. See opinion, *post* 000, (9 B., 350.)

And Judge Johnson also uses this language:

"If, by attachment or otherwise, this account, to-wit, the account sued on in the case, had been seized and a lien or charge established against the same, under Ohio laws, by a citizen creditor of Smal, the question decided in *Ingraham v. Parker*, 13 Mass., 146, would have been presented here for decision."

And I think it may be fairly inferred from what Judge Johnson here says, that had such a case been presented to him, as was presented in *Ingraham v. Parker*, and as is presented in the case at bar, he would have held that a lien or charge having been established against the account under the Ohio laws, the citizen creditor would have held the same against the assignee.

The other decision bearing upon this question is that of *Johnson v. Sharp*, 31 O. S., 611, where Judge McIlvane on page 620 says: "It is true that great contrariety of opinion on this general subject has been expressed by the courts of this country, but on the whole, we think, that Mr. Wharton in his work on the Conflict of Laws, section 353, has fairly stated the view most fully sustained in these words: "We may, therefore, hold it to be the law in the United States, that an assignment made in one state, of personal property in another (such property not being in transit or following the owner's person) passes no title to such property as against attaching creditors of the assignor, such creditors being domiciled in the latter state, when such assignment is invalid by its laws." And, we think, the implication arising from the language quoted is also sustained by the weight of current authorities, namely: that if such assignment be valid, or in other words, be in harmony with the laws of the state where the property is situated, the title passes, and the assignee should be protected against subsequent attaching creditors."

I think the implication fairly arises from the above language of McIlvane, J., that if such assignment is not valid, or in other words is not in harmony with the laws of the state where the property is situated, the title does not pass and the rights of the assignee would not be protected against subsequent attaching creditors.

Now, is this assignment in question in harmony with the laws of the state of Ohio? Certainly it is not, if as I have held that it is a prerequisite to a valid assignment in the state of Ohio, that a deed of assignment should be filed in the probate court, and the date of its filing indorsed by the judge, or clerk thereof.

No copy of the deed of assignment from Donnelly to Fleming has ever been filed in this state, and, in my judgment, that assignment is not valid under the laws of Ohio, as against attaching creditors who have levied their attachments before the assignee has even notified the debtors of Donnelly, that there was an assignment, and before he had attempted to take any possession of the funds due by them to Donnelly. The laws of Ohio have always to some extent favored its own citizens as against citizens of other states. For example, it allows an attachment to issue without bond when the defendant is a non-resident, and simply because he is a non-resident. In respect to assignments made under its own laws, it gives preference to attachments issued by any creditor before the deed of assignment is filed in its court, and I know of no reason why by reason of the comity between states, more right should be given to a foreign assignee than to a home assignee. I therefore hold that the assignee Fleming, as such assignee, having failed to file a copy of his deed of assignment, and having failed to take possession of said fund before Stiefel levied his attachment, the priority of Stiefel's claim will be maintained and he is entitled to the money in the court.

Judgment accordingly.

F. A. Thomson, for plaintiff.

H. M. Cist, for Fleming, assignee.

Pugh & Gerard, and Schwab, for Stiefel.

Gasser & Spangenberg, for other defendant.

FEES AND PERQUISITES FOR OFFICIAL SERVICES. 311

[Hamilton Common Pleas Court, 1882.]

STATE OF OHIO, for the use of Hamilton Co. v. WILLIAM S. CAPPELLER.
SAME v. GEORGE O. DECKEBACH.

Fees and perquisites for official services, not paid into the county treasury by the county auditor and recorder, under the provisions of the "fee bill," Revised Statutes, 1341, but appropriated to their own use, cannot be recovered by suit in the name of the state of Ohio, where the action is not on the bond. The party to bring the suit is the board of county commissioners.

AVERY, J.

These are two suits in the name of the State of Ohio as plaintiff; one against the county auditor to recover the per diem received by him for sitting as member of the decennial board of equalization, which duty devolved upon him by virtue of his office of auditor; the other against the county recorder, to recover the contract price received by him from the county commissioners, for transcribing and consolidating the two series of general indexes kept in his office, into one series; the only authority of the county commissioners in the matter being, as provided by section 906, of the Revised Statutes, "that they shall, when they deem the same necessary, have any of the records or books in the office of the county auditor, county recorder or county surveyor, transcribed into other books by the officers having charge thereof, and pay them therefor six cents per hundred words."

The claim to recover is because of the provisions of the "fee bill," that "the fees, costs, percentages, penalties, allowances, and all other perquisites of whatever kind, which, by law, the auditor or recorder, or other officers in this county, may charge, receive and collect for any official services rendered, shall be received and collected for the sole use of the treasury of the county, as public moneys belonging to it, and shall be accounted for and paid over by such officers respectively, into the county treasury," section 1341, 1346, Revised Statutes.

But granting the claim, it is not either in fact or in name a claim in favor of the state of Ohio. For money that should have been paid into the county treasury, to the credit of the fee fund, but was not, being appropriated to their own use by county officers, the state could have no claim. The fee fund is a special fund, but is still a county fund. If money paid into that fund, were embezzled after coming to the hands of the treasurer, surely no one would think, except in an action upon the bond, of suing to recover it in the name of the state of Ohio. The proposition seems a plain one, that the state of Ohio can no more be the party plaintiff, in a suit to recover money improperly withheld from the fee fund, than to recover money improperly withdrawn from such fund. The party plaintiff must be the board of county commissioners.

In *Shanklin v. Commissioners of Madison county*, 21 O. S., 575, 583, 584, where the commissioners had taken from the county treasurer an assignment of a certificate of deposit to the amount of the county funds he had embezzled, it was held: "The collection of this indebtedness of the treasurer to the county was not prohibited by any law, but on the contrary was enjoined upon the commissioners as an official duty. * * * To satisfy that indebtedness, the county might have invoked judicial process." In *Commissioners of Hamilton county v. Noyes*, 35 O. S., 201, it was held: "Where a cause of action in favor of the county arises out of a subject matter within the control of the board of county commissioners, suit may be brought thereon in the name of the board unless by statute the suit is required to be brought in some other mode."

The fee fund is devoted to special purposes, but its accumulations are subject to transfer to the general county fund. It is a subject matter within the control of the board of county commissioners, in the sense that upon a cause of action arising out of it in favor of the county, suit may be brought by the board. "The board of county commissioners," say the supreme court, in *Shanklin v. Commissioners of Madison county*, "is, in

an enlarged sense, the representative and guardian of the county, having the management and control of its financial interests" 21 O. S., 583. There is nothing to warrant the notion that this control, so far as the fee fund is concerned, has been transferred to the prosecuting attorney of the county as fee commissioner. True, he is to see that the provisions of the fee bill are faithfully executed, and to examine the accounts and fee books of the various officers, and to have general supervision of the matter of their collecting and reporting their fees. He may, indeed, for anything that appears to the contrary, cause suits to be brought. But there is no authority for his bringing suit in his own name, or the name of the state of Ohio. Money due the fee fund, is not due to him or the state, but to the county. The board of county commissioners is by law made capable of suing or being sued, and of asking, demanding and recovering by suit, any sum or sums due the county. Revised Statutes, 845. Such board should be the plaintiff in this action, not the state of Ohio. "The state of Ohio for the use of Hamilton county," is still the state of Ohio. "For the use of Hamilton county," is an idle addition.

The demurrers of the defendants, that the actions cannot be maintained in the name of the state of Ohio, as they are brought, must be sustained. The petition of the state of Ohio, in each case, is dismissed.

Miller Outcalt, for plaintiff.

Foraker & Black and T. Q. Hildebrandt, for defendant.

SCHOOLS.

312

[Hamilton Common Pleas Court, 1882.]

BOARD OF EDUCATION v. HENRY C. BOWEN et al.

Sections 3946, 3947, 3948, Rev. Stat., do not authorize the changing, by a township board of education, or in their default, by the probate court, of the lines of special school districts, as between each other.

Error to the Probate Court.

AVERY, J.

Upon petition filed with the probate judge by certain resident electors of special school districts 4 and 10, of Sycamore township, the two districts adjoining, on the north and south respectively, special school district 2, of the same township, such proceedings were had, that commissioners having been appointed and having reported in favor of changing the lines of special district 2, by extending them to include on the north a portion of district 4, and on the south a portion of district 10, the report was confirmed. The question is as to the jurisdiction of the probate court.

The organization of the school system is by districts,—city, village, special and township, each being governed by its own board of education, elected by the electors of the district and declared by a law a body corporate; the township district comprising all the territory of the township not included within the other three, and being sub-divided for local purposes into sub-districts.

The statute provides for the creation of additional sub-districts by the board of education of the township district, and for changing the lines of

sub-districts already existing; the mode being by petition of resident electors of the territory sought to be included, to be filed with the clerk of the board, and if not acted on within sixty days, or if rejected, to be filed with the probate judge. In like manner, and with the like right of petition to the probate court, provision is made for the creation of special school districts by the board of the township district, and for such board "changing the lines of special or village districts and adjoining sub-districts." 3946, 3947, 3948, Revised Statutes.

It is upon the construction of the words, "changing the lines of special or village districts and adjoining sub-districts," that the question of jurisdiction depends. On the one hand, it is contended that the provision is only for changing the lines of special or village districts as between the same and adjoining sub-districts; on the other hand, that the clauses are independent and provide severally for changing the lines of each, whether city districts, village districts, or adjoining sub-districts.

For this latter contention to prevail, would require the words to be read, "or adjoining sub-districts." Again, the statute having already provided for changing the lines of sub-districts, why should there be another provision of the same kind for adjoining subdistricts. It is a general presumption that every word in a statute was inserted for some purpose; mere idle and useless repetitions of meaning are not to be supposed. *Bloom v. Richards*, 2 O. S., 402, Thurman, J.

There is an additional consideration. The change provided for is upon petition to the ownership board; except when a special or village district is interested in the change, the petition may be either to the township board, to the board of such special or village district. This leaves the case of two or more special districts wholly unprovided for. Plainly, the change contemplated is not such as might effect special districts alone, or it would have been provided, as to one or the other special boards entertaining the petition. The only provision being for petition to the township board, or to the board of the special or village district interested in the change, the conclusion is irresistible that the only change of lines contemplated, was as between such special or village districts and adjoining township sub-districts. This indeed is the very language of the statute, "special or village districts and adjoining sub-districts." It is a construction that harmonizes with the language of the statute and saves it from idle and useless repetition. A construction that would leave the lines of special school districts, as between each other, to be changed on petition to the township board, when by their very organization they have become independent of the township board, should certainly not be adopted without plain words of the legislature expressing such intention.

The proceedings and judgment of the probate court are reversed and the petition is dismissed.

J. K. Love and Joseph Cox, for plaintiffs in error.

C. W. Gerard, for defendant in error.

ARBITRATION—NOTARY PUBLIC.

314

[Hamilton Common Pleas, 1882.]

†MARY PROSS v. E. P. BRADSTREET, Executor.

In an arbitration under the statutes, the oath to the witnesses cannot be administered by a notary public.

AVERY, J.

The court overruled a motion on behalf of plaintiff last month, to enter judgment on an award by three arbitrators for \$4,000, for services as housekeeper and nurse. Held, that the arbitrators, having been sworn before a notary public, were not properly qualified to act as such, and followed the ruling of Okey, C. J., in the case of *The State v. Jackson*, 36 O. S., 281, that: "in an arbitration under the statute (3 Curwen, 2409; 75 O. L., 736, sections 5601-5613, Revised Statutes), the oath to the witnesses must be administered by a judge or justice of the peace; and perjury cannot be assigned on the testimony of a witness in such a case, where the oath was administered by a notary public, notwithstanding the general language of the statute empowering notaries public to administer oaths in all cases required or authorized by law, 3 Curwen 1752, 1 S. & C. 873, section 118, Revised Statutes."

DEDICATION.

324

[Hamilton District Court, October Term, 1882.]

Johuston, Moore and Smith, JJ.

MACNEALE & URBAN v. CITY OF CINCINNATI.

1. Where the owner of land in a city sets apart a strip 20 feet wide and opens it as a passageway through a public square, and in his subsequent conveyances of lots describes the strip as "Mulberry street," and as a boundary line, and the way is used by the public as a highway without objection or question for over 25 years, the presumption of an intent to dedicate to public use, arises.
2. The acceptance by the public being complete, the municipal authorities may exercise their powers over the same as a public street.

Error to the Superior Court.

MOORE, J.

The plaintiffs in error, Macneale & Urban, seek to enjoin the public use of a strip of ground in the city of Cincinnati, known and designated as "Mulberry alley." In the year 1830, A. D. & S. A. Combs, then the owners in fee of in-lots numbered 332, 333 and 334 of the original plat of the city, laid out along the east line of said in-lots a strip of ground 20 feet in width from the south side of lot 332, to the north line of in-lot 334, at Third street, and in subsequent conveyances described the lots conveyed as fronting or bordering on this strip, which they designated as "Mulberry street." These conveyances cover a period of seventeen years, or as long as their ownership of lots continued. Upon the lots buildings were erected, and in a few years a distinct and defined passage was created from Third street southwardly, terminating within the lines of in-lot 332. About the year 1842, Pearl street was laid out and opened along the north line of in-lot 332. The passage way then became a free and uninterrupted

†What seems to be a fuller opinion in this case will be found *post* 000 (9 B., 244).

thoroughfare in the center of the square bounded by Third, Plum, Pearl and Elm streets, and its use became general by the public.

In the year 1875, A. D. Combs, claiming to be the owner of ten-fourteenths of the said strip of ground, executed a deed to W. B. Dodds as trustee, for the use and benefit of Macneale & Urban, describing the land covered by the alley as a lot.

The character of this passage-way as an easement is now in question. Macneale & Urban assert that it was originally laid out as a private way for the benefit of the lot-owners obtaining title under the conveyance of A. D. & S. A. Combs, and having purchased all the outstanding interests of the original lot-owners, under A. D. & S. A. Combs, they are now entitled to the absolute control of the way.

The city of Cincinnati asserts a right to the premises as a public highway by dedication, evidenced by the several deeds from A. D. & S. A. Combs, indicating the ground as a street and naming it "Mulberry street."

The evidence to support the claim of the plaintiffs in error is in the nature of declarations of parties in interest and the kind of use. A. D. Combs testifies to the effect that when the way was laid out in 1830, it was done with the expectations that Nicholas Longworth, who owned the land on the east, would join in making a street 40 feet wide, by granting a strip of 20 feet wide off the west side of his land; but Longworth did not do so, and the Combs, having made previous conveyances of lots fronting on the way as a street, they were compelled to maintain an open passage-way for the use of their grantees. Other witnesses testify to the restricted use of the way by the public, by reason of its obstructed condition.

To support the claim of the city, the several deeds named and the testimony of persons who have observed the use and condition of the premises for more than twenty-one years, in fact describing a use by the public for over thirty-five years is produced.

To rebut the presumption of a dedication to public use and an acceptance by the public, Macneale & Urban claim that the absence of recitations inferring publicity, in the early deeds from A. D. & S. A. Combs, destroys the presumption of a dedication to public use, notwithstanding the force imputed by the use of the word "street." Certain writings are also produced, which, if competent as evidence, would show that in the year 1854 A. D. Combs, in a notice to a neighboring property owner to remove certain obstructions in the street, described the same as a "private way;" also the testimony of one Rickey, a lot-owner on the north end, to the effect that in the year 1870, he protested against the interference of the city authorities in the way, claiming it as a private way; that a short post about six inches high was placed in a central position at the Third street end, by some person unknown, and remained there for several years; that in the year 1871, the city authorities compelled him as an abutting property owner to remove a nuisance from the way in his front. Other witnesses testify that for several years prior to the commencement of this action, the way was obstructed to a great extent by the adjoining proprietors by the storage of wagons, lumber and manufacturing materials at or near the south end, but not preventing the passage of a vehicle.

Coming now to consider the rights of the parties, it is of the first importance that the intent of the parties be ascertained.

Ordinarily highways are dedicated to public use by some open and unmistakable act. In this state, under the provisions of the statute, a

party may by a writing, duly acknowledged before a proper officer, and recorded in a public office where the land records are to be found, dedicate a street or highway to public use, and no formal acceptance is necessary, Chase's Stat. 502. S. & C. 1482. But in the absence of such observances, dedication by the common law rules have been established by every conceivable way in which the intention of the parties can be manifested. *Fulton v. Mehrenfeld*, 8 O. S., 440, citing cases. The intent is a question of mixed fact and law, and may be indicated either by a direct expression, or by a fair presumption from the conduct of the party; for instance, throwing open a piece of land as a passage-way and describing it as a boundary in a deed, or by long acquiescence in its general use by the public. The intention to dedicate may be established by parole evidence of acts or declarations, which show on the part of the owner of the land, that the land should be used for public purposes, and the acceptance on the part of the public, which may also be proved by the circumstances of the case.

The more practical inference from the facts presented, is that A. D. & S. A. Combs, intended to open a street for the public. A. D. Combs asserts that to have been the original or first intention of himself and S. A. Combs, and they have described the ground in their conveyances as a street, although they had a period of seventeen years within which they might have declared their intention to keep up a private way only.

The public use was uninterrupted for 24 years before even a simple declaration is heard of any intent, and that of no weight in the manner of its manifestation. The subsequent declarations and protests of the lot-owner Rickey, were based upon such rights as his grantors gave him, and they had already permitted the intent to dedicate to public use to be confirmed by the long and uninterrupted use by the public.

For a period of twenty-five years or more following the opening of the way as Mulberry street, not a single act or declaration appears to negative the intent manifested by the early deeds. The acceptance on the part of the public is complete by long user. Although the evidence shows that the travel was not very extensive or very general, yet the use was consistent with the surroundings.

We see no error in the action of the court below.

Judgment affirmed.

J. D. Macneale, for plaintiff in error.

Kumler, Ampt & Warrington, for defendant in error.

DAMAGES—MUNICIPAL CORPORATIONS.

326

[Hamilton Common Pleas Court, 1882.]

SCHERER v. CITY.

Under section 2326, Revised Statutes, the filing of a claim for damages with the city is not a condition precedent to the bringing of an action therefor against the municipal corporation, where the damages do not arise during the construction of an improvement, or could not reasonably have been anticipated from said improvement.

CONNER, J.

This was an action brought by the plaintiff to recover damages from the city, alleged to have been caused by the defective condition of Clifton avenue.

Plaintiff alleged that he was the owner of valuable improvements constructed on said avenue; that the city improved said avenue in 1879, building a portion of it on made ground, and so defectively constructed the same, that subsequent to the improvement and acceptance of the street by the city, the portion so built upon made ground slid down upon the premises of plaintiff, and that the water which ran along said avenue after said slide, fell over and on the premises of the plaintiff, and injured said improvements. A demurrer was filed by the city, the ground of the demurrer being, that the plaintiff had failed to file any claim for damages with the city before commencing the action. The claim of the city is based upon section 2326, Revised Statutes, which provides that: "No person who claims damages arising from any cause, shall commence a suit therefor against the corporation, until he files a claim for the same with the clerk of the corporation, and sixty days elapse thereafter to enable the corporation to take such steps as it may deem proper to settle or adjust the claim."

Section 2326 is a part of sub-division 2d, chap. 4, div. 7, of the Revised Statutes, referring to municipal corporations, which sub-division particularly refers to damages arising from the construction of any improvement. The original section, which is now embraced in section 2326, was section 575, of the Municipal Code, as passed in 1869, being found in 66, O. L., 247.

Said section 575, reads as follows: "No claimant for damages shall commence any suit, until he shall have filed a claim therefor with the clerk of the corporation, and sixty days shall have elapsed thereafter, to enable such corporation to appoint assessors to assess such damages, return the same to the proper officers, and sufficient further time shall have elapsed, not exceeding twenty days after the return of such appraisal, to enable the corporation to pay the assessment."

Section 575 has been uniformly construed, so far as I have been able to ascertain, to refer simply and solely to claims for damages arising out of any improvement, during the construction of the improvement, or which could have reasonably been anticipated by reason of such construction, and never to have referred or applied to damages arising from the failure to maintain an improvement after the same had passed into the control of the city. Taking the whole of said subdivision 2, and construing all of its sections together, it is but a fair inference, I think, that the legislature did not intend, by the language in section 2326, when it is said that a person who claims damages arising from any cause to extend the application of said section to any other causes than those arising from the construction of an improvement or those which could reasonably have been anticipated from the construction of said improvement. In other words, that the legislature, while using the phrase "any cause," did not intend to deprive a party of the right which he had at common law, to bring an action against a municipality as well as against any individual, for damages arising from the neglect of the corporation, but did intend to limit it as section 575, has been construed to be limited, simply to those arising from an improvement.

The demurrer will therefore be overruled, and plaintiff allowed time to answer.

S. A. Miller, for plaintiff.

Kumler, Ampt & Warrington, City Solicitors, for defendant.

INJUNCTION—STREETS—RAILROADS.

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[Hamilton District Court, October Term, 1882.]

Johnston, Moore and Smith, JJ.

CINCINNATI NORTHERN R. R. CO. v. CINCINNATI et al.

1. A mandatory interlocutory injunction, requiring removal of an alleged nuisance, will not be granted before trial unless the injury be irreparable, and where a railroad company has without consent or authority laid its tracks across a city street, the presence of the tracks there, if on grade, is not an irreparable injury and will not be abated by mandatory interlocutory injunction, but the running of trains on such tracks across the street, being for the time an exclusive occupation, the damage by which is not ascertainable in money, is in a sense irreparable, and the court may on application of the city, on it giving bond, restrain the use of such tracks by trains.
2. The care and control of streets, and the duty to keep them free from nuisance, being on the council, section 2640, Revised Statutes, city officers cannot tear up the tracks of a railroad laid across a street but not obstructing passage, without permission, until declared by council to be a nuisance, for this would be destroying property without warrant.
3. The right to fix a terminus of a railroad in a city does not imply the power to cross intervening streets without consent or condemnation, nor does it show that section 3283, Revised Statutes, is to be confined to occupation lengthwise the street and not crossing it, nor does section 3284 show that section 3283 does not apply to crossing a street, for section 3284 does not apply to streets at all, but only to roads which alone can be diverted from their location.

AVERY, J.

There are two questions. First, upon the motion of defendants, the city, the members of the board of public works and the chief engineer of such board, to dissolve the restraining order granted last term against the tearing up by them of the tracks of plaintiff's road, laid diagonally across Court street, between Broadway and Cleveland street, and against their interference with the running of the trains. The tracks were laid without authority or permission in any way from the common council, on the morning of Saturday, October 21; the restraining order was obtained the following Monday. The statute provides, that the council shall have the care, supervision and control of all public highways, streets, avenues, etc., within the corporation, and shall cause the same to be kept open and free from nuisance; 2640 Revised Statutes. But the tracks have not been declared by council a nuisance and ordered to be abated. Tearing them up by the officers and employes of the city, would therefore be a destruction of property without warrant. The abatement of a nuisance by mere act of the party injured is a private remedy. An individual can only interfere with obstructions in a public way, so far as is necessary for him to exercise his right of passage. He must commit no riot in doing so. 3 Bl. Comm. 5. If passageway of reasonable convenience is left him, he cannot justify destroying the obstruction, 15 Q. B., 276; 24 Mich., 508; 12 Gray, 101; 46 Barb., 561. His right extends merely to the private nuisance; he can no more abate the public nuisance than he can maintain an action for it. 5 R. I., 510; 29 Cal., 156; 10 Bush., 288. The remedy of the public for a nuisance is itself public, as by indictment. 7 Q. B., 376; Revised Statutes, section 6921; or by injunction. Putnam v. Valentine, 5 O., 187; State v. Railroad Co., 36 O. S., 434, 439.

The second question is upon the motion of the city for an order enjoining the continuance of the tracks and the running of trains across the

street, and to compel the plaintiff to take up and remove the tracks. This is made upon the answer and cross-petition filed by the city.

The question presented is as to the power of the company to cross the street with its tracks. The company is a railway corporation under the general laws of this state, with the southern terminus of its road in this city, but at what precise point does not appear. All that is said about it, is that the design and intention is and has been to construct and operate the road to some point south of and beyond the company's property on the south side of Court street, they owning also on the north side; and that last February they established its location across the street. Before laying the tracks on the 21st of October, they had applied to the board of public works for permission, and that body had recommended the resolution to council; but council doing nothing more than to refer the matter to the committee on railroads, the company, having fitted up a building, which had been used for offices on the south side, as a passenger-depot, took possession of the street and laid the double tracks across, replacing the street as it was before, except for the superstructure.

The contention is, that the power to fix a terminus within the city implies the power to cross intervening streets to get to it, and that the general law provides for this, by providing that when necessary to cross a road or stream, a railway company may divert the same from its location or bed, but shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness, section 3284, Revised Statutes.

There are two sections; the one just referred to, and section 3283, preceding it, which provides that "if it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way or public ground of any kind, or any part thereof, the municipal or other corporation or public officers or authorities owning or having charge thereof, and the company may agree upon the manner, terms and conditions upon which the same may be used or occupied, and if unable to agree and it be necessary, in the judgment of the directors, to use or occupy such road, street, alley, way or ground, the company may appropriate so much of the same, as may be necessary in the manner and upon the terms provided for the appropriation of property of individuals."

The distinction urged is that this is for occupation lengthwise the street, and that the right to cross is left without condition, except under section 3284, in respect to not impairing former usefulness.

Concerning the implied power of a railway corporation to lay its tracks between the chartered points, the power may be conceded; as must also be conceded, so far as concerns the public, the supreme power of the legislature over streets and their uses. *Western Union Telegraph Co. v. Mayer*, 28 O. S., 531; 4 Cush., 63; 24 Ia., 478; 2 Stockt Ch., 352; 29 N. J. Eq., 569; 27 N. Y., 188; 27 Penn. St., 339; 21 Ills., 516. But the extent to which the legislature may have exercised this power; or, to put it another way, whether the company has a right to lay its tracks across the streets of a city without restriction, is still a question. It would have been competent for the legislature to require that the consent of council be first obtained. 1 Dillon, 393. Has it done so?

Use or occupation of a street, or any part thereof, for the purposes of a railroad, under section 3283, can only be by consent of the municipal

corporation, or by appropriation. The crossing or diverting a road from its bed or location, is secured by section 3284. *R. R. v. Commissioners*, 31 O. S., 338, 346. The argument is, that this leaves the former section to apply, lengthwise the street only. But under section 3284, the power is not only to lay the tracks across a road; the road may be diverted; *State v. Railroad Co.*, 36 O. S., 434; a consideration which at once suggests that the streets of a city were not meant by the word "road." The division of public highways, by the general legislation of the state, into state roads, county roads, township roads, and streets and alleys of cities and villages, of itself repels the inference, that the crossing of streets of a city by the tracks of a steam railway was intended to be secured, under provisions for crossing or diverting from its bed or location, a stream or road. The express provisions for the use and occupation of streets exclude the implication, unless crossing at grade is not taken, as what is meant by use or occupation of any part of a street. The argument is that it is not, for the reason that the same provisions include public roads. But streets and roads differ. The use and occupation by the public of the streets of a city is continuous. Even as to roads, the power to cross by a railway confers no right, it has been held, to exclude the public from the enjoyment of any part without a substantial equivalent; that is, without appropriation. *R. R. v. Commissioners*, 31 O. S., 338, 346. A steam railway across the streets of a city, although at grade, is not a street use, and to the extent that it may be employed in the operation of trains excludes the proper use. The condition as to not impairing former usefulness, inseparable from the right of crossing a road, *State v. Railroad Co.*, 36 O. S., 434, is in its nature a condition that considering streets and their uses, could not have been expected to be complied with in crossing streets.

It does not appear then, that the legislature could have meant that only that use or occupation by a railway of a street would require consent of the public authorities, that would require it in the case of the public road. The only crossing provided for, without any such consent, is of a road or stream, and the words employed in conferring the power, limit it. The provision, that, in crossing any avenue or public highway, from a city of the first or second class to a cemetery of the city, the railway shall be so constructed as to pass under it or over it at an elevation, does not enlarge the construction; upon the contrary, it confirms the conclusion that the only subject in mind was the crossing of roads.

While the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or necessary implication. *Hickok v. Hine*, 23 O. S., 523, 531; *State ex rel v. R. R.*, 37 O. S., 157, 177. Use and occupancy by municipal consent, or by appropriation, being all that has been expressly granted as to streets, the maxim applies: "*expressum facit cessare tacitum.*"

The motion on the part of the city is for a mandatory order to take up the tracks. Mandatory injunctions are seldom allowed before final hearing. *Bispham*, Equity, section 400; *High on Injunctions*, section 2. Besides, as upon the affidavits it appears that the approaches from the street are level, the obstruction of the tracks being no more than is presented by the rails, the mere continuance where they are during the litigation, is not likely to amount to irreparable injury. But the motion is also against running trains across the street, and this presents a differ-

ent question. The use of the tracks, dependent altogether upon the business and convenience of the company, and necessarily during continuance of the use exclusive, can not be measured as the mere obstruction of the tracks may be. Being an injury, and the damage by reason of the public inconvenience being of a nature not to be ascertained and fixed in money, it would be, in the legal sense of the term, irreparable. Courts sometimes balance the public inconvenience as between granting and withholding an injunction. But in this case, so far as appears, the only public convenience involved in crossing the street, is whether the trains shall stop on the north or south side. The same reason that would have justified a restraining order, had it been applied for before laying the tracks, exists now against running the trains. The exercise of the jurisdiction is properly involved on behalf of the city in its corporate capacity by the solicitor. Revised Statutes. 1774: Putnam v. Valentine, 5 O., 187, 189; 21 Md., 93; 24 Ia., 455; 45 Barb., 63.

Upon the city entering into an undertaking according to law, with sureties to the satisfaction of the clerk in the sum of \$10,000, an order may issue restraining the plaintiff, its officers, agents and servants, until further order from running its cars, locomotives or trains over the tracks across Court street.

Paxton & Warrington, for the plaintiff.

Philip H. Kumlér, City Solicitor, for defendant.

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BILL OF EXCEPTIONS—PRACTICE.

[Hamilton District Court. October Term, 1882.]

Johnston, Moore and Smith, JJ.

JOHN T. WILLIAMS v. WESLEY M. CAMERON.

It is not required by section 5302, Revised Statutes, in order to give a party thirty days from the end of the trial term to prepare his bill of exceptions, that an entry be made consenting thereto or directing that the journal of the court be kept open for thirty days after the rising of the court, and if actual consent verbally given be necessary it will be presumed from the fact of the allowance of the bill within thirty days to have been given. It is not approved practice for the entry of allowance of the bill to state in the body of the entry that it was made within the time. The ordinary entry made upon the trial term minutes as of that term is sufficient.

Error to the Superior Court.

JOHNSTON, J.

The consideration involves a question of practice, and does not call for an examination of the merits of the case.

Defendant in error files the following motion here:

"Now comes defendant and moves the court to strike the case from the files for the following reason: The judgment and decree sought to be reversed herein was rendered by the superior court of Cincinnati April 29, 1880, to which said plaintiff in error excepted and took no bill of exceptions at said term of said court, nor consent that said court might sign said bill of exceptions during said term."

Referring to the transcript we find the entry to have been made as the transcript shows, May 1, 1880, minutes 243. "Now comes defendant, this 31st May, 1880, being within 30 days after the expiration of the trial term, and presents to the court this certain bill of exceptions herein,

which being found to be true in all respects is allowed, and upon motion is hereby made a part of the record of this court, to which the plaintiff excepts because no entry was made during the trial term consenting to the signing, allowing and filing thereof after the expiration of the term."

It was claimed by counsel for defendant in error under section 5302, Revised Statutes, that where a bill of exceptions is not taken at the trial term, an entry must be made, or the consent in some wise obtained by which the minutes of the trial term shall be kept open for the period of the next thirty days following, in order to permit a bill of exceptions to be examined, allowed, signed and sealed and ordered to be made a part of the record of the trial term.

The section reads as follows: "If the exception be true, or if it be not true, then after it is corrected, a majority of the judges composing the court must allow and sign it before the case proceeds, or if the party consent, within thirty days after the term. The bill of exceptions shall be filed with the pleadings, and if the party require it, made a part of the record, but not spread on the journal, and if it is to be signed after the term, the journal must be kept open, and the allowance and signing thereof entered thereon as of the term."

On the part of the plaintiff in error it is contended that this statute was strictly followed, and that a bill of exceptions in all respects was regularly taken and is a part of the record of the trial term (April), and he relies upon *Kerr v. State*, 36 O. S., 614.

There has recently grown up we might say a custom, to be followed rather than discouraged, where a party desires to take a bill of exceptions and has not time at the trial term to prepare it and submit it to the judge for his examination and signature, to have an entry made on the journal of the trial term directing the clerk to keep the minutes of that term open for the purpose of enabling that party to prepare his bill of exceptions and to permit him to have it when signed, sealed and ordered made a part of the record of the trial term, the entry providing that the minutes shall be kept open for a period of thirty days next following the trial term.

When, however, we are asked to strike a bill of exceptions from the files because no such entry was made, we must give to that statute such a construction as will accord with the intent and purpose thereof.

This provision is, we think, remedial in its character. It was enacted for the purpose of giving to the party a right that he did not theretofore possess. It enhances and enlarges his rights, and in the construction of a statute remedial in its character, it is a rule that it must be liberally construed, that its object and aims may not be lost sight of. As is well known where a case is on trial and many exceptions are being taken, it is impossible to have the trial stop as the excepting party has the right to compel it to do, to have the bill of exceptions then and there signed and sealed before the case proceed.

Very frequently a case that has taken a month or a week or ten days in its trial may reach a conclusion on the very last days of the term. It becomes under such circumstances a physical impossibility to then and there prepare the bill of exceptions. Hence under the old practice in *Irvine v. Brown*, 6 O. S., 12, the court said, that while a good bill of exceptions must be signed, sealed and made part of the record at the term at which the exception is taken, very frequently if not in almost all cases,

the bill of exceptions is not in fact prepared and submitted for allowance until long after the term closed, but the transcript showing that it was made a part of the record of the trial term, no matter what the information or knowledge of the parties may be as to when it was actually and in fact prepared and signed. The record imports absolute verity and all the parties are concluded by it. That court said "there was no objection to that practice." To obviate this difficulty and in convenience, the substance of this section 5302, first found its way into our practice by an amendment of sec. 4 of the act of 1858 for the relief of district courts and for the greater efficiency of the judicial system of the state, vol. 73, O. L., 141 (1876). It provided for the first time that the party taking an exception might consent that the trial proceed and that he should have the right at any time within thirty days after the close of the term to prepare his bill of exceptions and have it made a part of the record as of the trial term. And it is significant that in that enactment it was provided that the clerk should keep the minutes open. No entry seems to have been deemed necessary, the consenting party being the party taking the exception, and not the other party. The keeping open of the minutes is left simply to the clerk. That section was followed and appeared in the laws of 1878, 75, O. L., 664, there having been eliminated what was supposed to be all unnecessary verbiage. That provision was in turn followed in the revision of the statutes, and while it is not provided that the clerk shall keep the minutes open, that part of the amendment being eliminated, the act does not provide that the court shall order it to be done; but there is still reserved the language that it is the right of the excepting party to take his exceptions, and thereupon to have it signed and sealed without having the court to proceed further with the business, or if he consents that then the bill of exceptions may be prepared, allowed and signed and entered at the close of the trial, or within thirty days next after the rising of the term.

It is claimed by counsel for defendant in error, that, because this entry contains upon its face the statement that the bill of exceptions was presented to the court for his allowance and signing and sealing on the 31st of May, 1880, being plainly after the trial term, that it must have been the intention of the court to put the stamp of disapproval upon it so that the reviewing court would at once see that the party did not prepare a bill of exceptions and present it for signing and sealing until after the term had passed.

We think it but fair on construing this entry to be governed by the same rules of construction applicable to statutes, and examine the entire record to ascertain the purpose of putting in the body of the entry the day at which the bill of exceptions was in fact signed and sealed. Although the transcript shows that it was presented and signed a month before the actual signing took place, to-wit: May 1, 1880, the trial term, it is however, a principle of law, that where the literal construction of a statute would lead to gross absurdity or absurd consequences, the obvious intention of the law must prevail over a literal interpretation, and adopting the language of the supreme court in *Slater v. Cave*, 3 O. S., 83, "provisions leading to collateral consequences of great absurdity or injustice may be rejected as absolutely void."

The intention of the court in setting out the day of signing we think was done to protect and enable the party in obtaining a good bill of exceptions, rather than to defeat him in that purpose.

Looking at the bill of exceptions we find that it is endorsed, filed May 1, 1880, signed properly by the clerk, being the trial term. Just above the signature of the judge, we find this "allowed, signed, sealed and made part of the record which is done this 31st of May, 1880," and interlined in the handwriting of the judge "within thirty days after the expiration of the term last aforesaid."

The term "last aforesaid" was, of course, the trial term of that court. Looking then at the transcript of the journal entries, by which we must be governed, rather than by anything in the bill of exceptions, in accordance with the opinion of the supreme court in *Hill v. Bassett*, 27 O. S., 597, we find that an entry, making the bill of exceptions a part of the record, was entered upon the minutes of the trial term (April) on May 1st, being the last day of that term. The fact that the phrase "within thirty days after the expiration of the term," seems both in the entry and first preceding the signature of the judge, and is in the exact language of the saving part of section 5302, is quite conclusive of the construction given this entry when construed in connection with the whole record.

Now, even if actual consent were necessary on the part of the excepting party, to have the trial go forward, and he then and there obtained permission to have his bill of exceptions signed, sealed and made part of the record within thirty days after the trial term, we have the right also, to presume, if necessary, from these acts done that the court gave him a right to present his bill of exceptions within the thirty days next following the rising of the term of that court—for "acts done that presuppose the existence of other acts, to make them legally operative, are presumptive proofs of the latter." 12 Wheat., 70.

We cannot say that this is an entry that ought to be followed. It is wholly unnecessary for the entry, when a bill of exceptions is ordered to be made a part of the record, after the term, in fact, to set out in the body of the entry the fact that it was signed actually at some period of time after the rising of the term, but within thirty days thereafter. It is sufficient to cause simply the usual entry to be made on the trial term minutes.

We do not feel disposed to hold, until the supreme court otherwise decides, that any entry shall be made, directing the journal to be kept open for thirty days after the rising of the term, that a party's bill of exceptions may be entered as of the term.

We think the supreme court in *Railway v. Probst*, 30 O. S., *supra*, had a fair opportunity, if such had been the law, as claimed by defendant in error, to have so decided.

The trouble in that case was, that while a bill of exceptions was presented and signed within thirty days after the trial term, it was held not to have been made a part of the record, not for the reason that consent did not appear on the record, or that the court did not order the minutes to be kept open for thirty days, but because the entry was not made upon and as of the trial term, but upon the journal of the term thereafter.

Motion overruled.

Judge Yaple, for the motion.

Stephen Coles, contra.

FINDINGS BY COURT.

[Hamilton District Court, October Term, 1882.]

J. B. SPECKER et al. v. H. S. HERZOG et al.

Where the error complained of is that the trial court erred in its findings of facts, the reviewing court cannot make a new finding upon the same evidence and enter a modified judgment thereon. It can only reverse the entire judgment and send the case back for trial.

Error to the Superior Court.

SMITH, J.

The petition in error in this case is filed to reverse a judgment of the supreme court of Cincinnati.

The defendants in error have also filed a cross-petition, not to reverse the entire judgment, but to modify it. The action below was commenced by H. S. Herzog and others against John J. Specker and others, to establish a trust, if I may use the expression. There was quite a number of plaintiffs, and also of defendants. All were creditors of F. M. & W. H. Safford, who were doing business at Eagle Station, Carroll County, Kentucky, and are said to be all the creditors of this firm. It appears in evidence, that on or about February 26, 1881, John B. Specker, one of the defendants below, a member of the firm of Specker, Buddecke & Co., went to Kentucky and secured a mortgage from F. M. & W. H. Safford to him, to secure the payment of a note to him, for \$600. Safford & Co. were then in failing circumstances. The debt due to Specker, Buddecke & Co., was less than \$400. This mortgage was intended to secure not only Specker, Buddecke & Co., but also certain other Cincinnati creditors, who are defendants.

When Specker returned to Cincinnati, Herzog met him and told him that by the law of Kentucky, in force at that time, this mortgage which he had received, made him a trustee for all the creditors. Specker denied it, and soon after went to Kentucky, and, as he claims, surrendered the mortgage. It is claimed, on behalf of the plaintiffs in this case, that when he returned to Kentucky, he caused the entire stock of goods of Safford & Co. to be sold to one Johnson, and received the proceeds, \$1,000. He also received \$60 more, the proceeds of sales made after the mortgage, receiving, in fact, from the goods the sum of \$1,060. It was further claimed by plaintiffs below, that by virtue of the statute in Kentucky, somewhat similar to section 6343, of our Revised Statutes that, where a person in failing circumstances makes an assignment to others, for the purpose of giving a preference to a portion of the creditors, that assignment shall enure to the benefit of all his creditors, pro rata, and it was claimed that by virtue of that statute this assignment operated pro rata for the benefit of all of Safford's creditors. It was claimed by defendant below, in the first place, that he did not receive that amount of money; that all he had received was \$459, his own debt, and \$219 more to pay his Cincinnati creditors, making \$750 as the total amount received.

It was also claimed as a question of law below that the statute of Kentucky could not be enforced in the courts of our own state; that by the terms of the statute, if we construe the whole statute together, not

merely the first section, but the subsequent sections, it was a remedy to be enforced through the Kentucky courts, and could not be enforced in the courts of a foreign jurisdiction. The court below seems to have taken a middle ground. It found as claimed by the plaintiffs, that the defendant had received \$1,060, and that he had recovered it for the purpose of paying these debts. But the court did not find as claimed by plaintiffs below, that by virtue of the statute this \$1,060 should be distributed pro rata among all his creditors, but made the order that the defendant, Specker, was entitled to pay \$600 of these proceeds to himself and the defendants, and should be required to pay the sum of \$460, the residue of the amount in his hands, pro rata among the plaintiffs; and that judgment was entered in the court below. To reverse that judgment the defendant below, Specker, the plaintiff in error, filed his petition in error.

It seems to us that he has no ground of complaint. The finding that he had received \$1,060 was fully warranted by the evidence; also that he received it for the purpose of paying Cincinnati creditors, including the plaintiff, and that the plaintiff in error has no ground for disturbing or reversing the judgment.

The prayer of the cross petition in error is to modify the decree by distributing the entire fund, \$1,060, pro rata among all the creditors, and is founded upon that section of our code which provides that the reviewing court, if not satisfied with the judgment below, is not bound to reverse the entire judgment, but may modify it to conform to the truth and justice of the case. But the reviewing court cannot do so unless it be upon an agreed statement of facts, or the facts are specially found by the court. It may shape the law to conform to the facts found by the court, but cannot make a new finding of facts. The error complained of by the defendants in error in this case is a finding of fact by the court below, for it was a finding dependent upon a foreign law, which is in itself a fact, It being a finding of fact by the court below, the only way to review that finding is to reverse the entire judgment and send it back for trial. That is not desired by the defendants in error. Therefore the judgment of the court below must be affirmed.

FORECLOSURE PROCEEDINGS.

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[Hamilton District Court, 1883.]

HERMAN P. DREYER v. P. M. BIGNEY.

1. A foreclosure sale should not be set aside for the reason that the decree included a finding of an amount due and awarded an order of sale to one on whose answer and cross-petition no summons had been issued against the mortgagor.
2. A mortgagor, who, after sale on foreclosure, has received the surplus of the proceeds of sale, left after payment of liens, cannot be heard to claim that the decree ordering sale was erroneous.

Error to the Superior Court of Cincinnati.

SMITH, J.

This is a petition in error to reverse an order of the superior court of Cincinnati ordering the sale of certain premises under mortgage. The facts are these: The Herman Building Association brought suit against Dreyer and wife to foreclose a mortgage, making Dreyer and wife de-

endants, also one John McGill and John Webb, Jr., who had liens upon the property. All were served with process. A few days after, a supplemental petition was filed making Bigney and wife defendants. They were served with process. Afterwards Bigney, claiming to have a conveyance of the property from Dreyer, and a lease back to Dreyer, which was perhaps in the nature of a mortgage, filed an answer and cross-petition setting up his claim, and praying a sale of the premises. Upon this answer and cross-petition a summons was issued and served upon Dreyer and wife. Afterwards John Webb, Jr., who was one of the original defendants, filed his answer and cross-petition setting up his judgment lien against Dreyer, and caused summons to be issued, and Dreyer was again served with process upon that answer and cross-petition. A decree was taken finding the amount due from Dreyer and wife to the Building Association, which seems to have been paid, and from that time the Building Association stepped out of the case.

Bigney, who had filed an answer and cross-petition setting up the conveyance from Dreyer and wife to him, and the lease back from him to them, obtained a decree finding that this deed and lease was a mortgage; also finding the amount due, and obtained an order that unless a certain amount, being interest, \$135, and costs, was paid, an order of sale should issue. In the same decree there was also a finding in favor of John Webb, Jr., who had a judgment lien upon the premises, and a similar order that unless the amount due him was paid, an order of sale should issue. There is also a finding in this same decree in favor of Mrs. McGill, who was made a party defendant, at her own instance and subsequently filed an answer and cross-petition, but had caused no process to issue against Dreyer. Before the order of sale was issued, Dreyer came in and paid up the amount ordered to be paid to Bigney, \$135, but did not pay the costs, which was a part of the decree, nor the amounts severally due to Webb and Mrs. McGill. An order of sale was issued, and on this order of sale the premises were sold. Two or three orders of distribution were made, paying costs, amount due Webb, the principal of the debt as well as interest due to Bigney, also the amount of various other liens, leaving a surplus of over \$400 undisposed of.

After all the lienholders had been paid off, Mr. Dreyer, who claimed to be the owner of the premises, filed a motion to have this balance paid over to himself, and a final decree of the court was made, in pursuance of his application, that the Master Commissioner pay over to him the balance in his hands.

Dreyer has filed his petition in error in this court, claiming that there is an irregularity in the original order of sale, and inasmuch as the amount found due Bigney was \$135, and having paid this amount, the order of sale should not have issued; also because this order of sale included in the judgment the amount due Mr. Webb and Mrs. McGill.

We do not agree with him. There was a valid judgment for the amount due Bigney, and costs. There was also a valid judgment for the amount due Webb. Dreyer had been served with process on his answer and cross-petition; a decree had been taken, and his decree was as valid as Bigney's; and it was a part of that decree that unless the amount due him also was paid an order of sale should issue.

It is not necessary to consider the question raised by counsel, whether it was proper to issue an order of sale for the amount due Mrs. McGill,

for there was a valid decree for definite amounts, viz., the amount due Bigney and the amount due Webb, and the costs; and, if it was irregular as to the amount found in favor of Mrs. McGill, it did not invalidate the other portions. If Mr. Dreyer had paid Mr. Bigney the costs, and Mr. Webb the amount of his judgment, leaving the amount due Mrs. McGill unprovided for, a very different question would arise—if the property had been sold on her decree alone. But it is not necessary to consider it.

Therefore, there being a valid decree in the case for costs, and a judgment for Mr. Webb, which had not been paid by Mr. Dreyer, there was no irregularity in issuing the order for sale, and causing the premises to be sold on that order. Therefore, the judgment should be affirmed.

But there is another view which would lead us to the same result. As I stated, after the property had been sold, and all the lienholders paid, Mr. Dreyer procured an order that the balance of the purchase money be paid to him. He availed himself of this decree, got the benefit of the sale, and ratified it by receiving the balance of the proceeds, on his own motion. He, therefore, is in no condition to attack the decree itself. The case of *Tabler v. Wiseman et al.*, 2 Ohio St., 216, affirms the doctrine "that a party ought not to be permitted to voluntarily take the benefit of a judgment and then attempt to reverse it."

In either aspect of the case, therefore, the judgment ought to be affirmed.

TAXATION.

16

[Hamilton District Court, 1883.]

NEWPORT & CINCINNATI BRIDGE CO., v. COMMISSIONERS OF HAMILTON COUNTY.

A bridge company owning a bridge across the Ohio river, which voluntarily returns for taxation in Ohio the value of the part from the Ohio end to the middle of the river, supposing that, instead of the low water mark, to be the state boundary, and pays taxes thereon, cannot recover the money under sec. 1038, Rev. Stat., as it is not a case of clerical error.

Error to the Common Pleas Court.

MOORE, J.

The plaintiff in error, the Newport and Cincinnati Bridge Co., having presented to the County Commissioners of Hamilton county, its claim for a refunder of taxes, and the board having refused the application, the matter was taken to the court of common pleas, under the statute authorizing an appeal in such cases. A petition was filed by the bridge company, to which a demurrer was interposed by the county commissioners, and the court having sustained the demurrer, the plaintiff in error now prosecutes its petition in error in this court to reverse the action of the court below.

The Newport and Cincinnati Bridge Co., a corporation doing business under the laws of the State of Kentucky, operate and maintain a bridge for railroad and other purposes, between the Ohio and Kentucky shores of the Ohio river. The structure commences at the west side of Eggleston avenue in the City of Cincinnati, and extends to a point on the Kentucky shore.

During the years 1876-7-8 and 9, the bridge company returned for taxation that portion of its structure lying between the west side of Eggle-

ston avenue, in the said city of Cincinnati, and the centre of the channel span in the Ohio river. The company now claims that in so doing it made the return under a mistake of fact; that it should have returned for taxation that portion lying between the west side of Eggleston avenue and low water mark on the Ohio shore, instead of that which they did return, to wit: 1,347 feet, which is the distance from the west side of Eggleston avenue to the centre of the channel span, an excess of 317 feet of bridge structure, for which it is now incorrectly assessed. The company alleges in its petition that the books of the county auditor show that the boundary line of the state of Ohio is at low water mark on the north side of the Ohio river, and that this point is 317 feet from the centre of the channel span; that in making a return of 1,347 feet of the structure it has been compelled to pay a tax upon the assessed value thereof of the whole 1,347 feet, for the years 1876 to 1879, inclusive, and for the same period has been compelled to pay taxes upon the structure from low water mark on the Ohio shore, to the end of the structure on the Kentucky shore, to the authorities of the state of Kentucky.

The bridge company claims that under the statute it is entitled to have an order from the county commissioners upon the county auditor directing him to draw his warrant upon the treasurer for the over-payment during the period indicated, under the authority given the county auditor by sec. 1038, Rev. Stat.

Section 1038, as aforesaid, authorizes the county auditor from time to time to make corrections of errors in the tax list and duplicate either in the name of the person charged with taxes or assessments, a description of the land or other property, or when property exempt from taxation has been charged with a tax; or in the amount of such taxes or assessments.

Evidently it was the intention of the legislature to give the auditor authority to make correction of clerical errors only. It is claimed that the county auditor should have taken notice that the tax was excessive and erroneous, because 317 feet of the structure is beyond the boundaries of the state of Ohio.

It is claimed by the bridge company that in returning the property, the boundary of the state of Ohio was believed to be the centre of the channel span of the Ohio river, and that in so doing a mistake of fact occurred, not by any fault of the company, but by the fact that it is still an unsettled question as to the true boundary of the state.

It is a matter of record, that when the northwest territory was organized (of which the state of Ohio was the eastern division), it was described as lying northwest of the Ohio river, so that in frequent adjudications involving questions of boundary, the low water mark on the north side has been recognized as the Ohio line.

Handy, Lesees, v. Anthony, 5 Wheat., 374, and cases cited.

Therefore as a physical fact it must be assumed the boundary of the state on the Ohio river is as indicated by these authorities. Where it is recognized or located by authority or by law is a question of law, which the company was bound to know.

In its petition the company alleges as a fact, that the books of the county auditor show the boundary of the state of Ohio to be at low water mark on the north side of the Ohio river, and it is bound by that statement of a fact of which it at the same time alleges its ignorance.

It is well settled that where a party makes a voluntary payment, no process of the law can be had to recover it back, unless the payment was made through a mistake of fact; for where a party with a full knowledge of the facts and presumed to know the law as in this case, and the opportunity and right to examine county records, voluntarily parts with his money, the court will not give relief, because courts of law are not organized for the purpose of correcting mistakes of people who have full opportunity of knowing their rights.

The return in question appearing to have been made by the company voluntarily under a knowledge of the fact that the boundary of the state of Ohio was at low water mark, and was known to it by the statement in its petition herein, and the law fixing the boundary at the point indicated, the mistake of the company is not a mistake of fact on its part and the error is not one of the class mentioned in section 1038, of the Revised Statutes.

The county auditor has no authority to correct the return of a taxpayer. It is his duty to receive the returns and place the property and assessments upon the tax duplicate, and if he has made a mistake, in making up the duplicate, or discovers an error after the duplicate is made up, or if an erroneous tax of the same class arising from his own clerical error, has been charged and collected, it becomes his duty to make the correction in the manner pointed out by the statute.

There is another view to be taken of this case. It appears by the record that the bridge property was returned by the company through its authorized agent, as personal property, under the provision of the statute, and was not returned for taxation by an assessor, or placed upon the duplicate by the county auditor. The return of the company must be considered as its voluntary act, and if there is a mistake in it, the error is not the fault of the county officials, but it is the fault of the company. It is not a case of a compulsory payment, but is a case where the law has allowed ample time to the taxpayer to make a return as required by the statute, and having done so, however erroneous it may be, the taxpayer is bound by the consequences, unless some other remedy may be provided by the statute other than that now resorted to.

The judgment of the court below must be affirmed.

J. D. Macneale, for plaintiff in error.

Chas. Evans, county solicitor, contra.

LANDLORD AND TENANT.

17

[Hamilton District Court.]

HENRY A. STEVENSON ET AL., EXECUTORS, v. W. H. ALMES ET AL.

1. Where a lessee, under a lease containing a privilege of an additional term holds over without an express election and leaves before the end of the additional term, it is incumbent on the landlord, in order to hold him for the full term, to aver and prove his election to take under the privilege of removal by a preponderance of testimony for the rule that a tenant holding over is presumed to do so under same conditions as under the previous term does not apply where an election is necessary.
2. In determining the intention of the parties all the circumstances may be considered, as that they were building another store to go into, which the lessor knew.

Error to the Common Pleas Court of Hamilton county.

JOHNSTON, J.

This controversy originated about the renting of three stores on the left side of Main st., above the canal, formerly occupied by Alms and Doepke, of this city. In 1876 there was a written lease made by Stevenson's executors to them, whereby they leased for a dry goods store buildings 433, 435 and 437 Main street for the term of two years at an annual rental of \$2,600, payable quarterly. In this lease occurred this language, "do rent to Alms and Doepke for the term of two years with the privilege on the part of said lessees of three years more on the same terms, from and beginning Aug. 15, 1876." On the 15th of August, 1878, being the expiration of this lease, it seems that this firm had built a new store directly opposite. When Aug. 15, 1878, was reached and passed they were still in possession. Their stock was moved about Nov., 1878, but the keys were not finally surrendered to the Stevensons until Feb. 15, 1879. This suit is brought for the purpose of recovering three installments of quarterly rent due Aug. 15, 1879, Nov., 1879, and Feb., 1880. It is averred in the petition affirmatively that these lessees, Alms and Doepke, elected to take the premises for a term of three years further after the expiration of their first term of two years.

There is a square denial by Alms and Doepke that they ever elected to take the premises for three additional years, but on the contrary they proceed to allege by way of defense that at the expiration of the term, to-wit, Aug. 15, 1878, one of their members called upon the executors and told them they did not propose to elect to hold for the term of three years more for the reason that they were constructing immediately opposite a new building into which they proposed moving; that they could not perhaps get out on Aug. 15, 1878, and therefore desired an extension beyond Aug., 1878, but not for the term of three years, but only until their new store should be completed. The cause was submitted to the court and judgment rendered for defendants.

There was to a certain extent a conflict of testimony, but it appears to us that there was one prominent feature upon which plaintiffs clearly failed. In order to make out their case it was incumbent on them to show affirmatively that these defendants did elect, either expressly or by implication, to avail themselves of the privilege of holding these premises three years longer. That is averred in the petition and it was necessary to aver it in order to recover, for the original term expired Aug. 15, 1878.

Taking this whole record together we think the weight of the evidence was against plaintiffs upon that point, in fact when the plaintiffs closed their case, the implied intention to elect and hold for the additional years, upon which they relied, was, if not altogether, very seriously shattered. We understand it to be the law that where a tenant has been in the enjoyment of premises by the year and he suffers the year to expire and enters quietly upon the new year, nothing being said before his term expires, and he pays and the landlord thereupon receives rent at the same time and upon the same terms, there is a very strong presumption that there was an intention on the part of the tenant to hold for another term. But there is no inflexible rule of law whereby if a tenant having thus held by the year or month enters quietly upon the new year or new month that he is held as having rented the premises for another year or another month.

After all, the question arises, what was the contract of the parties? Was there an agreement express or implied whereby the tenant agreed to become the tenant for another term and the landlord agreed to accept him is such—a question of fact?

Here is a firm of merchants engaged in business, doing a large dry goods business. They leased these premises for the term of two years with the privilege, if they might so elect, of another term of three years upon the same terms. They were paying a rental of \$2,600 a year. Immediately opposite they were engaged in constructing a large building into which they advised, and into which the landlords knew they intended to remove their entire business when completed. This is one of the strong circumstances to support the claim that they did not elect to take the premises for the further term of three years. It appears from the evidence in the case developed upon the cross-examination of plaintiff's witnesses that not only did these defendants not reach the end of their term quietly and enter upon another year without anything being said whereby there might be inferred an agreement to take for another term of three years, but it was developed that before the expiration of the term, as early perhaps as May or June, 1878, that Fred. W. Alms, one of the firm, called upon one of them and said that they did not propose to hold for a further term of three years, that they had been disappointed in getting their building completed, that they might not be able to go out exactly by Aug. 15, 1878, and desired to make some arrangements whereby they might occupy the store a short time thereafter upon the same terms. It is admitted that a conversation took place on the subject. There is a disagreement as to what was exactly said. Messrs. Stevenson insist that defendant simply made a proposition of that kind. Fred. Alms said they did not intend to hold for three years more; the Stevensons said that they did not desire to have the store thrown upon their hands in winter. Whereupon Alms thought they could manage that matter. Alms went in July and had a conversation, the same in substance that had taken place before with the Stevensons. He testifies that at his first interview, Messrs. Stevenson said that they desired to counsel among themselves before giving a final answer, and that was the reason of Alms calling a second time; Messrs. Stevenson testify that they said they did not desire to have the store thrown on their hands in winter. No memorandum was made of these conversations until in Feb., 1879, when the keys were finally surrendered and the last installment of rent was paid by Alms, up to which time they admit themselves to be liable, having bridged over the winter. The keys then being surrendered, they notified the Stevensons that they would no longer pay rent. Then one of the Messrs. Stevenson recalled as best he could what transpired in the summer of 1878, before the first term had expired and made a memorandum of it in their docket or account book. There seems to have been a very full trial of the case with all the witnesses before the court. The issue was found for the defendants. We think upon this record that it was a just finding. As stated in the outset of this brief opinion there was one proposition upon which the plaintiffs necessarily relied to make out a case against defendants and that was to aver and prove affirmatively by a preponderance of evidence that these defendants did elect, either expressly or by such circumstances and conduct as that it might be fairly inferred, to take these premises for an additional term of three

years upon the old terms. We think that the weight of the evidence upon the whole record was against them.

Judgment affirmed.

Stephen Cole, for Stevenson.

Ramsey and Wiggins, contra.

REFUNDER OF TAXES.

[Hamilton District Court.]

C. SANDHEGER v. COMMISSIONERS.

Where real estate and a building on it is appraised for taxation, and the building is torn down and a new one of greater value erected, and the county auditor, in fixing the increased value, omits to deduct for the value of the old building, and taxes are paid for several years on such valuation, a subsequent county auditor has no power to correct the duplicate by deducting, the value of the old building, nor have the county commissioners power to refund excessive payments.

Error to the Common Pleas Court of Hamilton county.

SMITH, J.

This was a petition by Sandheger to the county commissioners, alleging that there had been an erroneous valuation of his property and asking for a refunder of taxes amounting to about \$500.

The commissioners rejected his claim and he appealed to the court of common pleas. That court decided adversely, and this is a petition in error to this court to reverse that decision. The claim is similar to very many that come before this court. It is said by Mr. Sandheger, that in 1870, he owned certain real estate, of which the improvements were appraised at \$4,800.

In 1872, he tore down those improvements and built others upon the same ground, and the auditor added to the valuation of this property by reason of these new improvements the sum of \$15,000 and placed it with this increased valuation upon the duplicate for taxation. It continued thus upon the duplicate until 1880. It is now claimed by Mr. Sandheger, that the auditor, in making the addition of \$15,000 for the improvements, omitted to deduct, which he ought to have done, \$4,800, the value of the old improvements, and it is for this difference, the taxes in this \$4,800, which it is claimed the auditor failed to deduct, for which a refunder is now claimed.

It is now urged on behalf of Mr. Sandheger that under the well-known section, 1038, Revised Statutes, familiar to all the bar, the auditor can now make a correction which will reduce the valuation to the extent of \$4,800 and that the commissioners can order a refunder.

It seems to us that this is not a clerical error, which comes within that section. There may have been an erroneous valuation, or mistaken valuation, perhaps a wrongful valuation, but it is not a clerical error which can be amended upon the duplicate some six or eight years after it occurred. We have but to refer to section 2800, Rev. Stat., which provides each county auditor shall, from time to time, correct any errors which he may discover in the name of the owner, in the valuation, description, or quantity, of any tract or lot contained in the list of real property in his county, but in no case shall he make any deduction

from the valuation of any tract or lot of real property, except such as shall have been ordered either by the state board, or by the county board of equalization, or upon the written order of the auditor of the state; which written order shall only be made upon a statement of facts, submitted to the auditor of state in writing.

It is here distinctly stated, that the auditor has no power to reduce the valuation unless he is authorized by the state board, the county board of equalization or upon the written order of the auditor of state.

It is claimed, however, in the argument that under section 2801, Revised Statutes, the auditor had power to make the change. This section is as follows: "Each county auditor shall correct the valuation of any parcel of real property, on which any new structure of over one hundred dollars in value may have been erected, or in which any structure of the like value shall have been destroyed agreeably to the return thereof made in accordance with the provisions of this title by the assessor."

Now, this section, it seems to me, is but a counterpart of section 2753, Revised Statutes, which prescribes that the assessor from year to year in making a valuation of personal property shall also, when any new improvements have been added to real estate during the year, which exceeds one hundred dollars in value, to ascertain to what extent the value has been added to such tract or lot by reason of such improvement and also to ascertain when any improvements have been destroyed, to what extent the value of the property has been diminished by reason of such loss and return the same to the auditor.

Now, it seems to me, section 2831 is but a counterpart of section 2753, and when the assessor from year to year has made his return of any improvement upon real estate which increased its value, or of the destruction of any improvement which has lessened the value, then the auditor shall correct the duplicate to correspond to the returns made by the assessor, and does not permit the auditor from time to time to correct errors of valuation on the duplicate in the manner above provided in section 2800. The party is not entitled to relief under this section.

Judgment affirmed.

LIABILITY OF INN-KEEPER.

21

[Superior Court of Cincinnati, 1883.]

EDWARD WIATT v. THE ARCADE HOTEL CO.

A person residing in the city came to a hotel at 2 o'clock in the morning and called for a room, which the night clerk promised to give him. He then deposited with the clerk a package containing money, for which he took a receipt, and, without registering his name, left the hotel, returning at 4 o'clock in the morning when he found the money and the clerk had disappeared: Held that he was a guest and the hotel-keeper was liable for the loss.

HARMON, J.

The question in the case is purely one of fact. The responsibility of inn-keepers for the goods of their guests is as old as civilization. The question is, was the plaintiff a guest of the defendant's hotel? It is admitted that he did not in fact occupy a room. It is admitted his name did not appear on the register. Whether he did occupy a room in fact is not material. If he engaged one and

*This judgment was affirmed by the district court. See opinion, *post* 000. (s. c. 10 B., 310.)

became responsible to pay for it, his rights toward the defendant for anything in its custody were the same, whether he in fact occupied it or not.

The reason for the adoption of the system of registering in a hotel may be doubtful. It would not seem to be necessary for the information of the hotel, considering the other books kept, as appears from the evidence and the various reports of its employees as to the occupancy of rooms required. It may be that its adoption was due to a desire to inform the public and those desiring to visit guests. But whatever be the case it is not contended that the register is more than *prima facie* evidence. A man may be registered and may not, in fact, be a guest. He may not be registered, and yet, in fact, be a guest. If the plaintiff engaged a room so that he became liable to pay for it, and the defendant to supply him the accommodations of its hotel, he was a guest, otherwise he was not. The plaintiff's own testimony, and that of the friend who was with him, and one of the bell-boys of the hotel, established clearly the fact that the plaintiff asked for a room and was told by the clerk that he should have the best he had, and that he had one; that the clerk being engaged, and the plaintiff saying he did not desire just then to retire, the clerk took his name and said he would assign him a room. That thereupon the plaintiff deposited with the clerk a package of money, with which it is conceded the clerk absconded. There are some slight discrepancies of detail, but the testimony of the three witnesses is substantially alike. I should in this case be inclined to regard with suspicion exact agreement among the three as to details.

The only direct testimony with which the defendant meets the testimony of the plaintiff and his two witnesses is that of the night porter, who was present, and says that the plaintiff said nothing about desiring a room. Various contradictions, however, are relied upon to break down the plaintiff's case. The Arcade policeman, who knew the plaintiff slightly by sight, says that when he left the hotel the plaintiff was alone, the plaintiff having said he left it in company with his friend. Officers Tracey and Wappenstein both testified that they saw the plaintiff, however, with his friend, leave the hotel. It is shown that the bell-boys went off duty at 2:30 o'clock, and, therefore, it is claimed the one who testifies for plaintiff could not have been present, the plaintiff having come to the hotel about 2 o'clock in the morning, but the statement that the bell-boys were in the habit of stealing a chance to sleep in the house is abundantly corroborated. The various persons testify to statements made by plaintiff when he returned to the hotel about 5 o'clock and found that the clerk had gone.

Without going over this testimony in detail, I am not satisfied it is sufficient to break down the plaintiff's case. Most of the statements he is said to have made are not inconsistent with the truth of his testimony. It is natural, under the circumstances, not only that he should have stated some things too strongly, but quite easy in the confusion and excitement attending the discovery of the clerk's disappearance for the witnesses to have mistaken exactly what he did say, while to some at least of the witnesses his statement is substantially what it is now. The testimony of Mr. Emery and his employees as to the conversation between the plaintiff and himself is not inconsistent with the truth of the plaintiff's testimony. It appeared he called upon Mr. Emery to make some arrangement to send for a man who had been arrested, whose description corresponded with that of the absconding clerk. Mr. Emery declined, unless the defendant would waive the claim, which he understood was to be made against the hotel, saying the plaintiff was not a guest and the hotel was not liable. The plaintiff said it would have been easy for him to have slipped his name on the register when he returned had he so desired. He did not say he was not in fact a guest. It had been discovered by that time that his name did not appear on the register. It was known that that was the point on which the contest hinged, and it was natural under the circumstances, he should say that it would be easy, if he had been dishonest enough, for him to have supplied that evidence. He was not called upon to state the facts in the case; and, judging from his appearance and manner on the stand, he is not the kind of a man who is given to telling everything everywhere. He appears to be rather reserved and reticent, so that the inference to be drawn from his not stating the case on that occasion has little force. While the burden of proof is on the plaintiff, I think he has fairly borne it and is entitled to judgment.

The fact that the plaintiff, and some of his most material witnesses are professional gamblers has little weight in this case. Where the testimony is equally balanced a circumstance of this kind might have some weight. It might be said that ordinarily the testimony of one who follows a legitimate business has more

weight than that of one who follows an illegitimate business, although there have been men whose word was known far and wide to be good, although their business was notoriously bad, while there are others whose word carries little weight, though their business is respectable, and their pretensions great. In this case the disparity in number of witnesses is too great to give the consideration referred to any weight.

As to the amount which the plaintiff deposited with the clerk there is no testimony but his own. It is, however, corroborated by the fact that there was enough of it to make it an object for the clerk to abscond with. It does not appear from the testimony whether or not he secured any other booty, but it may be fairly inferred that he did not, because the inner departments of the safe were locked, the guests at the hotel were few at the time, and his opportunities for plunder limited. The plaintiff's testimony is also corroborated by the fact that he had during that day \$2,500. I see no reason to doubt his testimony that the sum deposited was \$2,195, for which, with interest, he may have judgment.

T. C. Campbell, for plaintiff.

Herbert Jenney, for defendant.

BUCKET SHOPS.

22

[Cuyahoga Common Pleas.]

T. GRIFFIN & CO. v. THE WESTERN UNION TELEGRAPH CO.

1. Where a board of trade, having the right to exclude persons from its rooms, issues an order to a telegraph company forbidding it to import market reports to bucket shops, or persons carrying on business forbidden by 79 O. L., 118, on penalty of excluding the telegraph companies from the floor, the court will not seek to compel the telegraph company to perform what it is thus unable to perform and the telegraph company will not be enjoined from resuming possession of its ticker.
2. The fact that plaintiff may carry on business other than that of a bucket shop, or may be willing to deliver the commodity instead of setting the difference in money, will not entitle him to the aid of a court of equity.

CALDWELL, J.

Judge Caldwell rendered the following decision as to whether or not the bucket shop of Griffin & Co. could prevent the Western Union Telegraph Co. from removing one of their instruments from the office of the firm. In the first place Judge Caldwell read over the affidavit of Griffin & Co., the plaintiffs, the answer of the defendant and the plaintiff's reply to it. "The instrument known as a ticker," said the judge "is the property of the Western Union Telegraph Co., and they say they cannot transmit the information desired by the plaintiffs for the reason that the Chicago Board of Trade, an organization over which the Western Union Telegraph Co. has no control, has issued an order forbidding the imparting of information to the so-called bucket shops, and in case the telegraph company refuses to comply with that order their reporters will be excluded from the rooms of the Board of Trade. That this order was really given there can be no doubt whatever. The Chicago Board of Trade has a perfect right to exclude any person from its rooms who is not a member of that body. Being a private organization and having rooms of their own, in which to transact their own business, they have complete control as to who shall be admitted, and as much right to exclude any and all reporters as they have of refusing admission to any one. That being so, while this court might grant the injunction, which would allow the ticker to remain in the office of the plaintiffs, the court cannot see that it would be the least good if the telegraph company are unable to gather information to transmit through the instrument. The ticker

would be absolutely useless without something to tick, and the court would hardly say that the ticker should remain and by so doing prevent the telegraph company from obtaining any information. The property belongs to the defendant, and if it is of no use to the plaintiff, the court cannot see why the defendant should not be allowed to take possession of it. Courts of equity cannot grant anything which a party cannot perform, and the action of Judge Force, of Cincinnati, in a case recently decided by him overruling the application for an injunction on that ground was, I think, well taken. It is claimed that the defendant is by law, and in fact a common carrier, and thereby owes a duty to all, and should treat all persons alike as long as they are compensated with the required amount for their services. While all common carriers may be bound to treat all persons alike, if a person should take an article to the common carrier, and he should refuse to comply with the request, the remedy would be, not by an action for an injunction, but at law to recover damages. Now, for the reason that they have no means to acquire information, for we have no control over the Chicago Board of Trade, we could not undertake to compel the Western Union Telegraph Co. to perform an act which they are wholly unable to perform.

"Another question for consideration is that the plaintiffs say that the ticker is not needed alone for the information concerning the price of grain and provisions at Chicago, but the plaintiffs, neither in their affidavit or reply, say what that other business is. The defendant claims that the ticker is not actually needed at all, because the business is gambling. This the plaintiffs deny, but their affidavit clearly discloses that a part, at least, of the business is what is claimed by the defendant. The reply is a virtual admission that the only purpose for which the ticker is used, is to enable them to carry on a business of buying and selling grain and provisions without an actual transfer of the goods. 'Although,' they say, 'they are always willing to do so when it is desired, but ordinarily closing their transactions without any delivery as other brokers.' The act passed by the Ohio legislature, April 15, 1882, says: 'Whoever contracts to have or give to himself or another the option to buy or sell, at a future time, any grain or other commodity, stock of any railroad or other company, or forestalls the market by spreading false rumors to influence the price of commodities therein or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than \$20 or more than \$500 or confined in the county jail not exceeding six months or both, and all contracts made in violation of this section shall be considered gambling contracts and void, provided that the provisions of this law shall only be held to mean and apply to such contracts where the intent of the parties thereto is that there shall not be a delivery of the commodity sold, but only a payment of differences by the parties losing upon the rise or fall of the market.'

"Now the reply of the plaintiffs is a virtual admission that the business is just such an one as the above section covers. If the parties desire it they say they will go and gather up the grain for them and deliver it. The fact is that the party betting does not expect to receive any grain, and the other parties do not expect to deliver any in their transactions.

"The only way to defend themselves if prosecuted would be to show that the intention was to deliver any and all grains for which bargains

have been made. It would be a poor excuse for the parties to make, if an indictment should be found against them, to say that they had other business besides this one of gambling. It makes no difference to the court whether betting on the price of grain and provisions is the whole business or not, the court will not countenance such transaction, whether it comes from high or low, rich or poor. It is downright gambling of the worst kind, and men who, to my knowledge, are considered pious, who would scorn to play a game of cards or any other game for money, go into these bucket shops and put up their margins. Well, if they can excuse their own consciences that is their own business and not mine, but in my opinion these very men would, if there were no chances for detection, play cards for money or do anything else of a gambling nature. The bucket shop business is the most dangerous method of gambling, because young men go there who would not go to a gambling hell, so-called. It can make no difference whether this is a part or the whole of the plaintiffs' business, the court cannot grant aid to anyone, in any manner, in carrying on a business which the legislature has declared a crime, punishable with fine and imprisonment.

"The court orders that the restraining order granted by Judge McKinney be dissolved and the request for a temporary injunction refused."

CONSTRUCTION OF A WILL.

23

[Holmes Common Pleas.]

*BARNABA SHENKET ET AL. v. CHARLES DEWIT ET AL.

Under a will, granting a life estate to and authorizing the widow "to dispose of all the above property to my heirs as she thinks best," her disposition of the property to four surviving children of the testator, requiring them to furnish her annually with one-third of the profits of the land, and providing that they should pay to an heir of a deceased son and to the heirs of a deceased daughter certain sums of money, is in harmony with the will.

VORHEES, J.

On the 20th day of July, 1873, Barnard Dewit, Sr., executed his last will and testament, which, after his death, was duly admitted to probate. His will consisted of a single item, in which he gave to his wife, Jane Dewit, a life estate in all his property, real and personal. His real estate consisted of 120 acres of land. The will empowered the widow to sell so much of the property as should be necessary to pay his just debts. In the will was the further clause, "I do further authorize my wife after my death to dispose of all the above property to my heirs as she thinks best."

The widow disposed of the farm in four several parcels to the four surviving children of the testator, and executed to each a deed for the parcel so sold to each, requiring the heirs or children to whom she had sold in the way of rents to furnish her annually one-third of the profits of the land and providing also that they should pay to an heir of a deceased son, the sum of \$5, to five heirs of a deceased daughter the sum of \$25, and to the three children of another deceased daughter the sum of \$15.

Some of the children to whom she had conveyed parcels of the real estate sold and conveyed the same to others of the defendants. The grandchildren now file their petition asking the court to set aside the deeds made by widow and the deeds made by her grantees, and that an equitable partition of the property may be made among the heirs of the testator according to the statute of descents in Ohio.

The above facts all being disclosed in the petition, the grantees of the widow and their grantees file a general demurrer to the petition. The question

*This judgment was reversed by the Supreme Court. See opinion, 44 O. S., 237.

presented to the court by the demurrer being whether or not the widow was empowered by the will to dispose of the property in the manner manifested in the petition.

The court held: First—That the widow, by the power given her in the will, had a right to “dispose of” the property, in which she was invested of a life estate. That the power to do so was unlimited except that her disposition thereof must be to the heirs of the testator.

Second—That the testator left four surviving children; that three of his children had died before his demise, each leaving children; that the heirs of the testator, and the only persons to whom the widow could dispose of the property, consisted of four surviving children and nine grandchildren of the testator. That under the statute of descents the estate would have been divided into seven parts of which each living child would take one-seventh and that the grandchildren would take an equal share of the part that their deceased parent would have taken if alive.

Third—That the power given to the widow to dispose of the property included the power to execute such papers as were necessary to convey a good title.

Fourth—The power given to the widow was limited only so far, that the testator designated the only persons to whom she could make disposition of the property, and that the persons so designated were to be the heirs of the testator.

Fifth—The power having designated the persons to whom she might make disposition, she was bound to so dispose of it that all the heirs would receive a portion, she being the judge of whether the part disposed of to each was an equal or an unequal part. That she having conveyed the land to the four surviving children, providing that a portion of the purchase money should be paid to the grandchildren, is a disposition of the property in harmony with the power given her in the will. The portion of the estate converted into money still retained the character of real estate and being secured to be paid to the grandchildren it was tantamount to disposing to them a portion of the property given to her in the power for disposition as she “thought best,” and as all the children and grandchildren of the testator are embraced within the disposition by her made, it is a disposition within the scope of the power that she should dispose of the property to the heirs of the testator as she might think best.

Sixth—The power being only to dispose of the property to the heirs and not a power to distribute, she might in such manner as met the approval of her own judgment as to what was best, dispose to the several heirs in equal or unequal portions as she thought best. If it was a disposition of the property to the heirs of the testator, and all of them, this is as far as the power conferred upon the widow seeks to hold a reforming hand. The acts under the power neither enlarge or curtail the language selected for the announcement of the power, and we find the acts in perfect harmony with the power conferred.

For the reasons above given the demurrer is sustained.

DIVORCE AND ALIMONY.

[Hamilton Common Pleas.]

YOUNG v. YOUNG.

A plaintiff in divorce and alimony is not entitled to a continuance on the ground that no summons has been issued, and served on defendant's cross-petition, asking for a divorce, as no summons need be issued on such cross-petition.

BUCHWALTER, J.

This cause is before the court on plaintiff's motion for a continuance. She objects to trial at this term, because no summons was issued upon defendant's cross-petition.

No showing is now made upon the facts, but it is intended by counsel to demand a ruling by the court upon the law.

The plaintiff by her petition asks divorce and alimony. The defendant by his cross-petition asks divorce. Summons issued upon plaintiff's petition, none issued upon defendant's cross-petition.

No authority has been cited by counsel and none found by the court, either in the reports or upon our records. The practice of this bar has been to issue summons. It has been claimed by counsel that other judge of this court have made ruling on this subject. I have conferred with them but they disclaim any specific ruling upon this question. Were it a civil case under the Code a summons would not be required to issue upon a cross-petition against the plaintiff.

When a party plaintiff complains and files a petition against another, as defendant, that plaintiff is presumed in law and reason to have knowledge of all subsequent proceedings in that case, and must look to the record to see the defendant's cross-petition as well as his answer.

I hold, therefore, as a rule of practice that a defendant cross-petitioner in divorce and alimony proceeding need not issue summons thereon to the plaintiff.

The motion, therefore, will be overruled.

APPROPRIATION OF LANDS.

32

[Hamilton Common Pleas.]

TRUSTEES OF CINCINNATI SOUTHERN RY. v. TRUMAN B. HANDY ET AL

1. Under the acts in relation to the Cincinnati Southern railway, and 77 O. L., 153, giving right to condemn for terminal facilities, the trustees may maintain such proceedings although the road has been leased.
2. Trustees of said company, by sec. 8318, Rev. Stat., may maintain proceedings to condemn land for the road in either the common pleas or probate courts, and are not obliged to aver the passage of a resolution by the city council declaring it necessary to condemn.

MAXWELL, J.

The plaintiffs have commenced proceedings to condemn and appropriate certain lands in Millcreek bottom, under the act passed April 9, 1880, 77 O. L., 153, for terminal facilities and right of way thereto.

One of the defendants has filed an answer setting up in substance that the road has been completed, and leased to a corporation under the laws of this state, and that that corporation is the proper one to condemn and appropriate any lands that may be further required for the use of the road.

Another defendant has filed an answer setting up in substance, that the trustees are functus officii, and therefore cannot maintain this action. To these answers the plaintiffs have demurred, and the demurrers have been argued both to the sufficiency of the answers and to the sufficiency of the petition or application, it being claimed that the demurrer searches the record, and that the application, or petition does not contain sufficient allegations to give the court jurisdiction of the application.

The demurrers to the answers may be considered together. It was undoubtedly the intention of the legislature in passing the acts authorizing the city to build the road, and it has been so held in the cases where the constitutionality of the act has been in question, that the city should own the road when completed, nor was it intended that she might build it and sell it as a speculation, but that she should continue to own it, as she does any other public improvement, as she does her public buildings for example. She has been authorized to lease the road, so far as completed, and has leased it for a term of years,

but that does not conflict with her ownership. It was also undoubtedly the intention of the legislature, that the road should have such terminal facilities as a road of its magnitude might fairly be expected to use. It follows then, that even if the city should lease the entire road with all its terminal facilities, the power of the city as a corporation to condemn and appropriate land, to be used by the road would not necessarily cease, and at any rate the power of the present trustees does not cease, at least, until they have acquired such terminal facilities as the road may properly require. The conclusion is that as far as the answers are concerned, the demurrers to them must be sustained.

It is claimed, however, by the defendant, as I have said that the petition does not contain sufficient averments to give the court jurisdiction, the petition having alleged, as the foundation of the proceeding that the trustees passed a resolution declaring it necessary to condemn, etc. The defendants claim that if the trustees are a private corporation, they must proceed under the act giving private corporations power to condemn, that is in the probate court, but that if the city is the real plaintiff, then the petition must aver the passage of the resolution referred to by the common council.

The trustees are not a corporation, but trustees of an express trust, as was held in the case of Walker v. City, 21 O. S., 14, but the legislature has vested them with certain corporate powers in building this road. I do not think it will be seriously questioned, but that the legislature may in its discretion, vest a body of men with special corporate powers. We have in this state, and even in this city, a number of quasi corporations invested, not with general but with special corporate powers. So in the case of the construction of the Southern Railroad, the legislature seems in its discretion to have diverted certain corporate powers from the city to the trustees.

Section 8313, provides that the trustees may appropriate lands, etc., under the corporation act of April 3, 1852, and the acts supplementary thereto, that is, under the private corporation act, and under that act they might themselves have passed the necessary resolution, but would have been obliged to institute their proceedings in the probate court. But section 8318, Revised Statutes, provides that actions may be commenced either in the name of the city, or in the name of the trustees, "and said proceedings may be commenced and conducted either in the court of common pleas or the probate court, as in other cases of appropriation" for the use of municipal corporations." I do not understand this act to mean that the proceedings must be conducted as in other cases of appropriation for the use of municipal corporations, but that the trustees instead of being confined to the probate court, as in the first act, were by this act given the right to go into either court. It follows that the trustees may pass the initiatory resolution, and may then institute their proceedings in this court.

I think the objection to the petition is not well taken.

The demurrer will be sustained.

W. T. Porter, for the trustees.

J. C. Thoms and Storer & Harrison, for defendant.

CONSTRUCTION OF SEWERS

34

[Superior Court of Cincinnati, 1883.]

***CINCINNATI (CITY) FOR KIRCHNER v. ANCHOR WHITE LEAD CO. ET AL.**

Specifications for building sewers provided that the plank sheeting used to support the sides of the trenches should be left in when directed by the engineer to secure pipes, buildings, etc., and paid for, when so left in, at not more than \$1.00 per lineal foot of sewer, and in building such sewers a large quantity was so left in and charged for at the maximum rate: Held, that in letting the contract this item should have been submitted to competition, like the other items, and this not having been done, the assessment, which included the cost of this item, is invalid.

HARMON, J.

This case was tried with a large number of other cases, they all being brought to enforce the collection of a sewer assessment upon lots and lands within the Eighth Sewer District of this city, comprising the territory between Third street and the Canal, Race street and Eggleston avenue. The court takes pleasure in saying that the industry and learning of counsel shown in the preparation of the cases, and the brief, forcible and pleasant manner in which the cases were presented, upon both sides, have materially lightened the labors of the court, and it is no mere phrase to say, in proceeding to judgment, that the court has been fully advised. The proceedings taken by the city authorities, from the adoption of the original resolution, down to the time of the levying of the assessment, have been scrutinized with unusual care and severity. In the light which has been thrown upon them, every defect, formal and otherwise, has been disclosed, while the counsel representing the plaintiff has presented every consideration which could possibly be of use in enabling the court to determine whether these defects were substantial or merely formal. Certainly, many of them would not exist if the city authorities had taken the precaution to have some of this strong legal light thrown upon their pathway as they proceeded, instead of waiting to have it turned on after they are through.

The one of the defects relied upon by the defendants which, upon the trial, struck me with the most force, I will first take up.

The specifications upon which bids were asked for by publication are very full, and, among other items, contain this:

"The sides of the trenches shall be supported by suitable sheeting, planking and shoring, wherever necessary. All sheeting, planking or shoring which may be left in by direction of the engineer to secure pipes, buildings or other structures shall be paid for at the rate of not more than \$1.00 per lineal foot of sewer, including all braces and stringers required."

The total amount of this assessment was nearly \$80,000, of which more than \$10,000, it is conceded, was for sheeting, planking and shoring, left in by direction of the engineer under this item of the specifications, and charged at the rate of \$1.00 per lineal foot. This is the item of largest amount called in question by the defendants, the other items of expense being for pipe-layer's time and inspectors' time, and for castings furnished by the city and not included in the specifications, which came within the principle of *Longworth v. Cincinnati*, 34 O. S., 101.

The position taken by the defendants is that, as this item was not subjected to competition, the assessment which includes it is void. It is undoubtedly the law, that in proceedings of this sort, affecting, as they do, the property of citizens, and liable, as they are, to deprive citizens of their property, the requirements of the statutes are to be strictly followed, not literally, but substantially. Such are the general authorities. *Cooley on Taxation*, 464; *Burroughs on Taxation*, 470; 71 *New York*, 311. And, our town, *City v. Oliver*, 31 O. S., 371; *Chamberlain v. Cleveland*, 34 O. S., 551, 566. And our constitution, by article XIII, section 6, has enjoined upon the general assembly the duty of restricting the power of assessment in municipal corporations, so as to prevent its abuse.

That compliance with the provisions of sections 2215 and 2303, Revised Statutes, is essential to the validity of assessments, those sections requiring publica-

*This judgment was affirmed by the district court, see opinion, 6 Dec. R., 1138 (s. c. 12 Am., Law Record 235), and the judgment of the district court was reversed by the Supreme Court, see opinion 44 O. S., 243.

tion for bids, a separate statement by bidders of labor and materials where both are to be furnished, and that the contract shall be let to the lowest bidder, our Supreme Court, in the case of *Uppington v. Oviatt*, 24 O. S., 232, 245, has decided. The only reason why the publication for proposals in question in that case can be important is because that is the means adopted by the law for securing this competition. Therefore it is undoubtedly true that the letting of the work by competition to the lowest bidder is one of the things which must be done to make a valid assessment. If, therefore, this item of board sheeting was one of the items which should have been submitted to competition, and was not, this assessment cannot be enforced. The question whether it should have been, depends upon whether it might have been. In other words, the law does not require impossibilities. It does not expect the officers whom it invests with power and discretion to be prophets, and the legislature must be supposed to know what everybody knows, that, in the progress of every important work, contingencies will arise which could not have been foreseen, which contingencies will occasion extra work, and may occasion changes in the plans of the work, and, as to these things, undoubtedly, the failure to submit them to competition would not invalidate the assessment, because they could not have been submitted to competition.

The only position which can with even a degree of plausibility be assumed with regard to this item of board sheeting is that it comes within this principle. Looking through the specifications, however, it appears that extras are provided for in the 42nd item. It stipulates that none shall be allowed, unless ordered in writing by the board, and the price agreed upon in advance. And changes in the work, the right to make which is reserved by the board, are provided for in sec. 45, which gives the board the right to order the omission of any portion, or to the work, or any of the materials called for by the plans and specifications, or to order any addition thereto, or make any alteration whatever in the nature of the work and materials called for, provided it be in writing, and the amount to be added to or deducted from the contract price for such addition agreed upon in advance.

The city authorities, therefore, by separately providing for the sheeting and planking, to be left in by the engineer, have admitted that they did not regard it as an extra. It was not in fact treated as an extra because it does not appear that the price was to be agreed upon in advance or in writing, and, so far as I can see, the specifications and the contract do not provide by whom the price for that item is to be fixed. It is to be paid for at a rate not greater than \$1.00 per lineal foot, but who shall say just what it shall be? In the reading I have given the specifications, it does not appear who was to fix or who in fact did fix it. Certainly it might easily have been fixed by competition as the prices of other items were. The evidence shows that estimates were made and plans adopted, and the territory upon which this improvement was to be made carefully surveyed and scrutinized with a view to this particular improvement, and it is not going too far to assume that the public authorities of a city as old as this know something of the character of the soil and the width of the streets, which knowledge, in connection with the plans adopted for the sewers, the depth at which they will be placed, etc., would enable them to tell, with some degree of accuracy, whether or not any board sheeting would be required to be left in, and how much. In the letter written by the engineer, which is relied upon as the preliminary estimate of the cost of the work, he puts it at about \$80,000, showing that he was then able to come within about two or three hundred dollars of the amount which the work actually did cost.

Now, shall the court assume that he was mistaken as to the cost of the work, excluding the item of board sheeting, and say that his estimate did not include that? In view of the general knowledge as an expert which he must be presumed to have and the particular knowledge he had in this particular case by an examination of the ground, is it not more reasonable to conclude that it did? In *Brady v. the Mayor*, 20 N. Y., 316, under a similar provision of the law of that state, the question arose as to the validity of an assessment the work for which had been let with a price fixed for rock excavation. The court discussed the question whether it was possible to subject this to competition, it being urged that the quantity could not be ascertained with sufficient accuracy, to make the bid therefor of any value in determining which bid was the lowest. The decision was adverse to the assessment and the remarks of the court are directly applicable to this case.

Even if all that appeared was that one of the things in contemplation by the city in asking for proposals, and by bidders in making them, was the leaving in of board sheeting, I am unable to see why a construction should not be put

upon the law requiring that to be let as anything else is let, although the quantity could not be or was not ascertained. Let the quantity be much or little, the law can be complied with as far as possible. In all contracts for building railroads or for buildings streets, where bids are called for at so much per yard, for excavating so much per perch at masonry, etc., there is no trouble in subjecting them to competition, although it is impossible to know in advance how much will be hard pan; how much simple excavation, and how much rock blasting. The rates may be fixed by competition, be the quantities much or little, and a fair exercise of judgment by the public authorities as to which is the lowest bid would not be interfered with by the court. (An argument might be made here as to the necessity of preliminary estimates as accurate as possible.) But in this case, in the absence of any evidence except the specifications themselves, and the general estimate above mentioned, it is impossible to escape the conclusion that it was known by the authorities and by bidders, not only that there would be a large quantity of this board-sheeting required to be left in, but, to a certain degree of accuracy, how much?

In a number of later cases in New York, whose assessment laws are like our own, similar cases have arisen. In *re Mahan*, 20 Hun., 301, which was affirmed by the Court of Appeals, in 81 N. Y., 621; in *re Manhattan Savings Institution*, 82 N. Y., 141; in *re Merriam*, 84 N. Y., 596; and in *re Pelton*, 85 N. Y., 651, contracts were let for building streets with the item of rock blasting fixed in the specifications, and the other work let to competition, and in all of them without dissent the assessments were declared void. So also in a somewhat similar case in this court. *Miller v. Pearce*, 2 S. C. R., 44.

Now in none of those cases could there be more than an approximate estimate so far as appears by the reports, o. the amount of rock excavation; but the fact that there would be some was a certainty. Just as here, the specifications show that it was expected there would be some sheeting left in.

To show the feasibility of subjecting this item of the work to competition, reference need only be made to one of the items for which its price was fixed in the bid and the contract. The specifications provide for foundations for the sewer in cases where in the judgment of the engineer the bottom of the trench is unfit to lay its sewer upon, and that such foundations shall be such as directed by the engineer, of concrete or otherwise. The contingency of such foundations being necessary was no more likely to occur than the contingency with regard to leaving in sheeting, yet the bid and contract fixed a price for timber in foundations.

Or competition might have been had in another way by letting bidders make their own estimate and take their own chances as to the amount of sheeting to be left in. The proposals asked for might be to build the sewers and do everything necessary in the way of leaving in sheeting to protect them and the buildings, etc., adjoining. Each bidder from his own experience or with the aid of his own engineer, or from the preliminary estimate of the city engineer, could estimate the probable amount required to be left in. How closely this can be done is shown by the estimate made in this case above referred to. At any rate the policy of the law is to leave that chance to be taken into account by bidders and not give to its officers such power of discrimination or favoritism as results from leaving both prices and quantities to their discretion. The court in 20 N. Y., 44, and 20 Hun., 301, said these provisions were adopted from a possible distrust of public officers on the part of the legislature. One should say rather that the object was to apply the scriptural principle of keeping them out of temptation, human nature being the same in office as out of it, as well as to secure the lowest prices possible. While there is no suspicion of wrong in this case it is easy to see the great possibility of it if the board or the engineer were so inclined. A favorite bidder might make his bid appear lowest relying upon the expectation or assurance that as much sheeting as possible could be left in at the maximum price, while in the case of an unfavored one as little as possible might be ordered to be left in or a lower price fixed.

I cannot escape the conclusion that this part of the work might have been subjected to competition with the others, and that both the letter and the spirit of the law required that it should be.

It is equally clear to my mind that this was not done. In the case of *Merriam*, 84 N. Y., 596, the same argument advanced here to show that in effect this item was included in the competition upon the others was urged with great force. The price of rock excavation was fixed absolutely there, and it was claimed that the effect was simply to transfer the competition in form to the other parts

of the work, though in fact such competition included all the price so fixed affecting the bids for other parts of the work, according as it was, high or low. The argument is not without weight in such a case, although the court rejected it as unsound, but when as here the price is not fixed at all, but only a maximum named, it certainly has none whatever.

Our statutes no longer contain a provision such as was contained in the old Municipal act in sections 550-1, providing that the court, where it finds an assessment invalid, may still proceed to determine and adjudge the amount which the property owners ought to pay, nor any provision like the New York statute of 1870, intended to confer like power upon the courts of that state. The court is enjoined, in sections 2289 and 2327, to liberally construe such proceedings, with a view to the speedy completion of the work, etc., but those sections were intended to change the particulars, substantial compliance with which is essential to the validity of assessments and, therefore, the only thing the court can do is to render a verdict for the defendants. A large portion of this assessment has been paid, it appears the contesting defendants being only a small portion comparatively.

Whether the city, under the power to order a re-assessment, may collect the remainder, excluding this item, or not, it is unnecessary now to determine, and the conclusion which I have reached upon this point renders it unnecessary for me to pass upon the many interesting and very doubtful questions which were so learnedly and ably argued by counsel.

Drausin Wulsin, for plaintiff.

H. D. Peck, James H. Perkins and John W. Warrington, for defendant.

EASEMENT—ESTOPPEL.

[Superior Court of Cincinnati.]

MATTHIAS KNEISEL v. SIMON KRUG.

1. A. conveyed to B. a lot bounded on the south by an alley three feet wide. At the same time, the ground on the south was owned by A., and was used as an alley in connection with B.'s lot: Held, A., and his assigns, are estopped to deny that B. and his assigns have a right of way in the ground described as an alley appurtenant to B.'s lot.
2. An assignee of A., purchasing at a time the alley is not used in connection with B.'s lot, but making no inquiry as to the reason, is not thereby relieved from this estoppel.
3. The doctrine of loss of easements by increase of burden, has no application to appurtenant rights of way.

WORTHINGTON, J.

This case, which was tried upon submission some time ago, is an action for trespass, and the defense is that the place in which the alleged trespass was committed was a place over which the defendant had a right of way; and the sole question in the case is, whether the defendant had a right of way over that piece of ground.

It appears that prior to 1848, George Gamble was the owner of a tract of about forty-four feet front, or thereabouts, maybe more, on the west side of Vine street, between Fourteenth and Fifteenth streets. By deed dated the 21st day of August, 1848, Gamble's heirs conveyed to Anthony Habig, a part of that tract, by the following description: "The following real estate to-wit: That lot of ground in the city of Cincinnati, county of Hamilton, and state of Ohio, lying on the west side of Vine street, and fronting thereon sixteen feet, between Fourteenth and Fifteenth streets, and extending back the same width of sixteen feet to an alley, for boundary, commence on Vine street at the corner of a lot on the corner of Vine and Fifteenth streets, heretofore conveyed to said Habig by N. Longworth, thence south on Vine street sixteen feet, thence

west to the alley, thence north with said alley to said Henry Harvey's line, thence east to the place of beginning. The lot hereby conveyed is ninety feet deep, and is bounded on the south by an alley three feet wide, and lies at a distance of twenty-six feet, four inches from Fifteenth street." The place in which the trespass was said to have been committed is this alley three feet wide, which is said to bound this lot on the south. Afterwards Gamble's heirs conveyed to Maue a tract immediately adjoining the above tract upon the south by a description which bounded Maue's lot upon the north by the south line of Habig's lot. So that the whole interest of Gamble in this tract of sixteen feet conveyed to Habig, and sixteen feet more or less conveyed to Maue, was vested in those two grantees. And the question now arises,—this suit having been brought by the assignee of Maue against the assignee of Habig for trespass upon this three feet, which, in this deed, is mentioned as an alley, and the assignee of Habig claiming a right of way under the deed from Gamble's heirs to Habig, over this three feet as an alley, and pleading that as a justification,—whether any such right of way did pass by this deed.

There has been a great deal of discussion as to the effect of bounding a lot upon a street, an alley, any sort of a highway, whether a land highway or a water highway, a discussion, in many cases, as to whether the boundary goes to the side of the highway or to the center. That question, it seems to me, is not to be disposed of in this case, unless it becomes absolutely essential in determining the right of way, because the question that is litigated between the parties is the easement, and not the title of the fee. So, that, passing that by for the present, the question first to be considered is, whether any right of way passed, over this alley, from Gamble to Habig by virtue of this conveyance.

There are many decisions upon conveyances more or less similar to this. The question has often arisen, and more often, probably, in Massachusetts than in any other state, or, than in England. I suppose probably there are four times as many decisions on this question in Massachusetts as in any other of the states, and the law there at least, has at last been reduced to some degree of certainty on this topic, and it has been held there that a description such as this does not operate as a covenant that grants a right of way, unless there are words of covenant in the deed, but that the only effect that it has is as an estoppel, that it is a recital in the deed, and, like any other recital of a fact in a deed, operates as an estoppel between the parties to the deed; and the result is that if the grantor owns the ground over which this alleged alley, street, way, whatever it may be, is declared to exist, then he is estopped from denying that there is such a street or way there as against his grantee, and by reason of that estoppel, the grantee can exercise a right of way over the ground because the grantor is estopped from preventing it. Upon the other hand, if the grantor does not own the fee of the ground which is declared to be a way, then the grantee gains nothing by the description, simply because he can only get the benefit of it by reason of the estoppel, and the grantor not owning the property there is nothing upon which the estoppel can act, and he has no personal remedy as against the grantor. In other words, as I stated in the beginning, it is not a question of covenant, but of estoppel. This distinction was first clearly drawn in the case of *Howe against Alger*, in 4 Allen's, and, consistently followed in Massachusetts.

It is suggested here that this a private way and that the reasoning that would apply to a public way, or, to a description or call for a public way, would not necessarily apply to a private way. But, in the first place, the deed does not say anything about a private way. The deed says that the lot "is bounded on the south by an alley three feet wide and lies at a distance of twenty-six feet, four inches from Fifteenth street." The term, alley, does not necessarily import a private way, because it is a matter that we all know that there are more public alleys than there are private alleys; nor does the fact that the alley is described as being three feet wide necessarily imply that it is a private alley, because there may be a public alley three feet wide just as well as one thirteen feet wide. I see nothing upon the face of the deed, assuming for the present, that the grantor would be prevented from asserting that there was not an alley three feet wide there, by which it could be ascertained whether the estoppel lay as to a private alley, or as to a public alley. But, be that as it may, even if it were a boundary upon a private way, even if it had been said to be a private alley, in terms, I am not prepared to say that it would necessarily follow that the grantee would not have the benefit of the estoppel, would not have the benefits that would accrue to him from there being a private way running along the side of his ground. The presumption would be, it seems to me, that where a lot is bounded, and bounded by a description that is sufficient to convey a lot, and then there is added this clause, "and is bounded on the south by an alley three feet wide," and that description is not needed in any way for locating the lot, there being a perfect description without it, and one by which the lot can be located, the parties put that in there for some purpose, and that the purpose would be the ordinary purpose which the law presumes from bounding a lot upon a way, and that is for the purpose of estopping the grantor from asserting that there is no such way, and estopping the grantor, also, from asserting that the grantee has no right to go over that way.

I stated that the doctrine in Massachusetts arising in *Howe v. Alger*, supra, has been followed since then. The last case of much importance is one that is somewhat, quite closely, in fact, analogous to this in so far as the description goes, because it is the case of a way which is conceded to have been a private way. It is the case of the *Franklin Ins. Co. v. Cousens*, 127 Mass., 258. There, a grantor, or, rather, a mortgagor, had mortgaged a portion of his land by a description which stated, "beginning at the corner of Cedar Square and Cedar street, and thence running by said Cedar street, ninety-one feet and six inches to McLean Place, so-called, then by McLean Place one hundred and twenty-five feet, then on a line parallel with said Cedar street and with the front line of the lot of land hereby conveyed ninety-one feet, six inches, then by said Cedar Square one hundred and twenty-five feet to the place of beginning." It appeared that, before the date of the mortgage, there was a way about thirty feet wide over this piece that was called Cedar Square, and that the question arose under this conveyance, whether the mortgagee had a right of way over Cedar Square, and the court held that he did, by virtue of the estoppel which was laid down in 4 Allen, 206. They say the rule is that, when a grantor conveys land bounded on a street or way over his other land, he and those claiming under him are estopped from denying the existence of said street or way.

Another case of the same point, which is instructive as illustrating the doctrine of *Howe v. Alger*, supra, that of *Tobey v. City of Taunton*, 119 Mass., 404. In this, also, the way that existed was a private right of way, and yet the grantee was entitled to the benefit of the right of passage over that way, by virtue of the estoppel between the parties. That is the settled doctrine in Massachusetts, and I think it is the tendency of the law wherever it has not been settled by definite decision in other states; and it is the law as settled in England as early as the case of *Roberts v. Carr*, I think is the name, in 1 Taunton, and as exemplified, although not in a case exactly similar, by *Wilkins v. Daniel*, L. R., 7 Ex. And cases of the same kind can be found through the reports of different states.

It is claimed, however, that, in this state, a contrary doctrine has been settled by the case of *Bailey v. Copeland*, Wright, 150, and that this is the settled law in this state, by which courts of this state are bound, from which they are not at liberty to depart. In the first place, with reference to the weight that is to be given to this decision, it must be remembered that it is not a decision of the supreme court in the sense in which we ordinarily understand, now, a decision of the Supreme Court. It was a decision made upon the circuit by Judges Wright and Hitchcock, in the supreme court, sitting not as a court of error, but, as a court of nisi prius, and it is not entitled to the weight therefore of a considered decision of the supreme court. It was made by a court which so far as the jurisdiction it was here exercising goes, was simply the equal of the court of common pleas as now constituted, and it is entitled to no more weight, therefore, as authority, than the decision of any other court of co-ordinate jurisdiction, and any weight that it has beyond that is to be gathered from the learning and ability of the judges who decided the case and the cogency of the arguments by which they enforced their opinion.

So much for the weight of that case; and I may state for myself, that I should hesitate to consider myself bound by that case in a matter that was exactly similar to it, supposing that that case stood alone upon our reports. But this case is not exactly similar to it, and the case of *Bailey v. Copeland*, supra, does not stand alone upon our reports; so that, I think I am not bound by it, either as an authority in point, or, as an un-
overruled decision. I should further state, by way of showing the distinction between the two cases, that in this case it appears that at the time these conveyances were made, there were two houses upon these two lots that were conveyed, the one to Habig, and the other to Maue; that between these two houses, there was a passageway about three feet wide; that this passageway was used by the occupants of both houses and of both lots; that that was the state of affairs at the time the deeds were made by Gamble's heirs to the first grantees. In the case of *Bailey v. Copeland*, supra, there was no alley, as a matter of fact. There was an alley upon paper which had never been used, and the alley that there was on paper did not abut along the side of the lot which had been conveyed, as it does in this case, but ran up to it, as a cul-de-sac, the lot which was conveyed forming the head line of the alley. Those circumstances are all material in distinguishing that case and the ground of its decision from this case. Judge Wright, in deciding that *Bailey*, the grantee there, had no right of way in the alley, says, first, "the deed of *Bailey*, in describing the boundary, called for the head of a ten-foot alley on the northeast." Then, in the opinion, that being in the description, he says, "was the right," that

is, the right of way over this alley, "necessary, appendant or appurtenant to the piece of ground granted to the plaintiff? The plaintiff's ground did not exist as a separate parcel until the conveyance to him. How could the right to pass into Second street along the ground marked as an alley, pertain to this ground? It is supposed that the call in the deed affects this question, but we can not see how it does. The call in a deed for a non-existing object, neither creates nor passes any interest in such object. Besides, the call was to designate the outer limit of the grant and not to convey anything beyond it." Now, in this case, the object is existing, whereas, in that, it was non existing, and the fact that Judge Wright makes the remark shows that he, himself, would not have considered this decision applicable to a case where the object was existing at the time that the deed was made. Moreover, he says that, "the call was to designate the outer limit of the grant and not to convey anything beyond it." In this case, the outer limit of the grant is already given before the alley is mentioned, so that it can not be said that the call for the alley is to designate the outer limit of the grant, and it seems to me that the call for the alley was put in there for the purpose of showing something beyond it. So much for distinguishing the cases in themselves; but, beyond that, if I should be wrong in that, it seems to me that the case of *Bailey v. Copeland*, *supra*, has been virtually overruled, in so far as it may be supposed to apply to calls for alleys indiscriminately. It may be that it is still to be considered as an unoverruled adjudication for an alley that runs up as a cul-de-sac, as it did in that case, but certainly not for an alley that runs along the whole line of the lot.

In the case of *Satchell v. Doran*, 4 O. S., 542, the whole charge of the court of common pleas—it may have been the superior court—was based upon the theory that the call for an alley was an estoppel as between the parties denying the existence of that alley, and the supreme court, in affirming the case, say that the charge of the court below, so far as it was applicable to the case, was correct, and that therefore they have got nothing to say upon the matter, and they print the charge in extenso. Certainly they would not have done that, if the vital point of the whole charge had been one which they conceived to be erroneous. They would not have felt the decision in that way, as a stumbling-block for other courts to fall over, unless they agreed with the law as laid down by the court below.

Next, in the case of *Seegar v. Harrison*, 25. O. S., 14, the syllabus says, "the grantee in a deed, which describes the premises conveyed as bounded on a street named, is bound to take notice of the existence of such street; and he is chargeable with such knowledge as to the location of the street as he could have obtained by reasonable inquiry." In other words, the court say that, as between the parties, such call is virtually an estoppel.

In the case of *Lockland v. Smiley*, 26 O. S., 94, Judge White says, by way of argument, "and while it is admitted that the description in these deeds estop the parties to them from questioning the existence of Mary street as respects the property conveyed by such deed," Mary street being a street which was called for in the deeds, "yet," he goes on to say that, "the estoppel certainly can not operate so as to include that part of the street as laid out on the plat, the proposed dedication of which had been revoked at the time of the conveyances," that is, the other part of

Mary street, which did not affect the principle in question. So that, it seems to me I have the express authority of the supreme court for saying that the rule that is laid down in Massachusetts is the correct rule and that *Bailey v. Copeland*, supra, is inconsistent with that, and that *Bailey v. Copeland* has been overruled. So I see no reason why the rule that is elsewhere prevalent does not apply here, that, by the terms of this deed, the grantor and his assigns were estopped, at the time of making the deed and from that time thereafter, from asserting that the grantee had no right of way over this alley.

The next question that arises is, assuming that a right of way originally passed, has anything occurred to take that right away. As to that the right was enjoyed until 1867. In 1867, a fence was put up between the two lots which would cut off the grantee, from access to this three-foot alley, the fence being erected by the grantee, himself, and in that fence a gate was placed, and that gate was within a very short time blocked up by the successor of Maue, and has substantially remained blocked from that day to this. There is a claim by the grantee, the successor of Habig, that he blocked up the gate on his own side, too, for his own convenience; but for the purposes of the present case it is unnecessary to consider that, as it seems to me. The way having been used until 1867, and having been blocked up by the adverse claim only in 1867, certainly the way has not been lost by reason of the statute of limitations. That is out of the way.

It is claimed, however, that it has been lost by an abandonment, and that the plaintiff in this case, Mr. Kneisel, had bought the property under such circumstances, that is, with this gate blocked up that it would be a hardship upon him to have to suffer the alley to be opened now; but, Mr. Kneisel, is bound by every estoppel that estops his grantor, and he claiming title under Gamble's heirs, is bound by the same estoppel which operated upon Gamble's heirs; so, that, he is estopped from denying the existence of this alley, and the only way that he can get rid of this estoppel is to assert some other estoppel against this estoppel which would set the matter at large, so as to leave it open for an investigation of the truth. Whether an estoppel in pais can be urged as against an estoppel by record to set the matter at large, is a question that I have not found it necessary to determine, because, admitting, for the purposes of the argument that it can, yet, what is there here upon which Mr. Kneisel could base an estoppel in pais? To create such an estoppel, there must be some act on the part of the party and by which he is misled. If Mr. Kneisel had asked the parties in whom this right of way existed by virtue of the estoppel created by these prior deeds, whether they still claimed any right of way over the alley and they had said they did not, then there would be some basis upon which to claim an estoppel, but when the deeds themselves charge him with notice or the existence of the right in them and he simply purchases the ground without making any further inquiry or exertion to see whether that right is claimed, I see no reason why they should be estopped from asserting their right.

I have been referred to sundry cases in which an abandonment, as it stated, although it is nothing more than an estoppel, has been maintained under certain circumstances; but it will be found that those were circumstances under which the party who is said to have abandoned his easement, or rather against whom the estoppel, as I think it should be stated,

has been maintained, has done something which is inconsistent with the right which he claims and that the other party has acted upon the new position which the first party had taken in such a way that it would be inequitable to restore the parties to the position in which they were before either party made any change. For instance, in the case of *Corning v. Gould*, 16 Wend., 531; here, there was a way between the two parties, and the plaintiff, who was claiming the right to use the way, had himself built a fence and obstructed the way; and afterwards, the defendant, assuming from that that the plaintiff intended to give up the way, had himself built out into the way and obstructed it, keeping upon his own lines as far as he could, but obstructing the part of the ground over which they had a right of way, and after that, the plaintiff, having become sorry for what he had done, wanted to reopen the way, and the court said he could not; although they did not say terms that he had estopped himself, they say he abandoned it, yet in effect, it is the same thing as an estoppel and nothing else. And all the other cases to which I have been cited as establishing an abandonment, it is upon the principle of estoppel and upon no other principle; and, as I say, I see nothing upon which an estoppel in pais can be based here.

Then it is claimed, also, that this right of way has been destroyed by increase of burden. As to that, it is sufficient to say that if the right of way ever existed, it existed in the grantees as by way of estoppel, as I have said, and applies to every foot of the lot; and as to the right of way appurtenant, there can be no such thing as an increase of burden. That doctrine applies as to the right of common. If a man has a right of common for twenty sheep, he cannot put on a hundred, and if he does, he destroys his right by increase of burden, but the doctrine itself, has no application whatever to a right of way appurtenant to a lot.

So that there must be a judgment for the defendant.

There is a cross-petition here also, for an injunction. In cases of this kind, the order can be had in equity, as I understand it, only when the party claims relief in equity, upon an equitable title, as distinguished from a legal one, or, to avoid a multiplicity of suits. In this case, there is no equitable title. There is nothing to show why suits should be feared. The judgment is an estoppel of the plaintiff from disputing the right of the defendant to this right of way, and I can see no additional relief to be gained by granting an injunction, and unless counsel on both sides prefer it by way of setting the matter right on the record, I should be disposed not to do it as being in violation of the settled practice. You can draw a general judgment for defendants, and dismissing the cross-petition for want of equity, or without prejudice.

Von Seggern, Phares & Dewald, for plaintiff.

Healey, Brannan & Desmond and Frank Bruner, for defendant.

TRADE MARK.

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[Superior Court of Cincinnati, 1883.]

WILTBERGER v. WALKER.

B. Barlow, manufacturer of Barlow's Indigo Blue, sold his business, name and recipe to plaintiff, who now makes it under the same name. J. H. Barlow had once been making a blue as J. H. Barlow's Soluble Washing Blue, but had discontinued business. He sold the name and recipe to defendant, who now represents it to be the same as plaintiff makes. Held, the name "Barlow's Indigo Blue" is a valid trade-mark in plaintiff's hands. But a name representing that an article is the manufacture of a certain person is not a valid trade-mark, nor assignable apart from the business with which it originated, hence defendant is unlawfully using the name.

FORCE, J.

John H. Barlow, although mostly engaged in other matters, did for a few years, say from 1849 to 1856, go into the business of making paints, and while engaged in the business of making paints, accidentally hit upon a method of making soluble Prussian blue. He embarked in its manufacture and sale as a washing blue under the name of "John H. Barlow's Soluble Washing Blue," but made little progress in it and gave it up. Whatever we may say as to the credibility of John H. Barlow as a witness and notwithstanding the erasures in his diary, the preponderance of the evidence, I think, is that he did, in 1853, see Benjamin Barlow engaged in business in Philadelphia, and did in New York sell to some man who represented himself as acting on behalf of Benjamin Barlow, his recipe for making soluble Prussian blue. But whether that recipe was a means of producing soluble Prussian blue in the way that Benjamin Barlow had already practiced, and whether what Benjamin Barlow had previously made was soluble Prussian blue or not; and whether the man really represented Benjamin Barlow or not; whether Benjamin Barlow really bought this recipe or not, we do not know. But we do know that Benjamin Barlow, in 1853, before he saw John H. Barlow, was in Philadelphia, making and vending a washing blue put up in little boxes in the way in which the plaintiff is now making his, and in the way in which that article is now usually found among our dealers. In 1853, Alfred Wiltberger, whether he had been in business with Benjamin Barlow or not, became owner of Benjamin Barlow's processes and paint, his business of the manufacture of this washing blue; and we find that in 1854 Alfred Wiltberger was making the same blue which the plaintiff now makes, in the same way, and putting it up in the same kind of boxes, and putting around it the same wrapper, putting on the same name, "Barlow's Indigo Blue" that he has now in use; and that in 1854, at all events, Alfred Wiltberger had an agent in Cincinnati who was selling the same in Cincinnati and in Newport, as "Barlow's Indigo Blue," prepared by Alfred Wiltberger, of Philadelphia. So that in 1854, Alfred Wiltberger was selling it in Newport, where John H. Barlow at that time was vainly endeavoring to introduce it under the name of "John H. Barlow's Soluble Washing Blue." Alfred Wiltberger took the plaintiff as partner and afterwards died, and the business became the property of the plaintiff. So that ever since 1853 this washing blue has been manufactured in Philadelphia, on the same premises, by the same house and its successors, in the same way,

put up in the same way, and bearing the same name, "Barlow's Indigo Blue." Last year Mr. Walker, a maker of paints in Cincinnati, went across the river and got John H. Barlow to give him a recipe for soluble Prussian blue, and took from him an assignment of the right to use his name, in which writing John H. Barlow recites that the "John H. Barlow's Soluble Washing Blue" and "Barlow's Indigo Blue" are one and the same thing, for the making of which there is but one recipe, and that recipe is the sole property of John H. Barlow, and gives to Walker the exclusive right to use that recipe, and Walker goes around selling the product to the different houses in Cincinnati, saying, "That this is the thing which Wiltberger is making and selling," and puts upon his boxes the words, "Barlow's Indigo Blue."

If the plaintiff has any right to the phrase "Barlow's Indigo Blue" as a trade-mark, there is no question that Walker is infringing. It is of no consequence that he says to the house with which he trades, "I don't claim to be palming off anything made by Wiltberger; what I sell is made by me; but it is the same article, and I know I am the man who has the right to make it." It was said by Lord Justice James, in *Singer Manufacturing Co. v. Long*, L. R. 18 Ch., Div., 412, "no man is permitted to use any mark, sign or symbol, device, or other means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchasers to tell a lie or make a false representation to somebody else who is their ultimate purchaser." So that if the plaintiff has a trade-mark, and Walker does use that trade-mark and puts it in the market by selling it to wholesale dealers, it is of no sort of consequence that he tells the wholesale dealers, "What I am selling you is made by me and not by Wiltberger," because he puts in the hands of the wholesale dealers the means of deceiving persons who buy from them.

One thing is clear, the Wiltbergers having used this name for thirty years as the designation of an article made by them, have certainly the right of a trade-mark in it, if such designation can constitute a trade-mark. So, the whole question is, whether these words, "Barlow's Indigo Blue," constitute a trade-mark or not. One question presented is this: Is it an honest one? Does it imply a deception? The suggestion is made that it implies a deception, because there is no indigo in the article; it is soluble Prussian blue. But indigo is the name of a color as well as the name of a vegetable drug. There is a bird called the indigo bird, and as said by counsel in argument, that name does not imply that the bird is made of indigo. And while in commerce ordinarily the extract of the Indian plant goes by the name of indigo alone, soluble Prussian blue is known as "indigo blue," sometimes "blue," sometimes "blueing," and very seldom goes by the name of "indigo" alone. So I think that not only does it deceive, but it has obtained a standing as the name of a distinct thing from the indigo of the East Indies.

It is claimed that the article is not a manufacture made by the plaintiff, and is therefore not the subject of a trade-mark. We cannot call native coal a manufacture, yet native coal is a substance which may bear a trade-mark. Licorice root is not a manufacture, yet boxes of licorice root may bear a trade-mark. But this soluble Prussian blue is a manufacture, the process of making it is a manufacture. Certainly whiskey is the subject of a trade-mark, although there may be a dozen different whiskeys, made from the same crop of corn, each one of which may have a trade-

mark. Cigars, made from tobacco, many different brands made from the same crop of tobacco, each made by the same process, may have different trade-marks. Flour, which is simply wheat ground to powder, is the subject of a trade-mark. So that, if the process which the Wiltbergers are engaged in, be nothing but grinding up the prussiate of iron into a powder, with the proper care, and putting upon it a stamp to show that it is powder made by them, and not powder made by Colburn and others who make the same sort of thing, still they have the right to designate the work of their hands as something made by their hands, and not made by the hands of another. So that, so far as it being a manufacture or not is concerned, it is sufficiently a product of their own labor and pains to enable it to bear a trade-mark.

The question comes, whether it is the subject of a trade-mark, in a different form. The name, "Barlow's Indigo Blue," what does that mean? Does it mean a composition devised by Barlow, like "Mrs. Winslow's Soothing Syrup," and therefore something which may be designated by that name by anybody who has a right to make the thing? John H. Barlow says, and I suppose truthfully, that he, in the process of making paints, accidentally hit upon this method of making soluble Prussian blue by treating some salt of iron with some salt of potash, which he claims is a secret of his by discovery, only known to himself and to those to whom he has disclosed it. However honestly he has testified to that fact, we know that he is entirely and absolutely mistaken. The process of making soluble Prussian blue was known to chemists long before his day. The very thing that he made, and made by that very same process, was on sale in the shops of Cincinnati long before he hit upon the way of doing it. So that the name "Barlow's Indigo Blue," if it is simply another name for soluble Prussian blue, cannot be taken to be the name of a product compounded or devised first by Barlow. The name of the substance is "Soluble Prussian Blue." When reduced to a fine powder, John H. Barlow called it "John H. Barlow's Soluble Washing Blue;" the Wiltbergers have called it "Barlow's Indigo Blue," another manufacturer called it "Baerlo's Indigo Blue," and another man called it "Colburn's Washing Blue;" and so many others. The article is a very common one, made by a great many people, and each man who makes it designates it by some name which indicates that he is the man who makes that which he sells, and not a name which indicates it as a composition devised.

But still is left this other question: How far is a man's name a trade-mark at all; and if at all, when and how far can it be assigned to another person? There is no question but that a fancy name may be a good trade-mark. "Dolly Varden" is a good trade-mark. There is no question but the names of dead persons, historical persons, mythical persons, may be a trade-mark; a fictitious name may be a trade-mark. There is no question but the name of living persons may be a trade-mark. It is established that the name "Bismark" is a good trade-mark; and the name "Phil Sheridan," has been established as a good trade-mark. Where the name of a living person is the name of the manufacturer himself, it simply means that the thing is made by him. While he makes the thing, he can protect his exclusive use of that name. But, how far can he transfer the original use of that name to somebody else? One thing is clear, he cannot transfer to another the right to use that name without transferring the business too. Thomas Brown, if engaged in making blankets called the "Thomas

Brown Blankets," cannot continue the making of the Thomas Brown blankets in his own place and at the same time sell to somebody else, in some other place the right to apply that term to blankets which he may be manufacturing there. But if he transfer his entire business and good will to a successor, especially to a successor who continues the business in the same place, the exclusive right to use the trade-mark passes with the business to such successor. This is clearly stated in the several opinions in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Ca., 523. It is when the assigned trade-mark not only contains the name of the original manufacturer, but also asserts that the articles to which it is affixed, continue to be made by him though sold by the assignee, that the use of the trade-mark by such assignee is a deception and will not be protected by injunction. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Ca., 523; *Patridge v. Merick*, 1 Howard App. Ca., 558. So, whether or not the name "Barlow's Indigo Blue" was originally used as designating the fact that this was made by Benjamin Barlow, if that was a fact; or whether or not Wiltberger or Benjamin Barlow, either one, first in 1853, chose to call it "Barlow's Indigo Blue," simply adopting as a designating mark the name of the man who was supposed to have first found out how to make soluble Prussian blue, I think in either case this plaintiff has the right to the exclusive use of that combination of words, "Barlow's Indigo Blue," as indicating the product of his manufacture and his hands. And while I must take it, from the evidence, to be true that all these washing powders, called by various names are nothing but soluble Prussian blue ground to powder, still they differ in purity of material, in shade of color, in fineness of power and in completeness of solubility; and all the witnesses agree that the preparation by the plaintiff is not only reputed best, but in fact is best; and the preparations made by different persons may be called by different names to designate the source of their manufacture.

In the evidence I do not trace this name further back than its use by Alfred Wiltberger, in 1853 or 1854; and I find that, having been used by him then as a means of designating the particular washing powder made by him and sold by him, it has been used from that day to this, exclusively as a designation of the washing powder made by him and his successors, and that the present plaintiff is the owner of the old stand, business and name; and that the defendant is unlawfully attempting to appropriate to himself the benefit of that name, and therefore he will be enjoined therefrom.

Von Seggern, Phares & Dewald, for plaintiff.

H. M. Cist, for defendant.

REPRESENTATIONS BY AGENTS—CHARGE TO JURY. 48

[Hamilton District Court, 1882.]

UNITED STATES HOME AND DOWER ASSOCIATION v. HENRY KIRK.

1. Prior negotiations are only excluded on the issue of a contract and its terms, and not where the issue is whether money was obtained by fraudulent representations, and the representations are provable.
2. Where a local agent repeats representations of a general agent, the latter's letters to him containing them are admissible in evidence in an action for credit against a corporation.
3. Refusal to give a series of special charges is not error if the general charge correctly and fully gives the law of the case.

Error to the Court of Common Pleas.

SMITH, J.

The action below was brought to recover the sum of \$855 with interest from September 1, 1879, and \$69.15 with interest from December 20, 1879, in all \$924, by Henry Kirk against the United States Home and Dower Association, claimed to have been obtained by fraud.

The petition alleges that the defendant, The United States Home and Dower Association, was a corporation chartered by the laws of Pennsylvania, and that it had fraudulently and falsely represented to the plaintiff that it had large sums of money to loan, and that it was ready and able to loan such sums of money to persons who would become purchasers of certificates of endowment therefrom; that the plaintiff being desirous of borrowing \$15,000, the defendant assured him that if he would become the purchaser of nineteen certificates of endowment of \$1,000 each and calling for the payment of \$22.50 per year each for the term of 21 years, it would loan that sum to the plaintiff; that the plaintiff relying upon these representations entered into a contract for the purchase of nineteen of said certificates of endowment, and did in fact pay two of the annual premiums amounting to \$45.00 on each certificate, being the sum sued for in this action; that the alleged representations were false and fraudulent and this money was obtained from the plaintiff by means thereof. The prayer was for a repayment of that money.

The answer first denied the alleged fraudulent representations and put in issue all the allegations of the petition; secondly, it set forth that the corporation, The United States Home and Dower Association, was authorized to issue certificates of endowment maturing within 21 years for the benefit of the holder upon his complying with the terms requiring the payment of \$22.50 per year for each year during the period it had to run. That the plaintiff being desirous of becoming a purchaser of nineteen certificates of this endowment, made application therefor to defendant; the defendant accepted the proposition and thereby there was created a subsisting contract between plaintiff and defendant and in pursuance of that contract, the defendant issued to the plaintiff nineteen of these certificates on the terms aforesaid; that the accrued payments being \$45.00 on each of these certificates, and that the aggregate making up the amount sued for were payments made in pursuance of the contract; that the contract for said certificates of endowment and the certificates issued in pursuance thereof created a subsisting contract between the parties.

The answer further alleges, that by the terms of the contract the plaintiff was required to make annual payments of \$22.50 on each certificate and had failed to make the payments due in December, 1880, and December, 1881, and that thereby the said certificates had become forfeited and the defendant was not liable for any sum whatsoever to the plaintiff.

It will be seen from the pleadings that the direct issues raised are: First, the allegations made by plaintiff that the money was obtained by fraud, and 2nd, the defense raised by the answer, that there was a legitimate, valid and subsisting contract entered into between the parties in writing; that this written contract merged all previous negotiations, and determined the rights and liabilities of the parties.

The case came on for trial before the court and jury. The plaintiff offered evidence tending to show that in 1877 the defendant being a corporation doing business in various parts of Ohio having its office in Cincinnati, through its agents made certain representations to the plaintiff: First, that it had large sums of money to loan at a low rate of interest for a long period of time; secondly, that to obtain a loan it was necessary to become a member of the association by entering into a contract for the purchase of certificates of endowment; that the plaintiff was desirous of borrowing \$15,000 which required him to purchase nineteen of these certificates and pay two of the annual assessments thereon; that the plaintiff relied upon these representations and the further representation that if the loan was not secured the money advanced would be refunded.

That upon the faith of these representations he advanced the amount claimed in the petition, viz, \$855, being \$45 upon each of these certificates and an additional sum of \$69.15 for interest upon money thus advanced. The testimony tended to show further that after this money had been advanced and after waiting from week to week, and month to month, the agent of the defendant acknowledged he did not have the money to loan, and stated among other excuses that this institution having its headquarters at Washington had been disappointed in not obtaining a large sum of money from some one who had a claim against the government which was to be paid through an act of congress, being \$300,000 or \$400,000; that a committee had actually passed upon the claim and allowed it, but through some chicanery or inadvertence upon the part of the clerk of the House the bill had failed to become a law and therefore this money was lost to the association.

The defendant on the other hand offered in evidence the contract for the purchase of these endowment certificates, signed by the party and reciting that the plaintiff became the purchaser of nineteen of these certificates and agreed to pay \$22.50 a year upon each, and that he was to be entitled after making two annual payments on these certificates to a loan if he was the highest bidder. The defendant also offered the various certificates issued in pursuance of this contract.

On the trial of the case, an objection was made to the admission of certain letters, written by the agent, Dr. Brigan, to one Brown, the local agent who made the negotiation with the plaintiff. These letters were of the date of May 7, 1877, and May 29, 1877, and shown by Mr. Brown to the plaintiff. The court overruled the objection to which defendant excepted.

The defendant as a corporation was dealing through its agents with the plaintiff and was represented by its agent whether general or local; and the representations of the general agent communicated to the plaintiff in any manner would be competent, and so far as appears from an inspection of the letters they were intended to be shown to the plaintiff. The first letter stated that the company had money to loan which could be furnished within 60 or 90 days; and the second letter stated that this company was about to make arrangements with a certain bank in Washington to negotiate these certificates at a small discount, and until this arrangement was made, the association would refund all moneys advanced on the certificate in case a loan was not effected. On the issue presented this evidence was competent and objection properly overruled.

At the conclusion of the testimony, the defendant below made a motion to exclude all the parol testimony which had been offered. This motion was overruled and it seems to us the action of the court below was proper. If the question had been whether there was a contract and what were its terms, there is no doubt that a written contract merges all previous negotiations. But when the issue, as was in this case, is, whether money had been obtained by defendant from plaintiff by fraudulent representations, parol testimony tending to show these alleged fraudulent representations and that this money was paid by reason of them was relevant and competent; and therefore the action of the court was correct in overruling that motion.

The court charged the jury that the burden was upon the plaintiff and he must show by preponderance of the evidence that representations were made by defendant through its agents to the plaintiff known to be false at the time, or, made as true, not knowing whether they were true or false; that these representations were made to the plaintiff to induce him to act upon them; that they were material and as matter of fact the plaintiff did act upon them.

The court also charge the jury that these elements constituting the charge of obtaining money under false representations must all be made out by a preponderance of evidence, and also very carefully defined what are false representations, distinguishing between a promise unfulfilled and a false representation of existing facts; that whereas the latter might be evidence of fraud, the former would simply be a broken promise which would not necessarily tend to prove fraud, unless the promise were in bad faith by one not made intending to perform it.

The court also charged the jury, that unless the jury were satisfied by preponderance of evidence that fraudulent representations were made then defendant was entitled to a verdict; that in the absence of fraud the written papers would regulate the rights of the respective parties.

To this general charge there was a general exception, which avails nothing.

After the general charge had been given, the defendant below asked certain special charges, which the court refused to give, and defendant excepted.

First—"The written proposal of plaintiff to defendant for defendant to issue to plaintiff 19 certificates of deposit, and the said certificates of deposit having been issued by defendant to plaintiff in accordance with the directions, and the same having been duly executed by plaintiff, this

in law makes a valid and subsisting contract between plaintiff and defendant, and a contract that defendant has performed in full up to the time of the bringing of this action; and plaintiff is not entitled to recover in this action the money he paid defendant on said contract or certificate in law. Unless you are satisfied from the evidence that plaintiff in the execution of said proposal has been deceived and induced to execute the said proposal to defendant by some act of fraud or device of defendant to mislead or defraud plaintiff, you will return a verdict for defendant."

This is substantially given and covered by the general charge, viz: That in the absence of fraud the written contract must prevail, but the question of fraud was to be determined by the jury upon all the evidence, the burden being upon the plaintiff, and if there were fraud, the fraud would vitiate everything. Second—"If you find from the evidence that the proposal of plaintiff to defendant for the 19 certificates was not the proposal or contract plaintiff desired to make with defendant, and there is no evidence showing that the defendant did in any way use any fraud or deception to induce plaintiff to execute the said proposal to it, then your verdict will be for defendant."

That is not the law. For certainly there can be no contract, unless the minds of the parties meet. If, however, it be intended to assert that these parties have signed a written agreement, it must be presumed that their minds have met, and a contract was made whether they intended it or not, then this charge is in effect the same charge as the preceding one and means that in the absence of fraud, this contract must prevail. This is covered by the general charge.

Third—"The onus or burden of proof of fraud or deception, or that defendant did by fraud induce plaintiff to execute these proposals to defendant, and to make the said payments to defendant is upon plaintiff, and if he has failed to satisfy you by the evidence that defendant has been guilty of any act or acts of fraud or deception to induce plaintiff to make the said proposal and contract with defendant and pay defendant the money thereon, then your verdict will be for defendant."

This is covered by the general charge.

Fourth—"The mere making out and sending the proposals for these 19 certificates to defendant by plaintiff did not make a contract between them; but the acceptance of the proposals and the issuing and delivering to plaintiff the 19 certificates ordered by plaintiff, and the acceptance thereof did make a complete and legal contract between defendant and plaintiff. Unless you find from the evidence that defendant has been guilty of fraud or deception in obtaining the said proposals or the money paid thereon, your verdict will be for defendant." This differs only in phraseology from the first special charge.

Fifth—"The application for loan by plaintiff to defendant placed defendant under no obligation in law to make the loan to plaintiff at any particular time, unless you find from the application that a time was specified when said loan should be made in the application."

I cannot see the pertinency of this charge. A mere application amounts to nothing and creates no contract. If it means that the application and acceptance which would constitute a contract does not state that it is to be performed in any particular time, and the time of performance is not named, then the law requires it to be performed in a reasonable time under all the circumstances of the case.

Sixth—"In law, defendant was not required to make the loan applied for by plaintiff, or any part thereof to plaintiff, until plaintiff himself had performed or offered to perform his part of the contract contained in the said proposal to execute and deliver to defendant a mortgage as set forth in his proposal for said loan to secure the said loan."

If this was a mere question upon a contract requiring the acts of both parties for its performance, very likely that charge would have been pertinent and proper, but in a question of fraud and to recover money obtained by fraud and nothing else, it was not pertinent. The rights of the parties did not vest in contract.

Seventh—"The law does not presume fraud, fraud must be proved before any one can have the advantage of a fraud or a contract can be annulled or set aside for fraud." This has been given several times in the general charge.

Eighth—"The fact that defendant advertised it had money to loan is no evidence of fraud on the part of defendant, unless you are satisfied from the evidence that defendant had no money to loan; to make the evidence available in proving fraud of defendant, you must be satisfied from the evidence that it was false."

This charge selects one fact from the whole evidence, and asks that the verdict be determined as the jury find that one fact. This cannot be done. The jury are to consider this fact with all the other evidence in making up their verdict.

Ninth—"If you find from the evidence that prior to the bringing of this action, plaintiff never performed, or offered to perform, his part of the proposal for loan, by delivering, or offering to deliver, to defendant a mortgage as he proposed in his application to defendant for loan. This is a circumstance for the jury to consider. In law, in such a contract, neither of the contracting parties has any right to assume that the other will not perform his part of the contract on a proper and legal application to him or her for the performance of the same. The legal presumption is that there would be a performance and proper application therefor by the proper party to the proper party. This is so, in this case, unless you are satisfied by the evidence that defendant never did intend to make the loan applied for by plaintiff to him at all."

This is only repeating in another form what are the rights of the parties under the contract if there is no fraud, and sufficiently commented upon under the preceding charges.

All these charges were refused, and, we think the court was justified in rejecting them.

Another error assigned was that the verdict was against the evidence. The motion for a new trial in this case does not cover that ground, and therefore we cannot consider it. We think that the plaintiff in error has not lost anything by the want of it.

Judgment affirmed.

The case of United States Home and Dower Association v. Mary J. Leeds is similar to the preceding, and involves the same questions. In this case, also, the judgment will be affirmed.

PARTNERSHIPS—ATTORNEYS.

[Hamilton District Court.]

JOHNSON v. MORRISON.

1. The liability of one who permits himself to be held out as a member of a firm of attorneys, is the same as if he were a real partner, to those who deal on the faith of such holding out.
2. Such liability is not confined to the ordinary employment of the firm in the court, but extends to the collection of claims from the government, such as securing for a former officer his proper rank and pay, and collecting back pay.
3. The giving of powers of attorney to one member of such firm, instead of in the firm name, to enable him to collect, need not militate against such liability, but may warrant the jury in finding that they were not a new employment, but in pursuance of the original employment.

Error to the Common Pleas Court of Hamilton county.

SMITH, J.

This is a petition in error to reverse the judgment of the common pleas court, recovered by Jane Morrison, guardian of George Morrison, an insane person, against Johnson & Taylor, defendants. The action below was brought by Jane Morrison, guardian of Geo. F. Morrison, against Johnson & Taylor, attorneys at law. The petition alleges that in 1869 Johnson & Taylor were partners in the practice of the law in the city of Cincinnati, and that the plaintiff, Jane Morrison, guardian of Geo. F. Morrison, employed them as attorneys at law to secure the proper rank and pay to which her ward was entitled in the Navy Department, and collect the money due to him from the government on account thereof; that they accepted said employment and in pursuance thereof collected various sums, viz:

| | |
|-------------------------|------------|
| April 3, 1869 | \$4,126.46 |
| November 25, 1870 | 1,297.99 |
| May 21, 1873 | 897.60 |
| August 4, 1874 | 1,121.59 |
| March 14, 1877 | 5,442.75 |

Amounting in all to \$12,896.19; that they had paid over to her on account of these collections \$2,000, \$800, \$300, \$1,121.59, and were entitled to certain other credits by way of fees, leaving a balance of \$7,355.65, for which she brought suit.

The defendants filed separate answers. Judge Johnson denied partnership; in fact, denied the money was received by him, or by them as partners; denied that they were employed as partners, and denied that they as partners or he individually, had anything to do with the transaction.

The second defense recites in substance that in 1866 he had received an appointment from the President as one of the commissioners to revise the statutes of the United States; that his codefendant, Taylor, was introduced to him as a young man in the practice of the law, and for the sake of friendship and good will to Mr. Taylor, he gave him the use of his library and office furniture, and what was of more importance, the use of his name; permitted him to open an office in the name of Johnson & Taylor, attorneys at law, and to print cards in the same firm name; and permitted him to use the name of Johnson & Taylor in all matters con-

nected with the practice of law in Cincinnati; that this nominal partnership, as he calls it, continued down to the year 1876, when becoming dissatisfied he put an end to it, and Taylor formed a new partnership with one Hollister, under the name of Taylor & Hollister; and a large portion of this money alleged to have been received, was received by Mr. Taylor when he had formed his new relation; that he himself had no connection at all with the matters alleged in the petition.

As a third defense, he claims that the money thus received was not received in the course of the practice of the law, but was received by Taylor through special powers of attorney granted to him by the plaintiff; that no part of such money came into his hands, and the last item was received, and powers of attorney given to Taylor to receive it, after there had been a dissolution.

The defendant, Taylor, alleged in his answer that he was employed in 1869 by the plaintiff to look after the interests of her ward, and undertook that employment, by virtue of which he received the first three items of money above claimed, viz: \$4,126.36, \$1,297.99, \$897.60, and that after he had received the same he made a settlement with the representative of the plaintiff, received his vouchers and receipts, and that was entirely settled for. He further says that the item, viz: \$1,121, never came into his hands, but the treasury warrant for the payment of that sum was payable to the order of his client, Mrs. Morrison. The warrant was handed to her and she received the money upon it.

As to the last and most important item, viz: \$5,442.75, he says, that in 1874, he was employed by plaintiff to secure her ward the rank and pay to which he was entitled as a Lieutenant Commander in the United States Navy, and by the terms of that agreement, if he succeeded, he was to receive as compensation for his services all of the backpay recovered for her ward up to that time, and that he did in fact succeed, and the ward, George F. Morrison, was raised to the rank of Lieutenant Commander in active service, which entitled him to the pay of \$1,400 a year from that time forward; and that the said sum of \$5,442.75 was received as back pay, and by virtue of this special contract between him and the plaintiff, he was entitled to hold it.

To these answers replies were filed. The case came on for trial before a court and jury. From the evidence reported in the bill of exceptions these facts appear:

In 1866, Judge Johnson was appointed by the President, with the advice of the senate, as one of the commissioners to revise the statutes of the United States. This commission continued for three years and required him to be in Washington. Before he went to Washington, Taylor came to Cincinnati with letters of introduction to him, and he gave him the use of his law library, office furniture, and what was of more importance to him, the use of his name. He permitted Taylor to open a law office in the name of "Johnson & Taylor, attorneys at law;" to circulate cards containing the same firm name; also to use the same firm name in his practice. It also appears as a fact that the business was Taylor's alone, that there was no partnership in fact, and Johnson had no interest in the business and received none of the fees except in two special cases, to be referred to hereafter. It also appears that Judge Johnson used this office for his headquarters when in Cincinnati; that he had a desk there, his mail matter was sent there for delivery, and so far

as he had any business in Cincinnati, that was his office. In other words, they both used the office. It appears that there were two special matters in which they had a joint interest, one of which was an action brought in the United States District Court for the Southern District of Illinois, to recover a certain amount of prize money for one of the boats of the Mississippi squadron. Both aided in the prosecution of that suit and shared in the fees. It does not very distinctly appear what the other joint employment was. It also appears that in 1876, Judge Johnson put an end to this nominal partnership, which had existed from 1866, and then Mr. Taylor removed from the old office to another, and formed a partnership with one Hollister, under the name of Taylor & Hollister.

It also appears that George Morrison was appointed in 1849 a midshipman in the Navy and served up to 1859, when he became insane, was retired on furlough and placed in a government hospital, and continued insane from that time till now; that from 1859 to 1869 the navy department paid to his father or mother for him part of the time \$30 a month, and part of the time \$40 a month. During this period his father had died; and Mrs. Morrison, his mother and plaintiff in this case, was appointed his guardian. Claiming that her ward had become disabled while in service, she employed attorneys to procure for him his proper rank as though he had remained in active service and pay corresponding to his rank. The attorneys first employed did not succeed. In 1869, one of the agents of the plaintiff, a son-in-law who had charge of this matter, came to the office of Johnson & Taylor to employ them as additional attorneys to aid in securing the money. Taylor represented to him that he had unusual facilities for this purpose; that Judge Johnson was his partner, then in Washington, and familiar with all the departments and with those who had charge of them, and if the matter was given to them, he presumed they might prosecute it successfully. He was employed and succeeded in getting Morrison placed on the retired list, with back pay coming to him amounting to \$4,126.36, and the warrant for it was payable to Mrs. Morrison, guardian.

By section 3477 of the Revised Statutes of the United States, no claim can be drawn from the treasury department on the power of attorney, unless the power of attorney is executed after the claim is allowed, the amount ascertained and the warrant for the payment thereof issued. A power of attorney was given by Mrs. Morrison to Taylor to draw the money. Taylor drew the first amount on that power of attorney; also the second amount in the petition on a similar power of attorney. After these amounts had been received by Taylor, he settled with the plaintiff for the same, deducting his fees, and proper receipts and acknowledgements were given and filed in the probate court in the settlement between Mrs. Morrison and her ward. After 1869 the pay drawn on account of Morrison, as a retired officer amounted to \$900, or \$1,000 a year less \$100 retained on account of his being in the hospital, and these warrants were paid to the guardian. It was, however, claimed by Mrs. Morrison that under the act of March 3, 1873, 17 United States Statutes at Large, 547, her ward was entitled to the rank and pay of an officer in active service on leave of absence, which would entitle him to a salary of \$1,400 a year during this time; and being dissatisfied with the amount already received, she made a new agreement with Taylor in 1874. This agreement was in writing, and in substance recited that Johnson & Taylor had been employed by

Mrs. Morrison to procure for her ward his proper rank and pay in the navy department, and if they succeeded, they were to have as their compensation all arrearages of pay coming to him.

About the same time a power of attorney was issued by Mrs. Morrison to Johnson & Taylor to enable them to prosecute this claim. After this contract was made Mr. Taylor did, in fact, give much attention to this matter, make numerous trips to Washington and employed other attorneys in Washington to aid in this service, and succeeded in having Morrison placed upon the active list as Lieutenant Commander of the United States Navy, on leave of absence, which entitled him to a salary of \$1,400 a year; and recovered as back pay for him \$5,412.75, for which he obtained a warrant payable to Mrs. Morrison as guardian. She was anxious to get this warrant. Taylor claimed it by virtue of his contract. Mrs. Morrison, through her representative in congress, made an effort to get the warrant from the department, but it had been delivered to Taylor. She hesitated a long time to give him the necessary power of attorney to draw it; but in December, 1877, she gave it, and he received the money. When the money came into his hands he claimed it under the contract as arrearages. Soon after, after Morrison had been restored to the rank of Lieutenant Commander in active service on leave the Secretary of the Navy, under section 1442, Rev. Stat., placed him on furlough, which entitled him to only half pay, which at that time was \$700 per year. There were certain powers of attorney, one given to Taylor alone in 1869, which authorized him to draw the voucher of \$4,126.66; another given to Johnson & Taylor in 1874, about the time of this contract, which was a printed blank partly filled up—and the name of Johnson & Taylor printed in the blank, for use in prosecuting claims against the government. There is a third power of attorney given in January, 1877, by Mrs. Morrison to Taylor alone, authorizing him to prosecute claims against the government in favor of her ward; and a fourth power of attorney to Taylor alone, to endorse the warrant for \$5,442.75.

The charge of the court is very elaborate. It construed that written contract favorably for the defendants. The jury rendered a verdict of \$1,187 in place of \$7,305.65, the amount claimed. It does not appear from the bill of exceptions upon what that verdict was based, but from certain admissions made by Taylor that he had received \$897 at one time, of which he paid only \$300, and that in this voucher of \$5,442.75 was included some \$260, which was no part of the arrearage, upon both which items several years of interest would be due, it is easy to see how that verdict of \$1,187 was arrived at and giving Taylor all he claimed by virtue of that contract. This petition in error is filed by Johnson alone. It is claimed by Judge Johnson in the first place that he is not liable as attorney at law by virtue of the contract or the employment. It is not claimed, I believe, that Judge Johnson had anything at all to do with this employment. It is not claimed that he received any portion of the money; it does not appear that he had any knowledge at any time of this particular claim, which was being prosecuted by Mr. Taylor.

It may be stated as a general principle, that where a man permits himself to be held out as partner, he is liable to the same extent to those who deal upon the faith of that holding out, as though he were a real partner. All persons relying upon these representations may treat it as if there were a real partnership, and if it were within the scope of such

apparent partnership to prosecute and collect such claims, either against individuals or against the government, and one of the firm undertook the collection of claims of that kind, then either, or both, parties would be liable, although one had no knowledge of the fact. In other words, a stranger may deal with persons holding themselves out as partners, on the faith of the apparent authority conferred as to all matters incidental to that relation.

What is the business of attorneys at law?

It is to represent parties in courts of law, to collect claims, either against individuals, or against corporations or municipalities or governments. If the appropriate tribunal through which the claim is to be collected, is a board or department of the government, we see no reason why the attorney may not prosecute it there. Sometimes a claim against the government is prosecuted by a suit against a public officer in the ordinary courts; sometimes by an action in the court of claims; sometimes by an appeal to an officer or department of the government, as the remedy is provided by law, and if legal services or legal knowledge are required, we think, the appearance of an attorney before either of said tribunals, boards or officers, is within the ordinary scope of the employment of an attorney at law. The instance referred to in the testimony of Judge Johnson, where both took part in the employment and shared in the fee, was in effect a claim against a fund held by the government, prosecuted in the courts of the United States in the state of Illinois and indicates that the law business of Johnson & Taylor was not understood by him to be limited to claims against individuals, or confined to Cincinnati.

But it is claimed further on behalf of this defendant that this employment was superseded, when the several powers of attorney were given to Taylor which constituted a new employment of Taylor alone. Whether this was or was not so was a question of fact to be determined by the jury, and a fair construction of the evidence warrants the view that these several powers of attorney were not intended for a new employment but given in pursuance of the original employment of Johnson & Taylor, to comply with the rules and regulations of the department of the government in prosecuting the claim. It was proper to make a power of attorney to one, rather than to two. The contract was in the name of Johnson & Taylor on the one side and Mrs. Morrison on the other, and the various powers of attorney were simply carrying out that original purpose. Another fact is important. Whatever contract there was, it was a contract made in the name of Johnson & Taylor in 1874. Taylor claimed that his employment was made and the sum of \$5,412.75 was received in pursuance of that contract, and that he was entitled to hold it as his own according to its provisions. As he understood the transaction, the powers of attorney were given in pursuance of the original contract and to enable him to get the money coming to him under it. We think the jury was justified in holding so also. It is also said that this nominal partnership was terminated in 1876, and the sum of \$5,442.75 not received till eighteen months thereafter. The answer is, that if collected in pursuance of the original contract, the liability of both continued, until the money was properly accounted for. *Atkinson v. Mackreeth*, 2 Eq. Ca., L. R., 573; *Bryant v. Hawkins*, 47 Mo., 410; *Smyth v. Harvey*, 31 Ill., 62; *Dwight v. Simon*, 4 La. Ann., 490.

Therefore it seems to us upon a very careful review of the testimony, we cannot interfere with the verdict of the jury on the ground that it was against the weight of the testimony. During the trial of the case numerous exceptions were taken to the charge of the court. This charge seems to have been given with unusual care and is quite elaborate; and that portion especially which affects the liability of Judge Johnson as one of the defendants, seems to have been drawn and given to protect his rights, either as an actual or nominal partner, and the jury were properly instructed in that respect.

We see no error in the charge to the prejudice of the defendant and judgment affirmed.

Mitchell & Holmes, for plaintiff in error.

Jordan & Bettman, for defendant in error.

DIVORCE—CUSTODY OF CHILD.

55

[Hamilton District Court.]

HICKMAN v. HICKMAN.

The court of common pleas is vested with a continuing authority to modify its orders theretofore made in a divorce proceedings, as the circumstances and conditions may appear at the time of the application, and a separate action for the maintenance of a minor child, subsequent to the decree for divorce, cannot be maintained.

Error to the Common Pleas Court of Hamilton county.

MOORE, J.

Plaintiff in error, Mary J. Hickman was plaintiff below. The petition of plaintiff avers that she and defendant had been husband and wife prior to March 12, 1870, when they were divorced on application of plaintiff for the fault of defendant; that by the decree of the court granting plaintiff the divorce, the custody of the child (a daughter about a year old) was given to the plaintiff. The petition further alleges that plaintiff has supported the child at an expense named in the petition from the time of the decree of the divorce up to the time of the commencement of this action.

And further that the defendant has wholly failed to contribute towards the expense, maintenance and education of the child and judgment is asked for the amount so furnished.

To this petition the defendant filed a demurrer which was sustained. To the action of the court in that respect the plaintiff excepted.

The questions raised by the record relate to the right of the plaintiff to maintain an independent action against her former husband for the necessary maintenance of their minor child, subsequent to the decree of divorce, the child being in the plaintiff's custody by order of court.

The statute of 1880, section 5696, Revised Statutes, provides: "The granting of the divorce, and the dissolution of the marriage shall in no wise affect the legitimacy of the children thereto, and the court shall make such order for the disposition, care and maintenance of the children, if there are any, as it just and reasonable."

†A contrary opinion will be found in Pretzinger v. Pretzinger, 45 O. S., 452.

The defendant claims that the common pleas court having jurisdiction of the action of divorce and averring that an order was made concerning the custody of the child, that this is the proper place for the settlement of the question of maintenance.

In other words that this action cannot be maintained as an independent action, but the parties are remitted to the proceedings for divorce. By the Divine law and law of nature parents are under obligations to support and protect their children. This is recognized as the common law of the land.

The manner of enforcing the obligation of a parent for maintenance of children has been a subject of frequent adjudication, but as presented by the case at bar it is not altogether important that the question whether the defendant is for the amount claimed liable be determined.

However, in the absence of a statutory provision regulating maintenance of minor children, can the simple averment of the petition that the custody of the child was given the plaintiff twelve years ago, carry with it the charge against the father for its support, the custody of the child having been denied him?

Should it not appear, that the father during that period had refused to support the child and that he was unwilling to receive it or was unworthy of the custody of it?

"There must be a clear omission of duty as to necessities before a third person can interfere and charge the father, where the infant is" *sub potestate parentis*. It will always be a question for a jury, whether, under the circumstances of the case the father's authority was to be inferred. If the father suffers the children to remain abroad with their mother, or if he forces them from home by severe usage he is liable for their necessities. And in consequence of the obligation of the father to provide for the maintenance and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and to the value of their labor and services." 2 Kent. Com., 133.

It would certainly be against reason to deprive a father of the future custody of his child against his will and at the same time charge him with its support, provided he is able, willing to support it and is worthy of its companionship. The relation of parent and child certainly admits of the presumption that however unfit and at fault at the time of the decree the father may have been to care for and protect it, he is at the same time entitled to the privilege of its custody. It may be true that in this case the defendant may have answered setting up a defense of that character, but it is his privilege to demur and claim the form of action prescribed by statute. In this country, the weight of authority sanctions the position that the obligation of a parent to third persons for the support of a child rests upon the natural duty violated by neglect, and a contract either express or implied, and of course upon the ability to furnish maintenance. Does this case present a state of facts consistent with these obligations? The wife is now a third party—a stranger to this defendant; there is no promise or contract; there is no showing of neglect or abandonment. The wife sought for the child and against the will of the father, deprived him of the future custody and control of it, and the opportunity of being the judge of the fitness of the support which he is called upon to pay. The decree of the court awarding the custody of the child to the plaintiff, may in this state be considered as an award subject to modification accord-

ing to the circumstances of the parties as they appear thereafter. The cases cited by the plaintiff's counsel, differ from the one under consideration.

In the case of *Courtright v. Courtright*, 40 Mich., 633, it was held that the father even where the children remained with the mother after the divorce and against his will, could not escape the duty of supporting them. In this case it appears, there was a contract between the parents by which the children were to remain in the custody of the mother, the father to contribute a certain amount each year for their support. In that case he was willing to part with the custody by the terms of the contract. And thereupon after the failure by the father to furnish means for their support he was held liable.

In the case of 47 Ill., it was held that the duty to support the children devolves first upon the father and then upon the mother so long as they are of tender years. In this case the facts show that the husband had deserted the wife and child and had failed to contribute anything to its support.

(The question involved in this case is, whether the plaintiff has a right to maintain an independent action against the husband therefor.)

The wife appeared in the original proceeding on divorce, and made a motion to re-docket the case, and subsequently by the production of additional testimony secured additional alimony to aid in the maintenance of the child.

In the case *Stanton v. Willson*, 3 Day, 55, a son had eloped from his father for fear of personal violence and abuse. The court said: "the father having forced his child abroad to seek a sustenance, under such circumstances, sends a credit along with him and shall not be permitted to say it was furnished without his consent or against his will." In all of these cases the husband was at fault in that he had either violated his contract or his natural duty and obligation under such circumstances as gave a third person a right to furnish necessities and charge the parent with the amount.

In contrast with the forgoing cases—is the case of *Hancock v. Merri-ck*, 10 Cush., 41, and *Reynolds v. Sweetser*, 15 Gray, 78, where the husband was held not responsible for the support of his child when held against his will; also see 22 Conn., 411.

In this state we have legislation upon this subject, also the expression of the Supreme Court by which we must be governed. In the case of *Hoffman v. Hoffman*, 15 O. S., 427, it was held that "the jurisdiction of the court of common pleas over the subject of the custody of children in divorce cases is a continuing jurisdiction, and may, on proper application, be invoked to modify orders originally made in respect to the custody of children whenever the character and circumstances of the case or of the parties require it." So that under the record presented and on the right of that authority we propose to determine more particularly the statutory rights of the parties. We are of the opinion that the court of common pleas is vested with a continuing authority to modify the orders theretofore made in the divorce proceedings as the circumstances and conditions surrounding the parties may appear at the time of the application, and not by a separate action.

Judgment affirmed.

J. F. Baldwin, for plaintiff in error.

Lloyd & Taft, for defendant in error.

BANKRUPTCY.

[Superior Court of Cincinnati, 1883.]

EDWARD H. GREIVE v. JOSEPH GIBBONS.

A. agreed to indemnify B. for any loss that he might suffer from the default of C. in not paying any judgment which might be recovered against C. in an action then pending, B. being the guarantor of performance by C. A. became bankrupt before any judgment was recovered against C., and subsequently received his discharge in bankruptcy. *Held*: This discharge is no defense to an action by B. against A. for failure to indemnify him. The claim was not a contingent claim of liability provable under sec. 5068 of the bankrupt act of 1867, but, instead of being an existing contingent liability which alone was contemplated by that section, was simply an existing contingency whether there would be a liability.

WORTHINGTON, J.

On March 2, 1882, an attachment was issued against Agnes Lake, in the case of Armstrong, Adm'r., v. Agnes Lake, then pending in the court of common pleas. Joseph G. Gibbons, the defendant here, being the attorney of Agnes Lake, desired to file a bond to obtain the release of property of hers which was taken under the attachment. He applied, according to his own testimony, to one Edward H. Greive to go upon that bond, and drew up a contract of indemnity which he offered to give Greive if he would sign the bond. Thus Edward H. Greive did not sign the bond, but it was signed by the plaintiff in this case, whose name also appears to have been Edward H. Greive, and who now sues Joseph Gibbons upon that indemnity contract, claiming that Gibbons delivered it to him.

Gibbons denied having made a delivery of the undertaking to Edward H. Greive, the plaintiff. Gibbons also sets up a discharge in bankruptcy.

The testimony as to the delivery of the undertaking by Gibbons was conflicting.

In that action, 38,742 common pleas, a judgment was recovered by Armstrong, administrator, against Agnes Lake, at the January term, 1877, for \$1,400, with interest and costs, amounting to \$1,550, the judgment being entered January 3, 1877.

Agnes Lake failed to pay the judgment, and an action was subsequently brought in 52,686 common pleas by Armstrong, administrator, against Greive, the plaintiff here, and one Carpenter, upon the bond, and at the July term, 1877, judgment was recovered for \$1,550.

This judgment was paid by Greive, September 9, 1877. In the meantime, on May 15, 1876, defendant Gibbons filed his voluntary petition in bankruptcy in the district court of the southern district of Ohio, and on that day was adjudged a bankrupt. On February 21, 1877, Gibbons filed his petition for a discharge, which was granted on October 12, 1878. Upon this state of facts the jury found a verdict for the plaintiff. A motion for a new trial was filed, and at a previous day I had overruled the motion so far as relates to the issues upon the first defense of non-delivery of the bond, so that it stands now to be considered that the defendant, Gibbons, did deliver this undertaking to the plaintiff, and the only question is whether the discharge in bankruptcy is a sufficient defense to this action, which was brought August 29, 1882. The effect of a dis-

charge in bankruptcy is declared in section 5119, Revised Statutes of United States. "A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy."

So the question here is simply whether this claim or judgment might have been proved against the estate of the defendant in bankruptcy.

The claims that are provable in bankruptcy are set forth in sections 5067 and 72, United States Revised Statutes, inclusive. Section 5072 says: "No other debts than those specified in the five preceding sections shall be proved or allowed against the estate."

If this claim, is provable under any of these five sections, it must be under section 5068. That section is as follows: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividends, or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

I made a suggestion at the time of the trial that possibly if no final dividend had been declared, then this being a liability depending upon a contingency, which became absolute before the declaration for final dividend, it might be proved. So evidence was introduced then, and further by leave upon this motion, showing that no final dividend had been declared, and also some evidence tending to show that no final dividend could be declared for want of assets.

The suggestion that I made at the trial, upon further consideration, seems to me to be without force. That section if read by itself might possibly be open to the construction that had then seemed to me to be a plausible one, that is, that if the bankrupt contract any debt upon a contingency, and this contingency occurred before the estate was finally wound up, that the debt must be proved in bankruptcy, but as I say, upon further reflection, I am satisfied that this is not sound.

The scheme of the bankrupt act as set forth in sections 5067 to 5072, is that debts due and payable from the bankrupt at the time of the commencement of bankruptcy, and debts then existing but not payable until a future day, and also contingent debts and contingent liabilities then existing but not becoming absolute until a future day, are the only ones to be considered as discharged; not those subsequently contracted, not contracts upon which at that time there is no liability, but upon which subsequently a liability accrues. Such subsequent liability is as far as the bankruptcy act is concerned, as much without that act as if the contract upon which that liability accrued had been made after the filing of the petition in bankruptcy. So that the occurring of the time of the final dividend strikes me as being immaterial in this case. The clause was put in to fix not what claims should be proved, but what amount. It was for the benefit of the creditor having a claim existing at the time of the bankruptcy, so that if the contingency happen upon which his claim is made certain instead of uncertain, he might prove for a certain amount becoming due him, or he might have the value of his debt ascertained, the court

ascertaining the diminishing value of the contingency. That leaves to be determined here whether this particular obligation which had been assumed by the defendant, was at the time of the commencement of proceedings in bankruptcy a contingent debt or a contingent liability. It certainly was not a contingent debt, because a debt means a demand for a specific sum of money and has so been always construed, and is so expressly defined in section 6057, Revised Statutes, United States, in which a distinction is taken between debts and claims for unliquidated sums.

Is it then a contingent liability within the meaning of section 5668?

The question is an interesting one, upon which there is some division of authorities, owing, as I think, to some lack of careful distinction upon the part of the courts as to the questions that arise in each case.

In ascertaining what meaning should be given to these words it will not be without value to look at the course of the English adjudications under the act of 1849. In 1825, the English act of 6 Geo. IV Ch., 16, was passed. Section 56 of that act provided substantially that if any bankrupt shall, before issuing of commission in bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may have the value ascertained and prove for such value, or if the contingency happen before such valuation is made, then prove for the whole claim that has matured. Under that section it has been well settled that the word "debt" means, as I have previously stated, a demand for a specific sum of money, and that contingent claims for unliquidated amounts were not embraced within the section. To remedy this, in 1849, in revising the bankrupt act, in the act 12 and 13 Vict. Ch., 106, after re-enacting not quite in the same words, but with words of the same meaning, section 56 of 6 Geo. IV, as section 177, parliament added section 178, which provides: "That if any trader who shall have become bankrupt after the commencement of the act shall have contracted before filing of petition for adjudication of bankruptcy, a liability to pay money upon a contingency, which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit, and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be permitted to prove such demands, and receive dividends with the other creditors, and so far as practicable, as if the contingency had happened, and the demand had been ascertained before the filing of such petition, etc."

The construction of the section came before both the court of common pleas and the court of Queen's Bench in the year 1855. The common pleas case is that of *Young v. Winter et al.*, 16, C. P., 401.

It is not necessary to mention it further than to say that the common pleas differed somewhat in their construction with the Queen's Bench and that the holding of the Queen's Bench was the one that has subsequently received the approval of the English courts, and which in 1866 was expressly approved by the House of Lords.

The decision of the Queen's Bench is in *Warburg v. Tucker*, S. E. & B., 384, affirmed in *Cam. Scac., E. B. & E., 914*.

There, Tucker being indebted to Warburg, assigned to Warburg as security policies of insurance upon his own life and upon the life of his wife, and covenanted that he would pay the premiums, and that if he did not pay the premiums that the plaintiff Warburg might pay them and recover from Tucker the amount he so paid out.

Suit was brought by Warburg against Tucker for the amount he had paid out under this agreement for premiums and Tucker pleaded a discharge in bankruptcy. The question arose whether this contract either gave rise to a debt payable under a contingency under section 177, or a liability to pay money under a contingency under section 178 of the act 12 and 13, Ch., Vict., 106. The court of King's bench held that it was not a debt under section 177, because the amount was necessarily unliquidated. They held also that it was not a liability upon a contingency under section 178, because that section contemplated only one contingency upon which the whole liability would accrue, and that here there were successive contingencies. Lord Campbell says: "But we do not think provision is made by the section for a case like this where there are to be successive payments on successive contingencies during the whole of the lives of two individuals, and the life of the survivor— but the section seems to contemplate only the happening of one contingency whereupon the whole demand in respect of the liability shall be ascertained."

This reasoning it will be noticed applies more particularly to the second promise alleged—to repay the plaintiff such premiums as he might pay. The case was taken to the exchequer chamber, and there the recovery on this breach was remitted, leaving only the first breach, that of failure by the defendant himself to pay the premiums in question.

Upon this the exchequer chamber said that even if there was a breach, the recovery of the plaintiff would be not the amount of the premiums, but the amount he was damaged.

There was no liability to pay money to the plaintiff upon a contingency therefore; no liability to the plaintiff at all, until he had been damaged by the failure to pay money to some one else, and then an absolute liability for the amount of the damage.

The ruling of the Queen's Bench upon the other branch of the contract, its suggestion as to one demand payable upon one contingency, has been followed ever since. The case that I have referred to in the House of Lords is *Metcalf v. Hanson*, L. R., 1 E. & I. App., 242, and was upon identically the same sort of contract as that in *Warburg v. Tucker*. It was taken to the house of lords for the express purpose of reviewing the decision of *Warburg v. Tucker* and is of course a definitive construction in England as to the meaning of that section upon such contingencies as that, that is, a continuing liability to pay money upon the happening of successive contingencies. The same doctrine has been applied to contingencies of different kinds, the sole question looked at by the courts being whether there is a simple contingency or a contingency upon a contingency, a double contingency.

In *General Discount Co. v. Stockes*, 17 C. B. N. S., 763, an action was brought by the plaintiff against defendant to recover calls upon his subscription for stock of a joint stock company. The defendant pleaded a discharge in bankruptcy, claiming that he was relieved under section 178

of the act 12 and 13, Vict., and the court all held that the plea was no bar. Earl, C. J., says: "Where a party is the holder of shares in a joint stock company, his liability to pay money depends upon more contingencies than one. There may or may not be a call made and the bankrupt might not be the holder of the shares when the call is made. There may be no existing liability at the time of the bankruptcy; but a liability may arise from the concurrence of these two contingencies."

Justice Byles in the same case says: "Here there are two contingencies at the least—one, whether a call would ever be made—the other, whether if a call were made, the bankrupt would at the time be the holder of the shares. If therefore any case could be imagined in which the existence of two contingencies would prevent its falling within the 178th section, this is that case."

The same precedent was followed so far as a claim coming under that section is concerned, in a case not of the same kind though analogous. *Betteley v. Stainsby*, 12 C. B. N. S., 477.

In that case the defendant, being indebted to the plaintiff, assigned to him certain stock in a railway company and covenanted among other things that he would indemnify the plaintiff against calls that were made upon the stock and also that he would deliver to the plaintiff certain other stocks before given days, and also pay him any dividends declared thereon upon such days. Breaches of the covenants being assigned, and bankruptcy pleaded in bar, the court held that the claim was not provable as a liability to pay money, under a contingency under section 177 and 178, but that it was provable under another section of the act. The calls in this case were made prior to the time when the proceedings in bankruptcy were begun.

This contract subsequently came up for consideration in a case between the same parties. *L. R. 2, C. P.*, 568.

In this case the breach assigned was that the defendant had failed to indemnify the plaintiff against certain other calls made upon the stock assigned to the plaintiff as security—the liabilities upon which those calls were made existed at the time of the bankruptcy, but the calls themselves were not made until after the bankruptcy.

The discharge in bankruptcy was set up again here and in this case also the court held that it was no defense, saying, that it was well established that section 178 only applies when there is a liability to pay money upon the happening of a simple contingency. There it was not a liability to pay money, but the liability was dependent upon a series of contingencies. Such as whether the company was solvent or not; whether plaintiff was selected to pay or not; whether the other shareholders were willing and able to contribute in whole or in part; and finally, if the plaintiff should have to pay, whether the defendant would hold plaintiff harmless.

By this line of decisions, it is evident that in England under these sections (which have since been amended so as to remove some of these objections raised) the liability to pay money on a contingency, refers to the liability to pay money on a simple contingency and if the contingency is two-fold or successive, if there is a liability to pay successive sums upon successive contingencies, it is not within the meaning of the section and a discharge in bankruptcy is not a discharge of the indebtedness, because the claim could not be proved.

In the United States bankrupt act of 1841, section 5, was this provision: "All creditors whose debts are not due and payable until a future day, all annuitants * * * bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts and claims under the act," etc.

It will be noticed that the words are "uncertain or contingent demands" and that the extent of the word "demand" is explained by the subsequent language of the section as covering both debts and claims that is covering both sections 177 and 178 of the English act of 1855 and also equivalent in language to the words "contingent debts" and "contingent liabilities," in section 5068 of the present act.

In *Riggin v. Maguire*, 15 Wall., 549, the Supreme Court held that "under this section, so long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable under the act." And, therefore, "a claim for a breach of covenant that the grantor has an indefeasible estate in fee in land sold—the claim arising from the right of his wife, yet living, to be endowed of the estate—is of this character during the life of the husband."

The court says: "It was uncertain whether there ever would be any claim or demand." And therefore, the claim or demand was not a contingent demand within the meaning of the statute. It was not a contingent demand but an uncertainty whether there ever would be a demand. The same ruling had been made in *Massachusetts, French v. Morse*, 2 Gray, 111, where they held that "a certificate of discharge under the insolvency laws of this commonwealth, or United States bankrupt act of 1841, is no bar to an action brought on a covenant against incumbrances in a deed conveying land, to recover damages sustained by the grantee subsequently to such discharge." The court said: "Whether such cause of action would ever exist was uncertain and contingent at the time when the defendant went into bankruptcy, and also at the time when he was discharged. At neither of those times had plaintiff any existing demand, upon which the cause of action depended on a contingency; but the very existence of his demand depended on a contingency."

"It seems, therefore, that the word "contingent demand" and contingent liabilities, prior to the passage of the present bankrupt act in 1867, had acquired a meaning by construction to some extent, and while the decision of the Supreme Court of the United States was subsequent to the passage of the act of 1867, yet the English decisions were prior to it. Some Massachusetts decisions were prior to it, and they are to be looked upon as throwing considerable light upon the meaning of the act of congress in the use of the phrase that it has used here, and particularly, I think, that the decision in 15 Wall., although occurring subsequently to the passage of the act, is to be considered here as throwing light upon what the Supreme Court would decide in the case, for although the language is different, yet the intent is evidently the same as I have already pointed out, so that I am to look here to see whether at the time the petition in bankruptcy was filed there was any liability or otherwise, existing on the part of the defendant to the plaintiff. If there was no existing liability, then there was nothing to be passed under the bankrupt act. If, that is, instead of being an existing contingent liability, there was

simply an existing contingency whether there ever would be a liability, there was no claim provable under the bankrupt act. The undertaking that the defendant gave to the plaintiff was simply an undertaking of indemnity, that is, to hold plaintiff harmless for anything that he might suffer by reason of signing the bond of Agnes Lake. The bond that plaintiff signed was also strictly an undertaking of indemnity, or, you might say, not an undertaking on his part that he would pay directly any judgment that might be rendered, or any indebtedness of Agnes Lake owing to the then plaintiffs, but an undertaking that if Agnes Lake did not perform the judgment and Greive and Carpenter, the sureties would, that then he would indemnify them.

Clearly there was no liability from Greive to Armstrong, administrator, to these plaintiffs. Furthermore the recovery of the judgment by him against Agnes Lake did not create any liability of Greive, for non-constat but that Agnes Lake would perform the judgment herself. If the judgment of the Exchequer Chamber in *Warburg v. Tucker*, E. B. & E., 914, is to be followed, not even the judgment against the sureties Carpenter and Greive created any liability against Gibbons, for non-constat, but Carpenter the other surety would pay the whole judgment and never call upon Greive to pay any part of it. Be that as it may, it must be conceded there was no liability on the part of Gibbons of any sort at all, until first, there had been a judgment against Agnes Lake and second, a failure on the part of Agnes Lake to perform that judgment; and if a liability was then created, it remains contingent, until third, Greive had paid the judgment or some portion of it, that is, until he had been damaged. Now, in this case, the judgment against Agnes Lake was not recovered until January term, 1877, which was after the filing of the petition in bankruptcy. There being no liability, contingent or otherwise existing at the time of the filing of the petition in bankruptcy, there was, under sections 5067, 5072, no claim which could be proved in bankruptcy. There being no claim which could be proved against the estate, the discharge is no bar.

Judgment on the verdict for the plaintiff.

I should say that the conclusion that I have come to on this section of the act of 1867, is not, I think, although I am not positive, in conflict with any adjudicated case. There are decisions where sureties in the strict sense of the word, that is persons originally liable with or for a person whose default has created the cause of action, have been held to be released by their discharge in bankruptcy; but as to cases upon a collateral agreement such as in this case, to indemnify a person for becoming liable upon another agreement, in which he is not strictly speaking a surety, I am not aware at present of any in which the bankruptcy is held to be a discharge, and there are two at least which are directly in point in holding that bankruptcy is not a discharge. *Eastman v. Hibbard*, 54 N. H., 504 (1874), and *Jacobson v. Horn*, 52 Miss., 185 (1872). This last is exactly in point with the case at bar.

LANDLORD AND TENANT—TRUSTS.

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[Hamilton District Court.]

MEHITABLE C. WILSON v. FREDERICK TISCHBEIN.

1. Where the ministerial section 29 is, by its trustees, leased perpetually to one S. the annual ground rent being devoted to the religious denominations of the township, and the act of congress of February 20, 1833, authorizes the legislature of Ohio to sell the fee, provided they had the consent of the lessee and of the inhabitants of the township, and an act of the Ohio legislature authorizes a sale by the state of the fee to any sublessee, with a right in the co-sublessees, on paying him their proportion, to receive releases from him, a sale by the state to a sublessee, without having procured the assent of the original lessee or his representatives, or the inhabitants of the township, if valid at all, does not work a merger of the estate of the original lessee, and the sublessee's rents are still to be paid. Nor does it work a merger of the ground rent due from the original lessee.
2. Where by will certain rents of perpetual leases are devised to a township, in trust for certain charities, and by annexation to a city the township is merged in the city, but the city neglects to carry out the trust, it is proper for the probate court to appoint a trustee to collect the rents, and appropriate them as required by the terms of the trust.

Error to the Superior Court of Cincinnati.

JOHNSTON, J

This is a petition in error to the Superior Court of Cincinnati, and the facts involved relate to the earliest history of this county.

In the patent to John Cleves Symmes, for the "Symmes" or "Miami Purchase," the United States in 1794 reserved lot or section 29, known as "ministerial section," in every township for the purpose of religion; and in 1810 the legislature of Ohio created a corporation consisting of three trustees and a treasurer, to be elected by the electors of any township containing section 29, for the purpose of taking into their care this section and leasing it out perpetually at a revaluation every fifteen years, and dividing the rent among the religious societies of the township.

Under the act of January 29, 1821, and found in 19 O. L., 89, the trustees with Stone's consent, cancelled his old lease recorded in book F 3, p. 206, of section 29, of Storrs township, given him under authority of the legislature by act of February 6, 1810, and made him a new lease in May, 1821, for ninety-nine years, renewable forever, recorded in book W 2, p. 205, at a ground rent of \$40 per year, and omitted the said revaluation provided for in his former lease.

Under this lease made to him, Ethan Stone made various sub-leases at greater ground rents payable to himself, from one of which plaintiff in error derives her title.

By act of congress of 1833, the United States authorized the legislature of the state of Ohio to sell the fee of ministerial section 29, on certain conditions, namely, provided they had the consent of the person who was its lessee, and the consent of the inhabitants of the township in which the land was situate.

By an act of the legislature of the state of Ohio in 1875, found in 72 O. L., 242, the authority was vested in the governor of the state on certain conditions to sell and convey by deed in fee simple the fractional section 29, to any one of the sub-tenants or sub-lessees of this ministerial section, and providing that, upon payment to him by any one of his co-

sub-lessees of their proportion of the purchase money so paid by him, said purchaser should release to him.

Accordingly, in the same year, one Daniel F. Goodhue, holding a lease as a sub-tenant under the Stone lease, paid the city of Cincinnati, as the legislative act provided, the stipulated sum of \$666.66 and received a conveyance from the governor of the state, recorded in book 445, page 240, of the recorder's office of Hamilton county, purporting to give him an absolute conveyance in fee simple of the 111 acres of fractional section 29; and then, in consideration of \$600 paid him by Mrs. Wilson, the plaintiff in error herein, he released to her and her husband, Davies Wilson, by release, lots 3, 4, 6 and 7 of Taylor, Fuller & Co.'s subdivision, being part of a 17 84-100 acre tract in said fractional section 29, leased by Stone to Julius Wright perpetually at \$30 per year, as recorded in book 128, page 614; and recited in the release, that he did so by virtue of a grant made to him by the state of Ohio.

In 1852, Ethan Stone died and in his will, being the person who made the sub-lease under which Mrs. Wilson claims title, and who had been enjoying the rents thereof, he devised these rents and sub-leases, amounting to about \$1,200 a year, on account of and in memory of his wife, who bore the maiden name of Storrs, to Storrs township, upon certain trusts, namely: that the township of Storrs should pay to the trustees of said ministerial section 29, his ground rent of \$40 per annum due from him to them under his original lease, and \$100 per year to The Cincinnati Orphan Asylum, and \$60 per year to the society for the Relief of Aged and Indigent Females, and the rest of said annual income, being about \$1,000 per year, the said township of Storrs should hold in trust, one-half thereof for the support of the Protestant religion in said township, and one-half for the support of one or more Protestant schools in said fractional section 29. This trust was accepted by Storrs township, and executed, until the township was annexed to the city of Cincinnati in 1869.

After that it seems there was a failure to carry out the trust, and thereupon in 1881 on application of one of the sub-lessees of Stone, Frederick Tischbein was appointed trustee by the probate court of Hamilton county, to go forward and carry out the trusts imposed by the will of Ethan Stone. One of the provisions of the trust was, that the perpetual lease to Stone should be kept up, by paying promptly the \$40, that Stone had covenanted to pay to the trustees, not of the township, but to the trustees of the ministerial section.

Mrs. Wilson, the plaintiff below as already stated, having received a deed from Goodhue to the fee of her portion of the 111 acres in said section, and claiming there was a merger and extinguishment of the leasehold interest, and that she was entitled to hold it free from any claim of rent, under the lease from Ethan Stone, refused to account for or pay her proportion of rent thereunder.

Thereupon she commenced suit against Tischbein, the newly appointed trustee and others, asking that her title might be quieted as against any and all persons claiming under the Stone lease, and that she might be declared to hold the title to her lots free and discharged from all claims for rents under said lease.

Upon the trial of the case below, in the superior court, the court there found the equities of the case to be with plaintiff, as to the parties to said suit other than Tischbein, trustee, but as to Tischbein, found that the

equities of the case were with him, that he was duly appointed as trustee under the devise of Ethan Stone, and had the exclusive right to collect said ground rents, and also found against the city of Cincinnati; that it had no right to collect any of said ground rents, and that there was due in ground rents from Mrs. Wilson, upon lots Nos. 4, 6 and 7, of said Taylor, Fuller & Co.'s subdivision, \$15.10 per year, from 1877 to 1881, amounting to \$80.63, and adjudged that unless she paid that sum to Tischbein, trustee, within the time fixed by the court, that her leasehold estate in said lots be sold. She excepted to this judgment and prosecutes this petition in error to reverse it.

It might be sufficient to dismiss this case with the simple statement, that this court had occasion, as now constituted, some months ago to pass upon the actual law questions involved in this case. The facts there were not as they present themselves here, but it became necessary for this court to decide whether or not the conveyance of the state of Ohio to Goodhue, he being in possession under a Stone sub-lease, annulled and destroyed the lease from the trustees of said ministerial section to Ethan Stone and his sub-lease thereunder. For if that was the effect of that deed, of course, the trust to Tischbein would have no support. The question then was, whether a Mrs. Jackson, who was a devisee under the will of Stone, of a certain portion of these ground rents, could maintain an action for the same against Goodhue, who was in possession as a sub-tenant of Stone. It was claimed there, as Mrs. Wilson claims here, that the deed from the state to Goodhue was valid, and in accordance with law, and that it extinguished the leasehold estate in Goodhue.

The common pleas court, to which error in that case was assigned, found differently, and this court at some length, Judge Smith announcing the decision, affirmed the judgment of that court, finding that the act of the legislature of 1875, did not follow the provisions of the act of congress of 1833, which provided how the state might convey the fee simple of the ministerial section. It is hardly worth while to refer to that act in terms, but one of the significant provisions of that congressional act is, that congress, recognizing it, retained the title to this section, authorized the legislature of Ohio to sell the fee, providing the consent not only of the lessee was obtained, but also of the inhabitants of the township. In this case, the court below seems to have treated those conditions of the act of 1833, as conditions precedent, to the right of the state to convey at all, and, referring to the act of 1875, authorizing the governor of Ohio to convey to Goodhue, held, it did not contemplate the assent either of the original lessee, or the inhabitants of the township and therefore held, that nothing passed by the grant to Goodhue, and that hence all the questions that were ably argued by counsel for Mrs. Wilson had no foundation.

It was of course essential, and the intention of congress was that the two interested parties should be consulted before the fee should be conveyed, to-wit: The inhabitants of the township, which would, of course, embrace all, the religious element therein, and for which section 29 was reserved, and the lessee then in enjoyment of the property under the lease from the trustees of said section. And very properly they should be consulted; for while the lessee might consent to surrender his lease and buy in the fee simple, yet the *cestui que trust*, the inhabitants of the township, might not be willing, that the fee should be thus divested and

sold, feeling that the land itself in the shape of a perpetual lease might be more permanent than if sold, and the proceeds held in some other way.

In this case, as presented by this record, no assent to the sale of the fee to Goodhue was shown to have been obtained from either Stone or his legal representatives or the inhabitants of the township, and we are not prepared to say the court below erred in holding these to be conditions precedent. But even if they were not conditions precedent, and the fee did pass to Goodhue, there certainly did not pass to him anything else than a fee, incumbered with this perpetual leasehold, created by the trustees of the ministerial section in Ethan Stone; and, hence, a merger could not arise as presented by the facts in the case.

We can see how there could be a merger between the state and Ethan Stone, if living, if he purchased from the state. Where a landlord leases a piece of ground to a tenant and the tenant thereafter purchases the fee there is an extinguishment of the lease and the tenant becomes the absolute owner, but in this case there was no privity between Goodhue and the state in respect to these premises. There was privity between the state and Ethan Stone. Goodhue held under a different title. He held not as first lessee, from the state or township, but as sub-lessee under Ethan Stone, attorning to him, and not the trustees of the section.

It is also claimed that the right of the township to collect the \$40 ground rent, reserved by the trustees of this ministerial section in their lease of 1821 to Stone, became extinguished, by reason of the fact that he had devised certain portions of the rents to the township, and, that, therefore, Mrs. Wilson is to a certain extent interested, in having this \$40 ground rent extinguished.

We cannot accept this claim. Undoubtedly, if the deed to Goodhue from the state be null and void, as was held by the court below, it leaves the original perpetual lease in full force and effect. Furthermore the devise by Stone in his will is not made for the same uses and purposes as these, to which the \$40 ground rent by the terms of the lease and the reservation in the patent to Symmes, are devoted; the devise by Stone is, after certain sums are paid, an appropriation of the balance to said township, in trust one-half thereof for the support of the Protestant religion in said township, and the other half for the support of one or more Protestant schools in said fractional section 29: whereas the \$40, exacted from Stone, under his lease, is devoted generally to all religious denominations of the township, which included Protestant and all other religious denominations as well. That, we had occasion some years ago to decide with reference to the township of Millcreek, where the youth of all schools conducted in the township were entitled to share in the income arising from the proceeds of sale of section 16, reserved originally for school purposes under the same patent.

It is our opinion, that there was no extinguishment of this original \$40 ground rent but, on the contrary as very properly argued by Tischbein, trustee, to carry out the will of Ethan Stone, every sub-lessee in that section is interested to see that the trustee protects his title, by paying for the trustees of the ministerial section this ground rent of \$40 per year and thus avoiding the forfeiture reserved in the original lease.

Whether by negligence or otherwise, the trustees of the ministerial section have been lost sight of, we do not know, but it is clear the \$40 should be received and held by them for the purposes intended. All

religious denominations of that township are entitled to a portion of these \$40, because it is devoted to all religious organizations. The city of Cincinnati has no right to take it and devote it to other purposes. The government intended it for the uses of the religious denominations of that township. We think, therefore, that upon the whole record Mrs. Mehitable C. Wilson is merely holding as a sub-tenant under the lease of Ethan Stone to Justus Wright; that her lots Nos. 4, 6 and 7, of Taylor, Fuller & Co.'s subdivision, are properly chargeable with \$15.10 per annum; that said Tischbein, the trustee appointed by the probate court of Hamilton county, was properly appointed and has the right to collect these ground rents, and dispose of them as provided in the will of Ethan Stone.

The judgment of the court below is therefore affirmed.

Gray & Tischbein, for F. Tischbein, trustee.

Jordan, Jordan & Williams, for Mrs. Mehitable C. Wilson.

HUSBAND AND WIFE—LIMITATIONS.

63

[Superior Court of Cincinnati, 1883.]

MATHERS v. HEWITT.

The ordinary engagements of a married woman competent to bind her estate, are not within sec. 4981 Rev. Stat., prescribing a limitation of six years to the bringing of an action on an unwritten contract. An action to subject her estate on such an engagement is in substance not an action at law, but in equity, and is governed by sec. 4985, limiting the time for bringing actions for relief to ten years.

The plaintiff sues the defendant, a married woman, the owner of separate estate, upon a promise made by her, for the fulfillment of which she impliedly bound her separate estate.

The plaintiff sets up the agreement, which was not in writing, and was made more than six years prior to the beginning of the suit, as appears by the petition. He asks that the court declare the separate estate of the married woman owned by her at the date of the agreement, to be charged with the payment of this indebtedness thereby created, and for the sale of so much thereof as may be necessary to satisfy the said indebtedness.

To this petition the defendant demurred, claiming that under the section 4981, Revised Statutes, the cause of action of plaintiff was barred by the lapse of time.

The plaintiff relied on *Jenz v. Gugel*, 26 O. S., 527; *Allison & Townsley v. Porter*, 29 O. S., 136, and *Avery v. Vansickle*, 35 O. S., 273, claiming that by the force of these decisions the section referred to did not apply.

The plaintiff also cited *Norton v. Turville*, 2 P. Wms., 144; *Vaughn v. Walker*, 8 Irish Ch., 458, and *Hodgson v. Williamson*, L. R., 15, Ch. Div., 87, to the effect that the statute does not run against the claim of a creditor of a married woman who seeks to enforce her charge upon her separate estate.

FORCE, J.

Notwithstanding the statute, an action against a married woman to subject her separate estate is, in substance if not in form, a suit in equity.

There is no right to trial by jury in such action, and it goes from the common pleas to the district court by appeal, not by petition in error. *Avery v. Vansickle*, 35 O. S., 270. A justice of the peace has no jurisdiction in such an action. *Alison v. Porter*, 29 O. S., 136.

The action is not an action at law upon contract, for the reason that the cause of action is, not her contract, but her undertaking to charge her separate estate.

She is not liable to action unless she had separate estate at the time she made her contract, *Jenz v. Gugel*, 26 O. S., 527. Though execution issues upon the judgment against her, it does not go against her property acquired subsequently to her making the contract. *Fallis v. Keys*, 35 O. S., 265. Though she executes a note jointly with her husband, it is not a joint obligation;—he becomes thereby liable to an action at law on contract, she only to a proceeding to charge her existing separate estate. *Avery v. Vansickle*, 35 O. S., 270.

Hence the action is not governed by section 4981, Revised Statutes, limiting the time for bringing an action on an unwritten contract to six years; but by section 4985, limiting the time for bringing actions for relief to ten years.

The claim that there is no limitation at all to the time for bringing the action is not well founded. Before the Code, the statute of limitations applied only to actions at law, not to suits in equity. Under the Code it applies to all "civil actions" of whatever nature.

Wilby & Wald, for plaintiff.

Foraker & Black, for defendant.

ATTACHMENT—BASTARDY.

[Pickaway Common Pleas, 1883.]

FLORA ARBAUGH v. JOSEPH MYERS.

The right to garnishee property of a debtor in the hands of "any person," under sec. 5530, Rev. Stat., includes the right to garnishee his funds in the hands of his guardian; as, where, in a proceeding in bastardy against a minor, he has absconded, funds in the hands of his guardian may be garnisheed.

This was a proceeding in bastardy. The defendant was a minor and had absconded. An attachment was issued and process of garnishment was served upon the guardian of said Joseph H. Myers. The guardian answered that he was not personally indebted to the said Myers, but that he held money in his hands as guardian of said Myers. A motion was made to dismiss the attachment on the ground that money in the hands of a guardian could not be attached for a debt of the minor.

The opinion of the court was substantially as follows:

BY THE COURT:

"Section 5530, Revised Statutes, provides that when the plaintiff makes oath in writing that he believes that any person or corporation has property of the defendant in possession, etc., he shall leave with such garnishee a copy of the order of attachment and notice, etc., etc."

It will be observed that the statute uses the expression "any person." It makes no exception and we contend it means what it says. Why should the court by a sort of judicial legislation interpolate the words "except a guardian or administrator" after the words "any person?"

Section No. 5531 provides that the service of process on the sheriff, coroner, clerk, constable, master commissioner, marshal of a municipal corporation or other officer having in his possession any money, claim or other property of the defendant, shall bind the same from the time of such service and shall be a legal excuse to such officer for not paying over the money to the defendant.

It will be observed that public officers are made liable to the process of garnishment.

Prior to this statute, public officers, such as sheriffs, Drake on Attachments, section 503; clerks of courts, Id. section 509; receivers and trustees, Id. section 509 *a*; justices of the peace, Id. section 510; assignees of bankrupts and insolvents, Id. section 511; disbursing officers, Id. section 512; municipal corporations, Id. section 516, were not liable to garnishment at common law.

In Ohio this question arose in the case of *Dawson v. Holcomb*, 1 O. 135, and it was held that money in the hands of public officers could not be garnisheed, because it was contrary to the policy of the law.

But the legislature have since entertained a different opinion and they have made all public officers liable to garnishment.

If by express words of the statute all private persons, all corporations and all public officers are liable to garnishment, on what principle should guardians and administrators be exempt? An administrator or guardian is either a public officer or a private person, and he comes within the meaning of the express words of the statute to-wit: "any person."

We think this question is settled so far as good sense and argument are considered by the case of *Bray v. Wallingford*, 20 Con., 416. The language of the Connecticut statute is: debts due from "any person" to a debtor may be attached.

The Supreme Court of Connecticut, with the good sense which characterizes all their decisions, held that "any person" included a municipal corporation, and that money in the hands of a corporation, to-wit: a town, might be garnisheed.

The reasoning of the court there disposes of all the argument about "inconvenience." If the words "any person" include a municipal corporation, why don't they include a guardian or administrator?

As the statutes of Ohio on this subject make every corporation, every public officer and every private person liable to the process of garnishment, it would be a strange thing to interpolate an exception in favor of an administrator or guardian.

Motion overruled.

Page and Abernethy, for plaintiff.

S. W. Courtright, for defendant.

65 ELECTRIC LIGHT COMPANY—MUNICIPAL CORPORATIONS.

[Hamilton Common Pleas, 1883.]

JOHN R. McLEAN v. THE BRUSH ELECTRIC LIGHT CO.

1. Though the fee of a street in a city be in the city, and not in the abutting proprietors, the city holds it in trust for such uses only as come fairly within the intentment of the original grant for such uses, and, without obtaining the abutter's consent, or acquiring his interest, no other use can be imposed upon the street. Therefore, without acquiring such interest, the city cannot give to an electric light company the right to plant poles in the sidewalk in front of each abutter, against his consent.
2. It is no answer that a single pole does no material injury, for, if the right to plant one pole can be given, other companies could receive the same right, and the property might, by successive grants, be shut in as by a picket fence.

MAXWELL, J.

This case comes up for hearing on a motion to dissolve a temporary restraining order heretofore granted by one of the judges of this court.

The plaintiff claims that he is the owner of a lot abutting on Vine street between Sixth and Seventh streets, in this city, and that as incidental to the ownership of the lot, he also owns to the middle of the street, in front of his premises. He alleges that the defendants, without having obtained his consent, and without having in any way compensated him therefor, are about to plant a large pole in the edge of the sidewalk in front of his premises, and that if they do so, it will interfere with his access to and his enjoyment of his premises, and will materially injure him, and he asks that they be restrained from so doing.

The defendants admit that the plaintiff is the owner of the premises claimed by him, and that they are about to plant a pole in the edge of the sidewalk, in front of said premises, but they deny that the plaintiff owns to the middle of the street, and allege, on the contrary, that the city of Cincinnati owns in fee the street in front of the premises of the plaintiff, and that the city by an ordinance duly passed by the common council, March 3, 1882, and approved by the mayor and the board of public works, granted to the defendants the right to plant their poles in the streets of the city and to attach wires thereto, for the purpose of conducting electricity, and furnishing light to the patrons of the defendants, and they claim to be acting under that ordinance.

A copy of the ordinance is attached to the answer of the defendants, and appears to be in due form, so that the question for consideration is fairly presented as to what are the respective rights of the city, and the plaintiff, in Vine street, in front of the plaintiff's premises, including in the general term, street, the sidewalk.

It will be observed that both parties, the plaintiff for himself, and the defendant relying on their grant from this city, claim the fee in the street, but it will be found, I think, that the city holds the street in trust for certain public uses, and the question will be then whether the use sought to be made of the street by the defendants is one of those public uses.

Streets in municipal corporations in this state are usually acquired in one of two ways, either by voluntary grant, made by proprietors of tracts of land, in laying out lots, or by proceedings in condemnation and appropriation, taken by the corporation. In regard to the first method, section 2601, Revised Statutes, provides, that proprietors of ground in a municipi-

pal corporation, who subdivide the same for sale, shall make plats of the same, describing the streets thereon, and that the plat shall be recorded, and "thereupon the map or the plat so recorded shall be deemed a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended." This section is the same in substance as section 6, Ch. 867, Chase's Statutes, 1846, passed March 3, 1831. As Vine street in front of the plaintiff's premises is in the old part of the city, it comes within the terms of this statute, and, as a consequence, the city holds it in trust for such public uses only as come fairly within the terms, or intendment, of the original grant, and, in the absence of any express terms in the grant, extending or limiting the use, the city must be taken to hold the street, in trust for such uses only, as the grantor could fairly have contemplated at the time he made the original grant.

The foregoing proposition seems a simple one, and perhaps no one will dispute it, but as it lies at the foundation of cases like the one at bar, and, as the conclusions which I think must follow, may be disputed, I will briefly refer to some of the cases decided by our Supreme Court. In the case of *Crawford v. Village of Delaware*, 7 O. S., 459, the court says, as to the rights of abutting lot owners, p. 469, "the latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim, a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds and the erections thereon, an incidental title to certain facilities and franchises. This easement, appendant to lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself. Applying the above principles, the court held that the plaintiff, who had been injured by the village cutting down the street in front of his premises, was entitled to compensation. Again, in the case of *Street Railway v. Cumminsville*, 14 O. S., 523, 532, applying the same principles, the court enjoined a street railroad from laying their track in the street, until they had obtained the consent of the abutting lot owners, or otherwise acquired their interest in the highway; by their meaning of course the interest the abutting lot owners had in the highway as distinct from the local or general public. In this connection the reasoning of the court on p. 458 will be found interesting. Again, in the late case of the *Scioto Valley Ry. v. Lawrence*, 38 O. S., 41, applying the same principles, the court refused to disturb the judgment of the court below, enjoining a steam railroad from laying its track in the street until it had obtained the consent of the abutting lot owners, or otherwise acquired their interest in the street. In that case the court held, that, "it is immaterial whether the fee is vested in the city or in the abutting lot owners so long as it is held upon the same defined uses." In the state of New York it is held that municipal corporations own the fee in the streets in the strict sense, and the decisions of their courts have been somewhat at variance with ours, but in the late case of *Caro v. Elevated Ry. Co.*, 19 Am. Law Reg., 376, the Supreme Court of New York City have adopted the same principle so long maintained by our Supreme Court, and held that railways must compensate the abutting lot owner for taking from him the quiet enjoyment of his premises to which he is entitled, as between himself and the general public using the street.

It seems to me clear then, from principle and authority that although the uses to which a street may be put, under a grant for street purposes, may include not only the sewers, water pipes and gas pipes, as these are all put under the ground, and do not interfere with the abutting lot-owner, it is equally clear that this right cannot be extended so as to impose any burden, no matter how slight, on the original proprietor, or his successor in the ownership of the abutting lot, unless a new grant be made, in short without obtaining the consent of the abutting lot-owner, or otherwise acquiring his interest in the highway.

It follows as a matter of course, that the use sought to be made of the street by the defendant, under the grant to it, not being part of or in furtherance of the use of the street as such, but in fact adverse even to the interest of the general public therein, cannot be said to come within the scope and the spirit, or fair intendment, of the original grant and the abutting lot owner cannot be required to submit against his consent, and without having been first compensated therefor.

It is contended that a pole of the kind sought to be put by the defendant in front of the plaintiff's premises, will do no material injury to the plaintiff. Grant that the one pole does not, the city as it cannot give a monopoly to any one, must give the same right to every company that wishes to put a pole in front of the plaintiff's premises for lawful business purposes, and when the plaintiff is shut in by a picket fence, how can the court say which pole it is that injures the plaintiff, or which pole shall give place to the other.

The motion to dissolve the injunction will be overruled.

Campbell, Bates & Von Martels, for plaintiff.

I. M. Jordan, for defendants.

DECEIT—EVIDENCE—JUROR—NEW TRIAL.

[Hamilton District Court.]

DOKES v. SOARDS.

1. Evidence of plaintiff's loss of time, in an action for deceit in the sale of a business, or evidence of what sum plaintiff offered to re-sell to defendant, or the price at which he sold out his other property, are immaterial and it is not error to exclude such testimony.
2. An objection to the competency of a juror, on the ground that he could neither understand nor speak English, is waived unless such juror is examined and challenged.
3. It is not an abuse of discretion to overrule a motion for a new trial, on the ground of surprise and newly discovered evidence, where the only surprise is that the jury were influenced by the fact that certain pages were torn out of an account book, and that defendant denied a receipt of such, and the newly discovered evidence consisted of the missing pages of the book and a transcript of a justice bearing upon the question of rent.

Error to the Superior Court of Cincinnati.

AVERY, J.

The errors assigned are the exclusion of evidence and the overruling of a motion for a new trial.

The action was for damages by reason of alleged false and fraudulent representations in the sale of an undertaking business to the plaintiff, and the alleged failure to fulfill promises to assist him with the trade in the business and to assign the unexpired term of a lease of the premises.

The evidence excluded was, the loss of time and labor in the business, which was immaterial, for by the purchase the business had become his own, and it was time and labor expended in his own business; the price at which the plaintiff offered to resell to the defendant, which was likewise immaterial except as bearing upon the value, and in that respect it was simply the plaintiff's own declaration; the fact, that the defendant shortly after the sale, sold out all his other property to his brother, for \$20,000, which had no possible bearing upon the issues of the case.

The motion for a new trial was upon the ground of newly discovered evidence and surprise; and that a juror was not competent to understand the English language; and that the verdict was against the law and evidence. So far as this last ground is concerned, the bill of exceptions does not set out the evidence. Surprise and newly discovered evidence furnish no ground upon which error can be assigned, except where the facts are found by the court, or admitted, or where there has been a manifest abuse of discretion. *Smith v. Bailey*, 26 O. S., 1. Where the only surprise was that the jury were influenced in their verdict by the fact that certain pages were torn out of an account book and that the defendant denied a receipt of rent,—the newly discovered evidence consisting of the missing leaves of the book, and a transcript from a justice of the peace bearing upon the question of rent,—it cannot be said that the court abused its discretion in overruling the motion.

As to the incompetency of the juror, there is an affidavit of a neighbor of his, and of one of his fellow jurors that he could neither speak nor understand English except imperfectly and with difficulty. The want of a competent knowledge of the English language is a ground of challenge, section 5077, R. S.; (77 O. L., 570), but is nothing more. It does not appear that there was any objection to the competency of the juror, or that he was examined as to his qualifications. The general rule is, that an objection to the competency of a juror will be deemed waived unless he is examined or challenged, and that the mere ignorance by the party of the fact is not enough. This is a rule indispensable to prevent constant mistrials. There is no hardship in it; it simply imposes that diligence in making inquiries, which should be exercised when the jury is impaneled rather than be left until after the verdict.

Eastman v. Wight, 4 O. S., 157; *Kenrick v. Reppard*, 23 O. S., 333; *Watts v. Ruth*, 30 O. S., 32.

Affirmed.

MEMBERS OF CHAMBER OF COMMERCE.

76

[Hamilton District Court.]

ISIDORE BLUMENTHAL v. CINCINNATI CHAMBER OF COMMERCE.

1. In the trial, in a Chamber of Commerce, of charges against a firm, such corporation is not bound to acquit or convict the whole firm but may convict and punish the member of the firm which it finds to be guilty.
2. Charges of "unmercantile conduct in fraudulently charging purchaser with 300 or 400 pounds of meat to the car more than it actually weighed, and saying that was the weight actually bought of us," are sufficiently specific to render a sentence valid.

†For decision of the Superior Court which this decision affirms, see *ante* 410.

3. A provision in the constitution adopted by a corporation, especially one like a chamber of commerce, delegating the power to try and punish members, is legal.
4. A corporation, trying one of its members is not bound by the strict rules of evidence and a conviction is valid though hearsay evidence was admitted.

Error to the Superior Court of Cincinnati.

JOHNSON, J.

This action was brought to recover \$25,000 as damages, upon the ground that plaintiff was unlawfully and without any just cause whatever, disfranchised and suspended from the exercise of his rights as a member of the defendant. The petition avers in substance that he had long before 1881, become a member of the chamber of commerce and merchants' exchange, a body corporate and politic in this city, where merchants assemble for the purpose of transacting business; that without any authority whatever, without notice and without any trial, he was suspended as a member and denied the right to appear upon its floor as a member, or to enjoy any of the benefits that accrued to him from being a member of that body, for all of which he sustained damages in the sum of \$25,000.

The answer of defendant is that plaintiff was a member of that body; that he was a member of the firm of Samuel Hill & Co., and thereby a member of the defendant; that in accordance with the rules and regulations and by-laws governing this corporation, he had been charged by one of its members with, and had been tried for unmercantile conduct, in that he had bought of one of the members of the chamber, a lot of pork at a certain weight, and sold it elsewhere at a greater or false weight. The defendant alleges that he was under the by-laws and rules and regulations governing the corporation, notified of this charge, as also the firm of Samuel Hill & Co.; that he appeared at the trial before the board of officers of the defendant; that evidence was introduced; that he was found guilty, and that by a vote of over two-thirds at least, the requisite vote according to the by-laws, he was found guilty, and the punishment was that he should be suspended indefinitely as a member of the defendant and from participating in his privileges and rights as a member; that this action of the board of officers was duly announced in accordance with the by-laws and regulations of the defendant; therefore it denies any liability whatever to the plaintiff, but claims that it acted strictly in accordance with its charter and by-laws and is not answerable to the plaintiff in damages at all. The cause was submitted to a jury. During the progress of the trial various exceptions were taken to the refusal of the court to permit the plaintiffs to introduce certain testimony offered by plaintiff, and to certain rulings of the court refusing to rule out certain evidence that came in under the cross-examination of plaintiff's witnesses. Upon the close of the plaintiff's testimony the defendant moved the court to arrest the case from the jury and give judgment for the defendant. It seems upon full argument of that question before that court, the trial judge at length gave his reasons and sustained the motion, and the case accordingly was arrested from the jury and judgment given for defendant dismissing plaintiff's petition. To this exception was taken and a motion for a new trial was overruled and exception taken. The plaintiff in his petition admitted that he was suspended by virtue of an order made by the board of officers, but the chief claim made by the plaintiff on the trial, seems to have been that the corporation did

not prefer against him any specific charge; that no specifications were set out against him; that the board of officers before which he was tried had no jurisdiction of the offense, nor had they a right to try and suspend him. The question therefore for consideration upon this record is whether or not it presents the fact that the defendant did prefer charges, such as were properly within its charter, constitution and by-laws for which he was triable, and if such charges were preferred against him, the question then arises whether or not he had a fair trial upon such charges. A further question arises, whether or not this board, if it did try him upon proper charges, and did give him a fair trial, possessed the power to declare him suspended from the privileges and rights that he had theretofore enjoyed. The charter under which the defendant became a body corporate and politic in 1850, is a part of the record. The constitution thereafter adopted and last amended in 1874, forms also a part of the record in the case, as well as the various by-laws and regulations, governing its members. The rights of this plaintiff must be determined by them.

He admits that he became a member of the defendant prior to 1881, and therefore becoming a member of the defendant, he submitted himself to and it became his duty to abide by the charter, the constitution and rules and by-laws adopted for the government of its members. He is presumed to have assented to each and all of them and expressed his entire willingness to be governed by them.

Section 2 of the charter, passed in 1850, contains this provision: "The members of said chamber of commerce shall fill all vacancies in the board of officers during the year, and also shall have power to make by-laws and regulations for the government of said chamber of commerce; assess pecuniary fines for a breach thereof, and do all such acts as pertain to the chamber of commerce."

I will here read enough to show who constituted the board of officers.

"The administration of its affairs shall be under the exclusive direction of the said chamber of commerce. * * * officers shall be members of said chamber of commerce, * * * consisting of a president, six vicepresidents, treasurer and secretary, who shall hold their office for one year,—until their successors shall be chosen."

This board of officers is thus composed of nine members of the corporation. Now, turning to the constitution enacted by the defendant, we find under section 2, art. 6, this provision: "The board of officers shall have power to examine charges of misconduct in business matters preferred against any member of the chamber, when made to the president or secretary, in writing, by a member of the chamber, and if the party charged be found guilty thereof, or of breach of contract, fictitious reports of sales or, of any other act contrary to the spirit which should govern commercial transactions—the board shall have power to reprimand, suspend and expel such member," etc.

Thus we see the charter empowered the defendant to enact all necessary by-laws and regulations for its government and we see by turning to its constitution which is the law of the corporation, that the members in accordance therewith have constituted a forum before which members may be tried, and particularly defining the reasons that would be sufficient to put any of them upon trial. Referring to the charter, it does not in terms fix any particular ground upon which any member may be ex-

pelled and in this respect differs from the charter of many like corporations existing in other states. It appears that in chartering this defendant the legislature saw proper to leave the corporation itself to designate what causes would be sufficient to put a member on trial and for what to be expelled, thus vesting this corporation with very plenary powers in respect to its government and the government of its members. In accordance with this legislative grant it went forward and did enact a constitution, that embodied its law or laws by which each and all of its members were to be governed and in this constitution or code of laws is the provision which has just been read, section 2, ch. 6, wherein the corporation has seen proper to devolve the duty, or delegate the power to try members for breaches of mercantile conduct and good faith to the board of officers, and giving them the right in their judgment to either expel or suspend its members. This is the source of power vested in the board of officers. That this power may be delegated and exercised has been decided in New York, Illinois, Wisconsin and other states. The wisdom or policy of such a forum to try cases of this kind rather than the whole body is very clear. A corporation numbering as this does several hundred members, it would be utterly impossible for that body to sit as a body, and hear evidence touching the unfaithfulness of one of its members that might last days and sometimes weeks. It would be impossible for the chamber to attend to its ordinary business and meet the purposes for which it became a body corporate.

This power has been recognized in 61 Ga., 86, 8 S. & R., 254, 18 Abb. Pr., 271; 45 Ills., 112; 47 Wis., 670; 82 Ills., 134, and the same principle is to be found fully sustained in "Field on Corporations."

Thus the corporation having as we hold within its charter designated that a board of officers might try a member for unmercantile conduct, the next question that arises is whether or not the plaintiff had notice that any charge of unmercantile conduct was preferred against him and whether he ever had a trial before this board of officers, had a fair trial before it, and if he had, whether or not that board by properly exercising its judgment did suspend him, and whether if it was done, it was without any malice toward him.

During the introduction of the testimony of the plaintiff and before the plaintiff rested his case, there was introduced in evidence the proceedings of the trial before these officers in May 1881. As part of this record we find this to be the charge against Mr. Blumenthal.

"May 16, 1881.

"To the Honorable Board of Officers of the Cincinnati Chamber of Commerce:

"Gentlemen:—We hereby prefer charges of unmercantile conduct against Samuel Hill & Co. in fraudulently charging purchaser with three to four hundred pounds of meat to the car more than it actually weighed and saying that was the weight actually bought of us, thereby injuring our business and leaving a stain upon the character of merchants of our city. Hoping you will give this your prompt attention We are

Yours etc.,

"F. A. Laidley & Co."

F. A. Laidley & Co., it appears from the record, is a firm engaged perhaps as brokers and commission merchants, in this city. It seems

that in April, 1881, Samuel Hill & Co., purchased a lot of pork and hogs-heads of Laidley & Co. The weight thereof being 26,290 pounds in gross, salt 263 pounds, of which being deducted left 26,027 pounds net.

It appears that this was at about the same time shipped by Samuel Hill & Co., and billed as weighing 26,490 pounds, an increase of 463 pounds. It appears from the record made before this board of officers, that at the same time, Samuel Hill & Co. bought of this same firm of Laidley & Co., a number of packages,—they call them packages,—of pork, containing 26,330 pounds, which Samuel Hill & Co. shipped about the same time to Macon, Ga., the former to Atlanta, Ga. This last was shipped as containing 26,650 pounds, and billed to parties in Macon, Ga., being an increase over that bought and paid for of 320 pounds. Thus in the two shipments there was an excess of nearly 800 pounds, over the proper weight.

It appears from this record—I refer to the trial had before the board of officers—that other persons who were shipping pork from this city to towns south had their attention directed to the dealings of this firm, and it had been to them altogether an enigma as to how it was that buying pork in this market at the same rates that other merchants were buying and shipping to points south, that Hill & Co. could afford to undersell other merchants paying the same prices and same railroad rates, and it appears that parties to whom this pork was consigned, discovering this discrepancy in the weight, set about to investigate the case. They notified Samuel Hill & Co. of the shortage, who then through Blumenthal said it must be a mistake as the pork came from a good house, to-wit: the house of Laidley & Co., of Cincinnati. This brought Laidley & Co. upon the field, and from the correspondence attached to this record, it appears that quite a considerable amount of inquiry was made by Laidley & Co., through their correspondent at Atlanta and one at Macon to ascertain the facts.

The correspondence is attached to the record; it states the facts and representations made, and attempted explanations about the short weights. The packages which went to Macon were not only short in weight, but unmerchantable stuff—sour. Mr. Blumenthal also introduced in evidence before this board letters he had received in correspondence about this pork, one of them being of a damaging character in our opinion, written May 26, 1881, signed by one Fears, the agent of Samuel Hill & Co., at Atlanta. It was written for the purpose of being used before this board upon the trial evidently, because it was addressed, "To whom it may concern."

It reads: "Commenced business as broker for Samuel Hill & Co., of Cincinnati; in January, February, March and April sold for them, 123 (1,000,000) pounds meat and on February 21st, they wrote me as follows: "will say we guarantee full weight, of course they must expect some reasonable shrinkage in weights and quality on everything we sell etc.," in every instance of overcharge or error in weights, they have promptly corrected and paid, etc. During this investigation before the board in addition to this correspondence of the firm, Laidley & Co. took the stand and testified as having sold this lot to Samuel Hill & Co., and introduced evidence as to the weight at which Samuel Hill & Co. had billed it south. Laidley & Co. called Mr. Blumenthal who was the plaintiff in the case to

the stand. I desire to read a portion of his testimony which was developed in the trial before the board of officers.

The question put to him by Mr. Reed, who it seems according to the rules and regulations of the Chamber appeared in this case as prosecutor for Laidley & Co., was this: "You acknowledge you sold 563 packages clear sides 855 at Atlanta and billed them to Fears, the agent at 26,490 and Laidley & Co. got them at 26,027?" Answer, "Yes sir."

That one question and answer sustained the charges made by Laidley & Co. That was exactly what they charged them with having done; he said he did it. He claimed both before the board of officers and upon the trial of this case that it was through inadvertence and mistake. Some objection was made by Mr. Rowland, that the charges were not specific enough, that there ought to be something more specific set out in writing to enable Hill & Co., to know better, against what they were to defend, but the board of officers, thinking the charges specific enough, overruled his motion and thereupon the record shows, instead of Hill & Co., contesting further they said, "very well, if the board think the charges specific enough we are ready to go to trial." It was also claimed at one time, that the board had proceeded improperly when the question was raised by Mr. Rowland, as to the jurisdiction of this board, to try Hill & Co. for this offence. The record shows that upon objection being made, the board by a yea and nay vote decided that it had jurisdiction, as the constitution provided it should. Thereupon Mr. Rowland for Hill & Co., proceeded to examine witnesses called by Laidley & Co., and put in their evidence. Of course, looking at this record, much of the evidence introduced upon either side, would not stand the test of competency in the courts of justice, where rules of evidence are strictly enforced; much of the testimony introduced upon either side was purely hearsay and so far as appears, no objection was made to the same. Laidley & Co. put in their correspondence from the south, Hill & Co. did the same thing, so that it was a stand off in that respect. Looking therefore at the charge, we think that it was sufficiently specific. The object of this defendant, the chamber of commerce and merchants' exchange, is to inculcate, to encourage and to maintain a high standard of mercantile honor, or as some of the like associations in other states set out in their preamble, "The object is to promote just and equitable dealings in trade, to correct abuse, establish and maintain uniformity in commercial transactions, to acquire, preserve and fulfill business relations and measures, as may advance the mercantile and manufacturing interests of the city." These are the prime objects of such associations. Now there are certain powers in corporations of this kind, in fact, in almost all corporations, that are inherent, that exist in the very nature of things, and without which, such corporations would be unable to exist or achieve the purposes for which they were organized. Where the charter does not set out any special grounds, upon which a member may be tried, convicted and expelled, it has been held by a long line of authorities, that for any one of these three things, a member may be expelled or suspended. First. Where it is ascertained, that he committed an offence of so heinous a character, as to render him unfit to associate with honest men. Second, where he has been guilty of an offence against his duty manifestly as a corporator. Third, where he has been guilty of an offence, compounded of these two. Now, these three offences are not conclusive of the question, but where as in the case

at bar, the charter gives the corporation the right to adopt rules, by-laws and regulations for the government of its members, the corporation may define the charges upon which its members may be arraigned and tried, the character of the charges depending in most instances upon the character of the business, or object for which the corporation became a body corporate. What was the offence with which Samuel Hill & Co., was charged? It was unmercantile conduct. Of what did it consist? Of a character detrimental to the very existence of this defendant. I have stated some of the reasons for which a corporation like the defendant becomes incorporated. It is among other things to establish a high grade of commercial integrity and honor among its members, to advance the interests of trade and commerce to inculcate just and equitable principles among merchants in their dealings with each other. The plaintiff here, a member of the firm of Samuel Hill & Co., was charged with having bought of one of its members, 26,000 pounds of pork and with having billed it to another firm of business men in Georgia with an increased weight of nearly 500 pounds, and undertaking to collect it, and when confronted with the fact that there was a variance and false weight, instead of shouldering the responsibility themselves as they ought to have done, Laidley & Co., a member upon the floor of the defendant are brought into the transaction in this that Hill & Co., said that the firm south received that pork just as it was bought from Laidley & Co., Cincinnati, thus pointing to them as persons conniving at a crime, for it is a crime in this State to sell under false weight, and seeking to cast the blame from their shoulders and lodge it upon the shoulders of Laidley & Co.; hence it was this charge was preferred, first, unmercantile conduct in buying pork at one weight and selling it at another immediately thereafter which was a false weight, secondly, in imputing this charge or delinquency or crime to Laidley & Co. Now looking at the record of this trial before this board of officers, we think that the charge was sufficiently specific against Samuel Hill & Co., we think that the charge was one within the meaning of its constitution, by-laws and regulations, and we are of the opinion that Samuel Hill & Co. had a fair trial before the board of officers, composed of men of high character and standing as merchants of this city—a forum assented to by Mr. Blumenthal and Mr. Hill when they became members. It does not appear from the record that there was any malice on the part of these triers against Samuel Hill & Co., and we are satisfied from the examination of that record, that these charges and certainly the charge of consigning pork under a false weight to Atlanta was sustained by the weight of competent evidence in the case.

It appears from the testimony when we examine the record before the board of officers, it fairly is to be inferred from it that this was not a mistake, this 456 pounds in the shipment to Atlanta, and looking at the letter of Mr. Fears, it seems that this new firm outstripped everybody else in selling goods of this character in the south; that it had been dealing with Mr. Fears only since January last, that there were too many mistakes. that occurred all on one line of through freights, to have been considered as mere mistakes. It would seem that there had been a systematic plan arranged upon the part of this firm of buying at one weight, a proper weight, and selling at another or false or lighter weight. In no case did this firm, although the record develops three or four instances of this short weight inside of three or four months, stand a suit but invar-

ably settled. Thus it was that the board of officers decided by a proper majority that the charge had been sustained against plaintiff in this case, Mr. Blumenthal, member of the firm of Samuel Hill & Co., but that Samuel Hill did not participate in the wrong, and therefore they acquitted him. Some objections were made during the progress of this trial, that the board of officers had no right to pronounce such a judgment, but that if they found Blumenthal guilty, it was the duty of the board to expel both or suspend the whole firm. The record presented by the trial court shows that since the amendment of the constitution as last amended in 1874, it has been the custom in trying a firm for delinquencies of this or any other kind, to try the whole firm, but it is found that one member of the firm is more guilty than the other to grade the punishment, and if they can find one ring-leader, the severest punishment is put upon him, and upon any other not so delinquent, and a lighter punishment, if there be any member of the firm not implicated very justly to acquit him. This, it appears from the testimony of Mr. Rowland, as well as from Reed, has been the custom followed in the trial of cases before this board since 1874, and we think it not an improper custom, nor one contrary to public policy. Therefore it is that we have reached the conclusion that when the plaintiff rested his case in the trial court, it having appeared that the defendant had lawfully vested the power in the board of officers to try members for delinquencies, and for offences of the character of which Samuel Hill & Co. had been charged and the board of officers having tried the charge preferred against this firm, the firm having had due notice of it, having appeared at the trial, and the evidence having sustained the charges, being such as it was in the power of the defendant to determine as an offence for which a member might be expelled, and in fact it being an offence over which the corporation it might be said, possessed the inherent power to expel a member, and there being no evidence tending to show any malice on the part of the board, and the firm having had a fair trial before the board, and the charges having been sustained by a fair preponderance of the evidence, it left nothing for the jury to pass upon. And in our opinion, therefore, there being nothing at all for the jury to pass upon, a motion to arrest the case from the jury was properly made and the court did not err in sustaining it, and the judgment of the court below is affirmed.

O'Connor, Glidden & Burgoyne, for plaintiff in error.
Hoadley, Johnson & Colston, contra.

CONTRACTS IN RESTRAINT OF TRADE.

[Hamilton Common Pleas, 1883.]

JAMES H. EMPSON v. FREDERICK BISSINGER AND WIFE.

1. An agreement on sale of a business not to engage, "directly or indirectly," in the same business for five years in such city, is broken by acting as manager or employe in a competing business in the same city or in other places where the articles made are designed for sale in such city.
2. If a man's wife carry on such business, employing him on a salary or giving him support in lieu of salary, is a mere evasion, and he will be enjoined from assisting her and she from employing him or selling goods made by him elsewhere.

CONNER, J.

The petition sets forth that the plaintiff was induced by Frederick Bissinger and his wife to purchase a confectionery and candy business, carried on by them, on Fourth street, the consideration being \$4,000; that Bissinger pledged himself not to engage in that business, directly or indirectly, or any branch thereof, in the city of Cincinnati, for the period of five years; that the consideration of \$4,000 was paid, and Bissinger left the city, going east, but returned to Cincinnati in about one year; that about the same time business was opened at two points in this city by Mrs. Bissinger, and that her husband was interested in it. The plaintiff prays for an injunction and claims damages.

Frederick Bissinger files a separate answer, admitting the execution of the contract and the payment of the money, but denying that he was connected with the business carried on by his wife, which he alleges was her sole and separate property, his only connection therewith being that of an employee at \$25 a week for a few weeks. The wife answered to the same effect, she also alleging that she was not a party to the contract, and that the business was her individual property, free from the control or interest of her husband.

The state of facts before the filing of the petition were these: Frederick Bissinger was a manufacturer of fine French candies in this city, where he built up an extensive and valuable business, his candies acquiring a well established reputation. Empson knowing of the reputation Bissinger had acquired in his business, concluded to purchase the same, and did so, for the agreed sum of \$4,000. Previous to the sale, Mrs. Bissinger was the chief saleslady in the store, her husband rarely appearing, but devoting his time and attention to the manufacture of what was known as a very fine, high grade of candy. The contract under which Empson purchased contained a clause, by which Bissinger agreed that he would not, directly or indirectly, engage in any branch of the said business in Cincinnati, within five years from the date of the agreement, and, in consideration of this transfer of property and good will, Empson paid the mon-

Contracts of this description are in restraint of trade, are opposed to public policy, and are not encouraged. The language of the Supreme Court in *Thomas v. Admr. of Miles*, 3 O. S., 274, is the strongest language with respect to contracts in restraint of trade that I have met with, and I question whether, if the Supreme Court were passing upon the question now, it would use such forcible and vigorous language as it did then. In *Lange v. Werk*, 2 O. S., 519; that court remarks that "all contracts in restraint of trade are opposed to public policy and void, and those in partial restraint are also illegal, unless there is a valuable consideration, and good reasons appear for entering into the contract. Before, then, such a contract can be enforced, it must appear from the pleadings and proof, first, that the restraint is partial; second, that it is founded upon a valuable consideration; and, third, that the contract is reasonable, and not oppressive." There is no question that, in this case, the restraint was partial, limited to Cincinnati, and limited to five years, and no question that it was founded upon a valuable consideration. Mrs. Bissinger testifies that the good will was worth all the sum that was paid for it. The chief consideration was for the good-will, the stock, fixtures and machinery being all of trifling importance compared with the good-will, and Bis-

singer, before the suit was brought stated that another confectionery would have given more than double that amount.

It was undisputed that the Bissingers went to Boston, and remained away more than a year; that Bissinger lost his money, and, becoming involved, desired to return to Cincinnati and re-open his business. He first requested a loan of money from Mr. Empson, which was refused, occasion being taken, also, to remind Mr. Bissinger that he could not engage in business here again. In October, 1881, Mr. Bissinger addressed Mr. Empson from Philadelphia, asking him to relieve him from the contract, but acknowledging that he was bound by it. The answer of Empson was a distinct refusal to waive the agreement. Madame Bissinger, coming to Cincinnati before her husband, concluded to go into business, consulted some friends, and, among others Dr. Langenbeck, who knowing of the contract with Empson, concluded to start the business himself, and put Mrs. Bissinger in charge, renting a store for that purpose on Fifth street, and perhaps one on Race street. Dr. Langenbeck found after a time that he could not give his attention to the business, and concluded to transfer it to Madame Bissinger, who thereupon took charge, Dr. Langenbeck advancing her money until the amount reached about \$2,000. It appears Dr. L. did not have the money himself, but obtained it from his son and wife. The only evidence of the indebtedness to him by Madame Bissinger were two notes, signed by her with an endorsement by Bissinger that the loan was made with his consent. A more peculiar loan than this never came under my observation; yet there is no evidence of bad faith or fraud upon the part of either. It was however, distinctly in evidence that the object in putting the business in her name was to avoid the obligation of the contract between Empson and Bissinger. It appears she had legal advice that she had a right to go into the business; that Langenbeck had a perfect right to loan her the money, and that there was nothing to bar her or him from using Frederick Bissinger in that business, provided it was kept in her name and as her separate property.

Under these circumstances the action was brought, and the court granted a preliminary order, restraining the husband and wife as prayed for in the petition. Shortly after that order was granted the case was very fully heard on affidavits, and the court modified the injunction so as to restrain the husband from directly, or indirectly, engaging in that business in Cincinnati, and especially from managing or assisting in any branch of the business as carried on by his co-defendant so as to interfere with the good-will he had sold, and enjoined his wife from selling any candy manufactured by her husband within the city, and from employing him in the business in this city. After the modification of the order the factory on Fifth street, was closed, and Frederick Bissinger was employed by his wife to open a factory and store in Covington, he manufacturing candies from materials furnished by his wife, and these were sent to the Race street store at Cincinnati, where he was found nearly every evening, although there was no evidence to show that he took any active or personal management of that store.

It was claimed by counsel for the plaintiff that this property was, in fact and in law, the property of Frederick Bissinger, while on the other side, it was contended that the business was her sole and separate estate, under her own management and control, and with the full right to carry

it on, and to employ her husband in the factory in Covington, as she could have employed any third party. I do not deem it necessary to decide whether this candy business, fixtures, loan of money, &c., was really the business of Frederick Bissinger, or Mrs. Bissinger's separate property, but I will frankly say that under the decision of *Swasey v. Antram & Co.*, 24 O. S., 87, the husband is responsible, for the loan of Langenbeck, and being responsible, and the money being used in this business, it is his business,. Madam Bissinger testified that she knew little or nothing about the manufacture of fine French candies, and that all she sold were substantially, the work of her husband. There can be no question that his peculiar skill was necessary to the manufacture of fine French candy, and that, were it not for his industry, the Race street store could not have been supplied, unless other parties had been employed by her, and none were employed by her.

Does this state of affairs amount to a violation of the contract by Bissinger with Empson? After examining all the authorities I could find nothing tending to show what acts were a violation of an agreement of this kind, and without taking the time to read them, I can safely say there is not an English case in which the words "directly or indirectly" are used, where the court has not held that every act that would tend to affect the business sold is a violation of the agreement. I find two American cases, one in Massachusetts and a recent decision in Pennsylvania, and they fully bear out the decisions in England. It was clearly held in England that a party selling out a business and binding himself not to engage in it again, "directly or indirectly," cannot carry it on in his own name or as employee for another. The result of the investigation of these cases and comparison of the rulings there made, with the facts of this case is to show that there was a constant violation of his contract by Frederick Bissinger from the day the business was opened here to the day of the trial. He certainly, under the former order, could not act as employee of his wife in Cincinnati, nor, in my judgment, in the city of Covington, if the goods were manufactured by him for the purpose of being sold in Cincinnati. He had a perfect right to engage in the business in Covington as owner, manager, or employee, provided the object of such manufacture was not to furnish goods to an establishment in Cincinnati, which would directly interfere with his former contract.

The most serious question in the case, however, is, as to how far the obligations and liabilities of the wife are affected by that contract, and by acts she and her husband have been committing. Undoubtedly, she has a right to go into business in Cincinnati; no question but that she has the right to sell in such establishment any grade of candy, provided that her husband is not, directly or indirectly, engaged with her in that business. If he is, he is to be enjoined and she also. She can not aid or abet him in violating his agreement, when he and she are enjoying the profits arising from such violation.

Taking the whole case together, there is no question in my mind that the contract made between John H. Empson and Frederick Bissinger, which was limited as to time and place, was supported by a good consideration, was fair and reasonable, not oppressive in its terms, and should be enforced. I am satisfied that it was violated by Frederick Bissinger, and violated to this extent by his wife, in that she, whether the business was her own separate property or not, has aided him in break-

ing that contract—first, by employing him and enabling him to manufacture in this city the same grade of candy that was made and sold on Fourth street, and sold by her in this city, and afterwards by employing him and enabling him to manufacture at Covington the same grades of goods, and which she also sold in Cincinnati.

Therefore, the order will be that Frederick Bissinger be enjoined from carrying on, directly or indirectly, the confectionery business, or any branch thereof, in Cincinnati; during the term fixed by this agreement that he shall be enjoined from acting as employee or manager in the manufacture of candy outside the city for the purpose of being sold in the city, and that Mrs. Bissinger be enjoined from selling in Cincinnati candies manufactured by him, wherever manufactured, for the purpose of being sold in this market.

Adam A. Kramer, for plaintiff.

J. F. Baldwin, for defendants.

INJUNCTION—PARTNERSHIP.

[Allen Common Pleas, 1883.]

EDGAR B. HALLADAY v. B. C. FAUROT, S. W. MOORE ET AL.

Where two members of a private banking firm assist, against the protest of the other partner, in organizing a National bank in the same city, take stock in and become officers of such bank, the other partner is entitled to an injunction against his copartners engaging in such competing business.

Petition for an injunction.

HUGHES, J.

The case before us is one of unusual importance, as well on account of the gravity of the interests involved, as the novelty of the remedy sought. So far as my own reading and experience goes it is the first case in our state where the remedy by injunction has been invoked by one partner against his copartners, the partnership still continuing, to restrain them from engaging personally, and with their capital, in an enterprise in the same locality, the purpose and scope of which is claimed to be similar, and therefore adverse to and at variance with the business and interests of the partnership.

We are not without the aid of general principles as well as adjudications elsewhere to assist us in arriving at just and satisfactory conclusions, not forgetful, by any means, of the great help afforded us by the commendable research and able arguments of counsel on both sides.

It is a delicate duty, and one which we would gladly be relieved from, to determine such grave differences between neighbors and friends, but we will not shrink from it when our position and the occasion demands, and having arrived at what we believe to be right and justice under the law, dismiss all other considerations or consequences.

In substance the plaintiff sets out in his petition that on the 1st of January, two years ago, he entered into a written contract of partnership with B. C. Faurot and S. W. Moore, the principal defendants, for the purpose of carrying on a general banking business in the city of Lima, Ohio, for the period of five years from that date; that immediately thereafter the business was entered upon by the partnership and has been so continued

by it to the present time, doing a general banking business as provided in and contemplated by the partnership contract, and which business has been extensive and profitable, with three years yet unexpired for the continuance of the partnership; that in violation of the terms of said partnership contract, and in violation and disregard of the plaintiff's rights thereunder, the defendants, Faurot and Moore, are about to engage in a similar business in the same locality, to-wit: a National bank; that said National bank is in process of organization and is about to be opened for the purpose of doing a general banking business by their aid, procurement and assistance, and against his wishes and protest, and that these defendants propose to invest their capital in this institution and to give to it their personal attention and influence.

It is further alleged in the petition, in substance, that it is the purpose of these defendants to transfer the good will of the partnership, the Allen County Bank, to the new institution about to be organized, and also to withdraw their capital from the Allen County Bank, all of which the plaintiff claims would result in great and irreparable injury and damage to him, for which he has no adequate remedy, other than that sought by this proceeding to restrain and enjoin them.

There are other persons joined as defendants with Faurot and Moore, who are described in the petition as being in connection with Faurot and Moore in the organization of the Lima National Bank, and it is sought to enjoin them also from engaging with Faurot and Moore in the organization and carrying on of the new bank. I shall now only deal with Faurot and Moore as the principal defendants.

These principal defendants have answered and in substance they admit the partnership contract, the engaging in and carrying on of the partnership business to the extent and with results substantially as claimed by the plaintiff, that they have engaged in the organization of a National Bank in the city of Lima, Ohio, proposing to do a general banking business in that locality; that they have subscribed to the capital stock thereof, and claim that the same was fully organized at the time of the filing of plaintiff's petition in this case; that they have accepted respectively the positions of vice president and president in said National Bank, and that numerous other persons have invested capital with them in said institution, and that the granting of an injunction now, as sought for in this case, will in effect suspend the operations of said National Bank, and thereby work great and irreparable injury to all interested therein. They deny their purpose to transfer the good-will of the Allen County Bank to the new institution. They also deny their purpose to withdraw their capital from the Allen County Bank, which last fact is admitted by the reply of the plaintiff, so that that question is now out of the case. These defendants further allege that the plaintiff, Halladay, at the time he went into the partnership, was the owner of ten shares of the capital stock of the First National Bank of Lima—a rival institution—which he agreed to dispose of, but did not, and continues to own and hold it. Halladay, by reply admits the ownership of this stock as alleged, but says in substance that he has so owned and held it with the knowledge and consent of these defendants.

These are the issues, in substance, made by the pleadings. Applying the proofs adduced to these issues, shall a temporary injunction be granted?

That we may properly understand the status of these parties before the court, it is highly pertinent to inquire in the first place, what is this contract of partnership between them? What was the scope and extent of the business intended to be done thereunder, and what was reasonably and necessarily in the contemplation of the parties to the contract at the time?

In these particulars the contract in terms provides: "That B. C. Faurot, S. W. Moore, and F. B. Halladay agree and do hereby form and become a partnership under the name and style of the Allen County Bank, for the purpose of carrying on a general banking business in Lima, Allen county, Ohio. And it is agreed that said partnership shall continue for the term of five years from January 1st, 1881, and as much longer as said parties may agree. It is agreed that the officers of said bank shall be: B. C. Faurot President; S. W. Moore, Vice President, and E. B. Halladay Cashier. The capital stock shall be \$8,000, of which B. C. Faurot agrees to furnish \$2,000, S. W. Moore \$4,000 and E. B. Halladay \$2,000, &c." Annual settlements were to be made at the end of each year, and after the payment of all expenses and salaries the surplus earnings were to be divided in proportion to capital invested. Moore was to receive a salary of \$1,200 and E. B. Halladay a salary of \$1,000 per year, and both to devote their entire time to the business. B. C. Faurot was to receive no salary, and "is not required to be an active member of said firm."

By their contract they were to do a general banking business in Lima, Ohio. What is meant by this term "general banking business" has not been made the subject of special proof, and must be determined from what may be regarded as "common knowledge," and by legal definition. From these sources we are not at a loss to determine with reasonable accuracy what was in the contemplation of the parties to this contract.

The partnership was to be engaged generally in the business of receiving deposits, loaning money, buying and selling exchange, discounting promissory notes, buying and selling securities, making collections and doing the various other things for profit, usually done in such institutions, in the city of Lima, and with its citizens and surrounding community, for the period of five years positively, and longer if they could so agree. They were to hold themselves out to the public for all such business as legitimately belonged to that kind of an institution—all that they might gather in by their personal skill and ability in the management of the business and their well known financial responsibility. Mr. Faurot alone is relieved by the contract from the duties of an active worker, but not from other duties, which were perhaps equally valuable to the firm, both in their own and in the estimation of the public. It is clearly within the scope of this contract that each member of the firm should use reasonable effort and personal influence to secure the confidence and patronage of the general public for the firm during the contracted time or its continuance.

It is a well known doctrine, that there are many things to be looked to in the interpretation and enforcement of contracts, and peculiarly so in contracts of partnership, which are implied by the law, although not specifically set out in the written articles. I have gathered from the authorities what is implied and understood by the law in these matters of partnership contracts, whether expressed in the written contracts or not.

They are classed under two heads: First—Those requirements and duties of copartners which are positive in their character. Under this may be embraced personal service, personal attention and good-will; contribution and continuance of capital, when capital is required; good faith to the full extent in all dealings with partnership property or business, and all these to continue in force and unimpaired during the continuance of the partnership; devotion to the business and true interests of the partnership for the common benefit of all, and such reasonable skill, diligence and sound judgment as the parties are capable of. Second—Such requirements and duties as are negative in their character. These are comprehensively stated by Story, in his invaluable work on Partnerships, in substance as follows: "A partner is not at liberty to deal on his own private account in any matter or business which is obviously at variance with or adverse to the business or interests of the partnership; nor to engage in any other business or speculation which must necessarily deprive the partnership of a portion of the skill, industry, diligence or capital which he is bound to employ therein."

These duties and requirements are engrafted by the law upon every contract of partnership, whether expressed therein or not, to the full extent that the nature of the business to be engaged in would reasonably require. And every partner is bound to obey and perform them diligently and in good faith, unless specially exempted therefrom by the express terms of the articles of copartnership. In this regard contracts of partnership are found to differ very essentially from contracts made between persons not thus confidentially associated.

Keeping these landmarks well in view, let us test the case before us. Under the written contract heretofore referred to, the parties have actively and in good faith, engaged in the business contemplated, for two years, with results which would seem to be gratifying and satisfactory, leaving three years unexpired time in which to continue under their contract.

What would be the effect upon this plaintiff, or the Allen County Bank, and who would be responsible for it, if Messrs. Faurot and Moore are permitted to do the things complained of against them, some of which have already been done, others by their own admission, they are about to do? The proofs are undisputed that B. C. Faurot has subscribed to the capital stock of the Lima National Bank, \$25,000, and S. W. Moore, \$30,000; that in the organization of that bank and in the selection of officers preliminary to the transaction of business, S. W. Moore, has been chosen president and B. C. Faurot vice-president, and that the two own and control a majority in amount of all the capital stock in said National Bank. Now it would seem to me superfluous to suggest that the positions which these two parties are to occupy in the new bank are utterly inconsistent with and antagonistic to their positions and contract duties in the Allen County Bank.

In the new organization personal service is contemplated necessarily by the positions which they have respectively accepted, and that, too, of a high and responsible character. Good-will and personal influence are also contemplated and required in their new relation. They cannot be extended to both the old and the new, to the extent and in that good faith which each has a right to demand.

If then these matters of personal service, good-will, personal endeavor and influence cannot be given in full to both, where will they be expected to gravitate? Would it be to the Allen County Bank, to look after and help the \$6,000 capital, or to the Lima National Bank, to look after and help the \$55,000 capital? As a business proposition it would not be difficult to tell how the defendants would answer this inquiry. By a necessary law of gravitation, so to speak, these necessary and valuable adjuncts to a successful business, would be drawn away in a direction greatly to the prejudice of the plaintiff and the Allen County Bank.

But in addition to these Mr. Moore contracts to be the Vice-President of the Allen County Bank, and an active worker therein for the period of three years yet unexpired. How can he consistently be this, and at the same time be the first officer of the Lima National Bank? Such positions might not seem to be so inconsistent in a large city, where there are a multitude of banks, and the rivalries of business and investments are not so much marked and felt, but even there, I should take it, they would be regarded as not very consonant. But in our small community, it is a well known fact that bank presidents are the active workers of their respective institutions, and the two positions about to attach to Mr. Moore are inconsistent with the idea of active and faithful work in both. And so also it may be said of Mr. Faurot, but not perhaps to the same extent.

It is claimed by the defendants, and conceded by the plaintiff, that the defendants do not intend to withdraw their \$6,000 capital from the Allen County Bank, but they do not say that they will not personally engage with the Lima National Bank. What would be the effect upon the Allen County Bank to place under the control of the defendants, this National Bank, with its capital of \$100,000, with Moore as President and Faurot as Vice-President, backed with their immense wealth, as against Mr. Halladay standing alone with his \$8,000 capital in the Allen County Bank, divested of their good-will, influence and personal endeavor, for these will necessarily follow their persons and their capital?

It would seem to me that he would be without the range of a possible business, such as he has a right to claim and expect under his partnership contract. He could not hope for such a business as would be either profitable or satisfactory. By that which is proposed to be done by the defendants, unless restrained by the interposition of the law, the Allen County Bank would be left soulless and lifeless, as a skeleton without flesh or blood.

Various reasons are urged on behalf of the defendants, against the allowance of the injunction, which we will consider in their orders as presented.

First that an injunction will not be granted where there is a complete and adequate remedy at law, and that such a remedy exists in favor of the plaintiff. The legal proposition stated is one well known to the profession, and universally recognized and adhered to by courts of equity, but the facts in the case do not in my judgement support the claim that there is a complete and adequate remedy for the plaintiff by an action at law for damages for the breach of contract.

It is an equally well established rule of law that one partner cannot sue another partner at law to recover unliquidated damages, for a breach of the partnership contract, until after a dissolution of the partnership. So that the plaintiff, if he is damaged by the acts of the defendants, can-

not have a present remedy for the redress of his wrongs without a dissolution of the partnership. His remedy would lack completeness in that particular in the outset. If he goes into court and himself asks for a dissolution of the partnership as a precedent and indispensable conditions to the recovery of damages, he places himself in the unfortunate position of having, by his own act, compelled a dissolution of the partnership—a position, in my judgment, would bar his right to recover damages for the future time contemplated by the contract of partnership.

The incompleteness and inadequacy of his remedy are at once apparent from this view of the case.

But suppose that the partnership should be now dissolved, for any reasons not traceable to the motion or volition of the plaintiff, or that he should delay his redress till the expiration of three years, leaving the defendants to do the things complained of against them, and then or now bring his action for damages for the breaches of the contract. Would his remedy be complete or adequate? Who can estimate with sufficient certainty and exactness as to secure justice between the parties, the damages which the plaintiff would have sustained? Who can measure the effect that would be produced upon the business and interest of the Allen County Bank, by the conduct reasonably to be expected from and the positions about to be assumed by these defendants, in and with reference to the new institution? Suppose they remain silent, and do nothing to withdraw business and patronage from the Allen County Bank. Less than this could not be expected of any rational business man. Who can estimate in dollars and cents, the effect of their silence and indifference upon the partnership business? Silence and indifference would be a violation of their duties to the plaintiff. What man could go onto the witness stand and tell the court and jury the amount of these damages, whether great or small? Business fluctuates; one year the business is large and profitable, another it is smaller and less profitable, it may be without profit. The proof shows that for the two years past, one yielded a profit of \$13,000, the other less than \$4,000 to the partnership. Which year would we take as a standard to estimate from? What rule and guide would a court give to a jury from which to estimate and fix the damages? No rule and measure has yet been devised by courts that would insure accuracy and fairness. I am unable to see wherein the remedy at law for damage is complete and adequate.

Again it is urged, as a corollary of the proposition just discussed, that it is not enough, that the remedy at law for damages should be doubtful, or that the damages threatened are probable, a strong case must be made—one based upon facts which will clearly warrant the exercise of such high powers. Sufficient has already been said to indicate pretty clearly my conclusions upon this proposition. The case is certainly a strong one, and calls loudly upon a court of equity to interfere to the end that justice and good faith may be secured.

It is further urged against the allowance of this injunction, that it is sought thereby to restrain the personal conduct of the parties and their right of investment. Such is the very purpose and definition of an injunction as embodied in our statute, and such the consequence of almost every adjudicated case where injunctions have been allowed. And especially is this so in cases of partnerships. (See Collyer on Partnerships, page 162; also 4 W. L. Mo., 557, case cited by defendant's counsel.)

Individual freedom in these particulars is controlled and circumscribed by the law, to the end that contracts shall not be violated and the rights of others disregarded. And the cases are numerous where this power of restraint has been exercised to control investments, where such restraint was necessary to enforce justice and secure good faith. This restraining power is exercised with much more freedom and frequency in matters growing out of partnership relations, than in other matters, and the reasons therefore are potent and numerous.

By way of illustration the subject of contracts in restraint of trade has been referred to and commented upon by counsel for the defendants. The analogy between this class of contracts, and those of partnerships, is not so close and striking as to call for much consideration or comment. True, the former class of contracts is not much favored by the law, but they are uniformly respected and enforced by courts, when they are reasonable in their nature, lawful in their subject matter, and properly limited as to time and territory; and courts of equity will restrain their violation, where the remedy at law for damages would be uncertain and inadequate. Contracts of partnership rest upon a higher plane of business morals than these, and receive much greater respect and consideration from courts.

It is further urged against the allowance of this injunction, that it is in effect, an attempt to compel specific performance of the contract of partnership, which would not be decreed upon the facts proven. It can hardly be expected that the defendants should escape upon this ingenious pretext. I am aware that courts of equity rarely attempt to do a vain thing, and hesitate to decree specific performance, where the results of such decree would be fruitless. But such decrees have been made by courts of high standing, compelling the specific performance of partnership contracts, where the circumstances clearly indicated that the party was without a complete and adequate remedy at law, for damages. There is a marked difference, both in remedy and result, between decreeing specific performance, and restraining the violation of a contract. In the one case the result may be fruitless, and the court powerless, upon the familiar illustration that "you may lead a horse to water but you cannot make him drink." In the other case the restraining decree, and its effects, may be sufficient inducement to the party to fulfill in good faith, the requirements of his contract. If not, it is always within the power of the court to punish, as for contempt, any positive violation of the terms of the decree. There is magic, oftentimes, even in the fact of such power without its exercise.

The fact that the plaintiff, Halladay, has had, during the continuance of this partnership and still has \$1,000 of the capital stock of the First National Bank of Lima—a rival institution—is also urged as an excuse for the defendants and as a reason why the relief sought should not be granted to the plaintiff. And the familiar maxims of the law, for which I profess to have a high reverence, are to our remembrance, "He who seeks equity must do equity." "He who comes into a court of equity asking the interposition of its strong arm in his behalf must come with clean hands, and free taint of wrong to the party against whom he seeks relief." If the proof satisfied me that this fact, or the conduct of Halladay in reference to this matter, had resulted in any substantial wrong to the defendants, or the partnership, I should certainly deny him any relief, no matter

how serious its denial might be to him. But it is not claimed, either by the pleadings or the proofs, that any wrong or injury has been occasioned to them or the partnership by the plaintiff's ownership of this stock. Nor is it claimed that Halladay, to any degree, failed in his duties to the partnership, on that or any other account, or that his affections were on that account divided to any damaging extent between the two institutions. Relatively speaking the fact appears very insignificant, and does not challenge any serious consideration. So it must have been regarded by the parties themselves, as their affidavits, clearly show. If so why not call upon the court to give it such weight and prominence? Again it is urged with great earnestness, that the laches of the plaintiff in seeking his remedy has been such, that the relief sought, ought not to be granted, even though he might otherwise be entitled to it. And it is claimed by the defendants that the plaintiff had full knowledge of their purposes and doings with reference to the proposed National Bank, and made no active opposition thereto until it was fully organized for business. The proofs do not sustain this claim. Glancing at the history of this matter as between these parties, the proof shows that some months before active steps were taken for the organization of this National Bank, the subject of converting the Allen County Bank into a National Bank, and the transfer of its good-will and business to such new institution was fully considered and discussed between these parties. These discussions and negotiations terminated in a written communication, addressed by Mr. Halladay to the defendants, in which he states fully his views and claims in a firm, but friendly spirit, and therein positively declines to enter into the proposed arrangement himself, and refuses his consent that the Allen County Bank shall be interfered with, converted into, or transferred to the proposed new organization. It is fortunate perhaps, that his protest in that behalf has been thus preserved, in permanent form. It does not appear from the proofs that negotiations for a like purpose were afterwards entered upon between these parties. The most that can be claimed from the proofs, is that Halladay had notice of their intention to organize a National Bank, and that pending its organization, negotiations were had between the parties for the purchase of Mr. Halladay's interest in the Allen County Bank, with a view, I presume, of its transfer to the new organization.

These negotiations have failed by reason of a failure to agree upon its value. The most that can be claimed against the plaintiff is, that he kept silent, or at least made no active opposition to the organization of the new bank. In view of what had taken place before between them upon the same subject, and of the business relations then subsisting between them, could anything more be reasonably demanded of him by the defendants? His duty to them, as well as theirs to him, in this regard, must be ascertained and judged of by the light of these surroundings. Judged of in this light, it seems to me that he had done all that they or the law could demand of him, while, on the other hand, it rested with them as a first duty, to satisfy and discharge the earlier obligations to him before entering upon new relations which must necessarily be in conflict with and prejudicial to his rights. Instead of that, they press right on to put the new enterprise upon its feet for business, leaving it to chance or the law to settle their difference with him. This certainly was not in accordance with approved business ethics. By their own conduct they have

brought about the complication under the shelter of which they now ask to defeat the plaintiff in his remedy.

It is also urged on behalf of the defendants, that the effect of granting an injunction in this case will be by indirection at least, to obstruct the operations of a corporation organized, or in process of organization, under the laws of the United States; that such jurisdiction pertains only to the federal courts, and is without the jurisdiction of the state courts, and authorities are cited, in support of this proposition. This proceeding is not instituted against this corporation, nor will it have the effect to inquire into or disturb its organization or business operations as a corporation. It deals with persons who happen to be connected with the corporation, and may have the effect of disturbing their relations with the corporation, but the corporation will remain intact to far as this adjudication is concerned. How their investments in the new bank shall be disposed of, and their positions as officers therein filled, so as to avoid disobedience to the order of the court, are business questions for them and the corporation to settle. They are beyond the scope of this case. It is neither my right or my duty to consider or deal with these questions, and I certainly will not volunteer suggestions. When first suggested, this proposition seemed of startling magnitude, inspiring, as it did, unpleasant feeling of a possible conflict with the powers and jurisdiction of the United States. These unpleasant reflections are soon dissipated, however, when we carefully consider and analyze it. An illustration or two will perhaps uncover its fallacy better than any extended reasoning or research.

To avoid any appearance of casting reflection or opprobrium upon the parties, I will substitute myself in the illustrations.

Suppose I was able to and had invested in the Lima National Bank \$30,000, and was its chosen and qualified President, and the institution actively carrying on its business. I step aside to my neighbor's stable and steal his horse, am arrested therefor and placed upon trial in our common pleas court. I am guilty and ought to be punished. I interpose the plea "that I am a member, stockholder, and president of a National Bank, doing business under the laws of the United States. My trial, conviction and imprisonment will obstruct and interfere with the operations of this institution, and the exercise of jurisdiction over me by this court, is in conflict with the authority and jurisdiction of the United States." What respect or consideration would be given by the court to such a plea? Or, to put it in another form more analagous. Having this investment, and position in the National Bank. I am without other means or property subject to execution and largely indebted. A creditor whose claim I have neglected and refused to pay, brings his suit in the same court to subject my stock to the payment of his claim. I admit all the facts, but deny the jurisdiction of the court over my person or property, because the institution to which they pertain is clothed with the mantle of a United States corporation, and ask that my creditor be relegated to the federal courts for his redress. Can it be seriously claimed that such a defense would be recognized and sustained? There is certainly no conflict of jurisdiction within the recognized meaning of this phrase.

And, finally, it is urged against the allowance of this injunction, that the injury which must result to the defendants by its allowance will be

equally as great as that which would be occasioned to the plaintiff by its refusal. No direct proofs are offered in support of this claim, but it is argued as a proper and necessary inference from the whole case. I have no doubt some inconvenience will be occasioned, and possibly some loss result, but I should think not to any serious extent. We do not propose to disturb the investment or business of the other defendants, aside from Faurot and Moore. The capital of the other defendants need not long wait for profitable investment, should they conclude to abandon their National Bank organization. Opportunities for safe and profitable investment are numerous and inviting. As to the defendants, Faurot and Moore, I cannot regard them as in a situation that entitles them to be heard upon this complaint, for the consequences, whatever they may be, are the result of their own acts.

I have thus endeavored to fully and carefully consider all matters that have been presented and urged on behalf of the respective parties in this case, to the end that my conclusions might at least command the respect and confidence of all interested, if not concurrence on the part of those against whom they are drawn.

A temporary injunction will be granted against the defendants, Faurot and Moore, to the full extent prayed for in the petition.

I am not clear of the right to an injunction against the other defendants, hence the injunction as to them is refused.

Isaiah Pillars, for plaintiff.

J. F. Brotherton, James Mackenzie and J. L. Price, for defendants.

APPROPRIATION OF PROPERTY.

97

[Hamilton Common Pleas, 1883.]

*TRUSTEES OF THE CINCINNATI SOUTHERN RY. v. JACOB A. HAAS ET AL.

The failure of a municipal corporation, in proceedings to appropriate private property, to pay for and take possession of the same within six months after the assessment of compensation, is a bar to a new proceeding for the appropriation of the same property.

MAXWELL, J.

This case comes up for hearing on the demurrer of the plaintiffs to the answer of the defendants.

In 1881 the plaintiffs brought an action to condemn and appropriate, for the use of the Cincinnati Southern Railway, certain lands in Millcreek bottom. The case was regularly tried by a jury, the jury returned their verdict assessing the value of the lands, and on May 6, 1882, a judgment was entered on this verdict, a motion for a new trial made by the trustees having been heard and overruled.

The trustees did not take the land under this verdict and judgment, but allowed the six months limitation provided by statute to expire, and, on December 2, 1882, began a new action against the same defendants to condemn and appropriate the same lands.

The defendants' answer, set up the foregoing verdict and judgment, and claim that in that first action, and by their failure to take under it, the trustees exhausted their right to take the lands by proceedings at law, and have no right to maintain the present action. To this answer the plaintiffs demur.

I cannot find that this question has ever been passed upon by our Supreme Court, either directly or indirectly. Judge Cox, of this court, had a similar question under consideration in the case of the trustees of the Cincinnati Southern

*This judgment was affirmed by the district court, see opinion, *post* 060, (s. c. 10 B., 97.)

Ry. v. O'Meara et al., 7 Ohio Dec. R., 346, in which it was held that a second action could not be maintained, but in that case the second action was begun before the expiration of the six months, and counsel for the plaintiffs claimed that, under section 2260, Rev. Stat., although the plaintiffs may not have the right to bring a second action within the six months, they have after the expiration of the six months, thus distinguishing between the O'Meara case and the case at bar.

A similar question to the one now under consideration was passed upon in the case of *Rogers v. St. Charles (city)*, 3 Mo. App., 41, in which the syllabus is: "The first award, if regular, fixes the value of the property condemned, and, unless the object for which the property was taken be abandoned, is binding, and is a bar to any subsequent action to condemn the same property for the same purpose," and the court in the opinion says: "In such cases, however, the party exercising, by delegation, the tremendous power known as the right of eminent domain must act in good faith * * * to enable the state, or any corporation, to be the sole judge of the due correspondence between the property and its variously estimated value, to cause a thousand estimates to be made, and to have the unrestricted right of rejecting, toties quoties, every estimate which did not suit its views, would be thought an extravagant idea of arbitrary power if it were imagined in a satire * * * if the purpose, instead of being abandoned in good faith, is merely modified so as to enable the party exercising the right of eminent domain to take the chances of a verdict of another jury, the first proceedings are a flat bar to such a course, and this for the sufficient reason that any other rule would work monstrous oppression and spoliation." Mills in his work on Eminent Domain, section 315, adopts the language of the foregoing opinion, as the statement of his own views on what he calls "experimental assessments."

See, also, *St. Joseph v. Hamilton*, 43 Mo., 282; *Neal v. Pittsburgh R. R.*, 2 Grant, Pa., 137.

In the case of the state of Iowa v. Keokuk, 9 Ia., 438, in deciding a similar question, the court, in its opinion, p. 443, says, "we are not prepared to say that the city has not the power to abandon the proposed work before the property of individuals is taken, but it seems clear that one of the parties has not the power to control the commissioners, and to appoint new ones, until the damages are brought to square with the views of that party." Judge Dillon in his work on Municipal Corporations, section 608, Note 1, says that the principle laid down in the foregoing language is in accordance with settled principles, and sound reason.

See also, 41 N. J., Law 90.

Counsel for the plaintiffs have not been able to furnish me, nor have I been able to find, any authorities in support of the demurrer, so that, so far as the law-writers, and the courts, have considered the question, their conclusion has been adverse to the demurrer.

But the counsel for the plaintiffs claim that he is supported by the language of section 2260, Rev. Stat., which is as follows: "When a municipal corporation makes an appropriation of land * * * and fails to pay or take possession of the same within six months after the assessment or compensation shall have been made * * * the right of the corporation to make such appropriation on the terms of the assessment so made shall cease and determine, and any lands so appropriated shall be relieved from all the incumbrance on account of the proceeding in such case * * * and the judgment or order of the court directing such assessment to be paid, shall cease to be of any effect, except as to the costs adjudged against the corporation."

Counsel claims that the words of the foregoing section "shall cease to be of any effect," etc., mean that the proceedings are wholly null and void, and that the parties are in statu quo, as if no proceeding had ever been begun. I do not so understand them. The object of the section is to give six months time to the corporation in which to pay for and take the property, and to provide that any and all claim on the part of the corporation as against the property, shall wholly cease after the expiration of the six months, if the corporation does not take the property within that time. The order of the court in such cases, is, that the corporation upon the payment of the money into court may take the property, but that after the expiration of the six months that order ceases to be available to the corporation, they cannot so acquire the property, they have lost their right through their own neglect.

It being conceded by counsel, that the only reason for allowing the six months to expire, and then bringing this second action, is that the plaintiffs con-

sidered the value of the land fixed by the verdict and judgment in the first case too high, the demurrer will be overruled and the case dismissed.

W. T. Porter, for plaintiff.

Long, Kramer & Kramer and A. B. Auston, for defendant.

TELEPHONE COMPANY.

104

[Hamilton District Court, 1883.]

* A. H. PUGH v. CITY AND SUBURBAN TELEPHONE ASSN.

1. A telephone company has power to adopt a regulation that the use of improper language shall be ground for cutting off a subscribers' use of the telephone.
2. It is sufficient notice to such subscriber of such regulation that the same was printed on the contract and on the pamphlet list of subscribers.
3. The word "damned" is improper language.

Smith, J., dissenting upon last proposition and upon review of facts to the judgment of the court.

Petition in Error to the Superior Court of Cincinnati.

MOORE, J.

This action was brought in the court below by the plaintiff in error to enjoin the defendant from removing a telephone from the office of the plaintiff, and, upon final hearing, the court ordered the dismissal of the plaintiff's petition.

The petition filed in the court below, in substance, alleges that the defendant, The City and Suburban Telephone Assn., is a corporation organized under the laws of the state of Ohio, for the purpose of constructing, maintaining and operating a system of telephonic communication in the city of Cincinnati and its telephonic approaches; that, in March, 1880, the plaintiff, at the solicitation of the defendant, agreed to take and use one of the defendant's telephones, having connection and communication with its telegraph wires and such other telephones, as defendant might place in the office, residence and place of business of other patrons of said system; that plaintiff, as a compensation therefor, agreed to pay the defendant \$75 per annum in quarterly installments, in advance; that the plaintiff paid all the installments, including the one for the quarter ending May 31, 1882, and that, on Saturday, April 1, 1882, the defendant arbitrarily, illegally and without cause, deprived the plaintiff of the use and enjoyment of such telephonic communication and therefore the plaintiff prays for an injunction to restrain the defendant from interfering with the plaintiff's telephonic communication, and that a mandatory injunction be granted requiring the defendant to restore and maintain such telephonic communication. The defendant, by its answer, admits all the allegations of fact therein recited, except the allegation as to the act of the defendant being arbitrary, illegal and without cause, and the defendant by way of justification of the act complained of by the plaintiff sets forth two separate contracts in writing made by A. H. Pugh, one of date, September, 1879, and the other, of date, September, 1880, subsequent to the date of plaintiff's contract. The answer also sets forth, in printed form, the contract which the defendant alleges is the form adopted by the defendant on July 1, 1880, for all subsequent contracts. By the terms of the second form of contract, the defendant assumes and reserves to itself

*The judgment in this case was affirmed by the supreme court commission, without report, February 17, 1885.

the power and right to withdraw the use of the telephone from any of its patrons, at its own option, and its discretion, if used for the transmission of profane and improper language. By the terms of the form adopted July 1, 1881, the defendant dictates it as one of the conditions that the subscriber will not permit the use of the telephone, for any profane, indecent or rude language, and the subscriber is required to covenant and therein agree that, on the violation of, or a failure to perform, any of the above conditions, the agreement shall, at the option of the Association, be terminated, and the Association may, by itself, or agents, enter upon the premises where the said telephone may be and remove the same and the fixtures connected therewith, and the subscriber shall have no claim for repayment of any money which may have been paid for rent or otherwise. The answer further proceeds to justify by making certain charges against Mr. Pugh, and closes by alleging that, at the time of the grievances complained of, the defendant used the telephone for the transmission of improper language and was an offense so gross as, in the judgment of the chief operator, to require him to exclude further communication.

To the action of the court below in dismissing the plaintiff's petition an exception was taken, which is now the foundation of the petition in error.

The record presented, shows A. H. Pugh to be the real party in interest, and that, September 1, 1880, he entered into a contract with the City and Suburban Telephone Association, as set forth in a form of contract, attached to the pleadings, and by which, in consideration of a certain sum of money to be paid quarterly, the association agreed to, and did, place in the office of the plaintiff, on Walnut street, in the city of Cincinnati, and at his residence, on Mount Auburn, in this city, the necessary instruments and wires to connect with the telephone exchange, to remain for the term of one year, and thereafter, subject to one month's notice to quit. Attached to the paper, signed, and referred to by it, are the terms and conditions, as part of the contract between the association and the plaintiff. The particular clause of the contract to which we desire to refer is in the following words: "The use of an instrument furnished under this contract for the transmission of profane or improper language will be held as sufficient cause for the said association to cancel this contract and for the immediate removal of the instrument leased thereunder." On April 1, 1882, the plaintiff, wishing to communicate with a business house in the city, placed himself at the instrument in his office and gave the usual signal to the exchange and asked to be put in communication with a certain person. The operator at the exchange gave some reply which exasperated the plaintiff, who then said to the operator, "if you can not get the party I want, you can shut up your damned old telephone,"—and it did "shut up," and has so remained, except when opened, a short time afterwards, by the superintendent of the line, for the purpose of communicating with Mr. Pugh.

The plaintiff complains of the defendant that, having paid in advance for the use of the line, he is entitled to its service; that the refusal to continue the use of it to him, destroys his vested rights, and is practically a condemnation without a hearing. The Telephone Association relies upon the contract and its restriction against the use of improper or profane language, as well as their right to make rules and regulations for the proper conduct of its business, and the right under the necessities of the

case to enforce them without a hearing. In the case at bar, involving, as it does, the power of the association to deprive the plaintiff of the use of the telephone, it is proper to ascertain the position of the defendant under the law. The legal existence of the association can not be questioned, and, by adjudication, *State v. Telephone Co.*, 36 O. S., 296, this association must be classed with telegraph companies, under the statutes of this state. Section 46, of the act of 1852, found in *Swan & Critchfield*, 298, and section 3471, of the Revised Statutes, which provide that telephone companies shall have the same power and be subject to the same obligations as are prescribed for magnetic telegraph companies, is sufficient authority for an association of this character to enter upon and prosecute its business and be recognized as a legal organization.

For the purpose of this inquiry, we direct attention to that part of section 46, of the act of 1852 which provides that telegraph companies may, from time to time, adopt such regulations and by-laws for the management of the business of the company as they may see proper. The particular clause referred to in the contract in question, from which it would appear that the whole matter as to the use of profane or improper language and the means to be resorted to for its prevention would rest in contract, and a rule or regulation would be unnecessary. If there is a stipulation in the contract, and it is one against diligence, defect, or omission of duty or management, upon the part of the corporation, or its agents, cases may arise where the validity of a rule would be a question of law: but if it is a case of the violation of a rule or regulation, and the same is not in violation of the statute or common law, it is a question whether the facts justify an enforcement of the rule. In some respects, the statute fails to point out definitely the responsibility and powers of a telephone company upon contract to be made in the future, with its patrons or subscribers; but, when we consider the business for which the association was organized; its rights and duties, in a certain sense, may be compared to those of a common carrier, and whenever the exercise of an authority under its rules and regulations is assumed, it may be said that it is, not by the mere incident of having authority to make certain regulations that a telephone company refuses to carry out a contract for service upon a violation of one of its rules, but, by the implied power to make and enforce reasonable rules and regulations, such as the Courts have so often recognized in the case of common carriers, in providing for the comfort and convenience of passengers and the employment of agencies, consistent with the welfare of the community.

In the case of the *W. U. Telegraph Co. v. Carew*, 15 Mich., 525, we find a principle of law recognized and announced, and one which we feel bound to approve. It is this: "Impartiality and good faith are the chief, if not the only, obligations required by the statute, so far as relates to the question here involved." The question in that case was as to the reasonableness of certain rules or regulations made by a telegraph company in the transmission of messages. The court goes on to say: "Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy recognized alike by common sense and the common law." In the

light of this announcement, a person dealing with a corporation of this character should know that it is charged with a public duty, and, if the legislature has omitted to define in exact terms this duty, the public welfare demands that the business shall be so conducted as to observe the rights of others, and enforce rules and regulations suitable to the habits of mankind. This view, we think is in harmony with the principle referred to in the well known legal maxim, that "no man should be condemned unheard," unless the legislature has expressly or impliedly given an authority to act without that necessary preliminary. Broom's Legal Maxims, 88. The statute having authorized the telephone association to make reasonable rules and regulations in reference to the conduct of their business, as well as for the protection of the public welfare, the nature of its engagements and the publicity of its operations justifies the adoption of the most expeditious and summary method of suppressing violent and offensive intrusions. There are very strong reasons for refusing to deal with a person who intrusively continues and insist upon his right to continue a course of conduct highly vexatious and annoying to those directly interested and contrary to the taste of the community. The facts of the case at bar exhibit the necessity of prompt and immediate action and possibly measures which under other circumstances would appear to be hasty and inconsiderate. Therefore, the rights of the plaintiff presented by the record, depend first, on the question whether he employed profane or improper language as charged by the defendant, and in violation of the contract.

Mr. Eckert, the superintendent of the telephone exchange in this city, testifies that he was not in the office at the time of the occurrence complained of, but that he returned about the time a written communication was received from Mr. Pugh complaining of the obstruction to his use of the line. Immediately after Mr. Eckert entered the office, the chief operator reported to him that Mr. Pugh had used certain improper language, and produced a memorandum, which is said to have been made by the operator at the time the language complained was received and had at the exchange. The language reported to have been used by Mr. Pugh, at his office instrument, after having made an inquiry of the exchange, and receiving a reply, and addressed to the operator, in presence of several witnesses, was about this, "God damn it to hell, can't I get the person I want this morning? God damn it to hell, if I can't get the person I want, call Mr. Eckert." Immediately Mr. Eckert, went to the telephone and put himself in communication with Mr. Pugh, and addressed him about as follows: "Do you know why you have been shut off?" or, "Do you know what this is for?" Mr. Pugh answered that he did not. Then Mr. Eckert proceeded to inform him that he had been shut off for using improper language, and then said, "This is not permitted, such language as this, and unless you promise not to use such language again, we will have to shut off your communication." Thereupon, Mr. Pugh demanded that he be notified of that in writing. Mr. Eckert answered that he would not do so and said, "I will notify you here through the telephone." It is testified to by Mr. Eckert, and by others in the room to whom the language was at the moment repeated by Mr. Eckert, that Mr. Pugh in answer to the last remark of Mr. Eckert, said "You know me well enough, Mr. Eckert; do you think that I will get down and eat dirt for your damned stinking corporation," and immedi-

ately "rang off," in Mr. Eckert's ear. Simultaneously with these occurrences the scene at the office of Mr. Pugh as described by himself and Mr. Trainer shows that about nine o'clock in the morning, Mr. Trainer went to the instrument and asked the exchange to place him in communication with Mr. Short, of the Cincinnati Transfer Company. After remaining at the instrument for a few minutes, and not getting an answer, Mr. Trainer left the instrument. A short time afterwards, Mr. Pugh desiring to communicate with the Cincinnati Type Foundry, went to the instrument and having called the exchange, a conversation with the operator produced some confusion or misunderstanding by the operator replying to Mr. Pugh as if replying to Mr. Trainer, the person who had inquired for Mr. Short of the Cincinnati Transfer Co. a few minutes before. Mr. Pugh tried to explain and say that he wanted to be put in communication with the Cincinnati Type Foundry, that he did not call for the Cincinnati Transfer Company, and, in the confusion which followed apparently exasperated, Mr. Pugh by his own admission, said, "if you can't give me the person I want, you can shut up your damned old telephone."

It is difficult to harmonize the statements of the several witnesses and ascertain the exact language used and heard at the exchange and for the use of which Mr. Pugh was shut off, or deprived of the use of the instrument, Mr. Pugh claims that, after having used the words admitted to have been used by him, he asked to be placed in communication with Mr. Eckert, the superintendent, and was denied that privilege; but it does appear, in evidence, that, a very short time afterwards, communication was reopened with the exchange by Mr. Eckert, who made the inquiries of Mr. Pugh which we have just referred to. The confusion and misunderstanding as to the exact words transmitted by the instrument may have been caused by a confusion of sounds from the machinery in the printing establishment of Mr. Pugh, where some ten or more presses were in full operation, and of course making a very great noise. There were two or three persons in the office of Mr. Pugh on that morning, who describe the actions of the parties in going to and from the instrument about as related, but they deny that Mr. Pugh used any such language as that imputed to him by Mr. Eckert, and by the operators at the exchange, but they testify that he did say, "If you can't get the person I want you can shut up your damned old telephone." It is very probable that the persons in the office of Mr. Pugh on that morning, by reason of the noise of the machinery may not have distinctly heard the expression of Mr. Pugh, and it is therefore quite probable that he made use of the language reported by Mr. Eckert and by the operators in the office of the exchange.

The question whether or not Mr. Pugh was "shut off" for using the words, which Mr. Eckert and the operators at the Exchange testify he used, or whether he was "shut off" for using the words which he acknowledges he used is a question claimed by the defendant to be unimportant.

The exact language used must, therefore, remain among the uncertainties of the evidence, but it is quite certain he did use the word "damned" during the course of the conversation in question. One decided expression, employing that word, is admitted, and there is a strong probability that the same expression was heard at the Exchange, but in a different connection, somewhat, that is, other words were used with it, dif-

ferent from those admitted by Mr. Pugh. A majority of the court are of the opinion that the employment of the word "damned" was the inducement on the part of the defendant to deprive the plaintiff of the use of the telephone.

It becomes necessary to determine whether or not the words used were profane or improper, or, in violation of the rights of the telephone association, independent of the contract. It is hardly necessary, from our understanding of the ordinary rules of society, to go into an examination of the question whether the word "damned" is profane or improper. The propriety and fitness of that form of expression need not be the subject of extended consideration. The use of such language in the social and business intercourse of daily life is inconsistent with the laws which prudence dictates and which are the very cement and support of civil society. The spirit in which the word "damned" was uttered, and the occasion upon which it was used, show that it was employed with a vile and insulting intent, and we are, therefore, unable to escape the conclusion that if not profane, the form of the expression is certainly improper.

The next inquiry is, had Mr. Pugh notice of the rules and regulations which were made by this Association, and were they reasonable. And we propose, in this connection, to pass by the consideration of the right of the plaintiff under the contract, to demand a hearing and rest our conclusions upon the reasonableness of the regulations, under the power derived from the statute and implied by law. The plaintiff certainly had notice of this regulation, because his contract refers to it. The evidence shows that, several months before the occasion complained of herein, Mr. Pugh was denied the use of the line for using language of a like nature. It also appears by the evidence that, about the first day of January, 1881, as a subscriber, he was presented with a list of subscribers of the telephone exchange, and with this list appeared the printed terms and conditions regulating the use of the telephone by its patrons.

We think the rule a reasonable one. The telephone in its workings and the manipulation of its machinery and appliances brings into the condition of possible communication by sound at a moment's warning all parts of the business community and of a very extensive neighborhood of homes, where the instrument is also used for social purposes, and the peculiar construction of this invention with the vast number of wires crossing each other between the points of communication, and the manner of its operation renders it quite possible, at times, for a communication intended for one person to go to another. If indecent, rude or improper language was permitted, evil and ill-disposed persons would have it in their power to use it as a medium of insult to others, and perchance by some accident, such as the crossing of wires, or by a species of induction, the same communication be launched into the midst of some family circle under very mortifying circumstances. The management of the telephone requires the observation of common propriety in the use of language, because, in many cases, the operators at the Exchange are refined and well disposed females. In fact, all operators, whether male or female, have a right to be respected, and to be protected from insult and annoyance. Society demands the conduct of all business with decency and propriety. Field on Corporations, 609, 70. 5 Am. Law Reg., 143.

The cases are very few in which the facts permit a comparison with the case at bar, but in the case of *Pendegrast v. Compton*, 8 C. & P. 462,

the extent, and the reasonableness of a rule or regulation made by a common carrier is aptly discussed. This case is also referred to, as it has a bearing upon that portion of this case wherein it is claimed by the plaintiff that he was prevented from using the instrument for the alleged use of words which he claims were not proven to have been used by him. The Court says in the charge to the jury: This is an action brought by the plaintiff, a captain in the army, against the defendant, the captain of the ship Bolton, to recover damages for breach of a contract, by which he undertook to convey the plaintiff and his wife as cuddy passengers on a voyage from Madras to England. The plaintiff's complaint consists of three particulars:—first, that the defendant did not treat him and his wife as cuddy passengers; secondly, that he did not provide good and sufficient meat, drink, etc.; and, thirdly, that he excluded him from the cuddy, and from walking on the weather side of the ship. With respect to the second ground of complaint, there is scarcely enough to justify the charge; and as, on the other side of the plaintiff, some things have been thought of that would never have been thought of if no other ground of complaint had existed, so, on the other side, many things have been introduced which, under other circumstances, never would have been referred to. Therefore, I think, you may consider the question upon the first and third grounds, which seem very much to stand upon the same footing, the unfitness of the plaintiff to associate with the other passengers. The question for you is, whether the defendant has shown that he had a good cause of justification for the exclusion of the plaintiff from the cuddy, and from certain parts of the deck. The plaintiff complains, that his wife also was excluded from the cuddy, but in fact she was not excluded, except so far as a proper feeling on her part would lead her to remain with her husband. The defendant rests his defence on three distinct grounds, all of which he says operated on his mind at the time. First, he says that the conduct of the plaintiff was vulgar, offensive, indecorous and unbecoming. There is some evidence that he was in the habit of reaching across other passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle. The second ground on which the defendant relies is, the incident which took place on the 19th of July. The conversation on that occasion seems substantially to be proved by the different witnesses, as it is stated in the plea, and one cannot help thinking, from all the circumstances of the case, that this was the motive operating on the defendant's mind. The third ground is, the threat used by the plaintiff, that he would cane the defendant. But it does not seem to me that the threat was heard by the defendant, before he gave the order for the exclusion of the plaintiff from the cuddy. I do not see, upon the evidence, that it was, but it is for you to say. It is important to consider this, as if it did operate on the mind of the defendant at the time of the exclusion. I cannot conceive that such conduct would not justify that exclusion."

It is the opinion of a majority of the court in the case at bar that the superintendent of the telephone association, after having satisfied himself that Mr. Pugh had used language prohibited by the regulations of the

association, and did in fact upon that information, very properly shut off all further communication with the plaintiff, and hence the court below did not err in its judgment.

Judgment affirmed.

Johnston, J., concurs.

SMITH, J., dissenting opinion.

I cannot agree with the decision of the majority of the court, with the opinion just pronounced, nor the reasoning which sustains it.

There is no doubt that the telephone is a wonderful invention, nor that the telephone company has a right to establish reasonable rules and regulations for its use, but I think upon a careful examination of the testimony in this case, it is apparent that the operator who first shut off the connection, acted with too great haste and under mistake of fact, and the general manager, Mr. Eckert, when the communication was made to him, acted upon the same mistake of fact and with too great haste. It seems to me that the testimony clearly shows that the connection with Mr. Pugh was cut off for language which he never used; that this exclusion was made permanent because he refused to promise never to use again language he had never used at all. Where one of two contracting parties, like a telephone company in this case, sees fit to establish rules, one of which is to forfeit the rights of the other contracting party, for breach of condition, and to make himself the judge whether or not the condition has been broken; in other words becomes the prosecutor and judge in his own case, it seems to me he should act with very great care and caution, lest he infringe upon the vested rights of the other. This is not entirely a question of what is good taste, but what are the rights of these parties secured under a contract. It appears from the testimony of Mr. Ritterhoff who was operating the exchange on the morning of the day in question, that he received a communication from Mr. Pugh, first to be put in connection with the C. H. & D. R. R. Co. There was some confusion of lines, and he did not succeed. The lines were down. Afterwards he wished to communicate with the Cincinnati Transfer Co., as he understood it, but that was not satisfactory. Then he says the words came through the telephone from Mr. Pugh: "D—n it to hell, can't I get anybody this morning." "G—d d—n it to hell, if I can't get my party, I want to communicate with the general manager." Thereupon without any notice or warning to Mr. Pugh, or reason assigned, or without ascertaining whether this language was in fact used, the connection was shut off. In the meantime, Mr. Pugh was trying to communicate through the telephone and sent message after message, getting no response. He then sent a messenger boy down to the office, to know the reason and to have Mr. Eckert send a man up to see what was the matter with the telephone. This messenger boy with a written note came over to Mr. Eckert as soon as he arrived at the office. At the same time this objectionable language, which Mr. Ritterhoff reported Mr. Pugh had used, having been reduced to writing, was reported to him. At once Mr. Eckert opened communication with Mr. Pugh and said: "You know what you are shut off for, our men up stairs say, you have been using improper language." He said he could not understand whether Mr. Pugh made any response or not; there was some confusion. He then says, "Mr. Pugh, I don't want any trouble, but unless you promise that you will never use that language again, we will cut off the connection permanently.

Upon that, Mr. Pugh became excited and said I will do no such thing, "Do you think I am going to eat dirt to your damned stinking corporation?" Then he cut off the connection altogether. Mr. Pugh denies that he used the last expression. I think it also very clear from the testimony, that Mr. Pugh never used the language, which Mr. Ritterhoff reduced to writing and handed to Mr. Eckert. Mr. Pugh testifies he never did: Mr. Walker standing by said the language was not used; some two or three persons, standing by said it was not used. The weight of the testimony goes to show, that the language to which Mr. Ritterhoff testifies, upon which he acted and upon which Mr. Eckert acted, was never used at all by Mr. Pugh. It was simply this. After trying all the morning to get some connection, he says, "If I can't get the man I want, shut up your d—d telephone," or words of that effect, certainly different from the words attributed by Mr. Ritterhoff. The question arises, whether the language he did use, the word, "damn" when used in a business communication, is sufficient ground for forfeiting a man's contract or depriving him of his right under a contract. It is said that it is a profane expression; that there is a condition in the contract between himself and the company, that if he makes use of any improper or profane expression, that will deprive him of the use of the instrument.

Be it so, but he is entitled to a hearing, to notice, to have some reason assigned before a forfeiture should be enforced. Mr. Pugh testifies he did not know why his connection was cut off. I admit that the telephone company may prohibit the use of certain words, it is perhaps a reasonable rule; but when it comes to a doubtful or an uncertain expression, the word itself should be distinctly pointed out as one of the prohibited words before the party is to be deprived of his right. Is the word "damn" in itself necessarily a profane expression? It is perhaps a pretty violent adjective. What is profanity? If you look at the Decalogue it says, "taking the name of the Lord in vain." If you look at our statute against profane swearing it says, "profanity, cursing or swearing by the name of God, Jesus Christ, or the Holy Ghost."

If you look at the dictionaries, the term profanity signifies an irreverent expression towards God. If you look at the dictionaries for the definition of the word "damn," you don't find it included among the profane expressions. It is not necessary to go outside of the record of this case. Mr. Eckert having stated in his examination in chief that whenever any profane expressions are used the operators are required to report them to him was asked on cross-examination whether the operators are required to report the word "damn." No sir, but are ordered to report when improper language is used." Then when the further question was put upon cross-examination whether he thought the word "damn" used by a subscriber under the circumstances, a sufficient ground for depriving him of his rights to use the telephone," he does not say yes or no, but answers I did not understand from the operator that the language you refer to was used. On the contrary very much more serious language, thus implying that if the word "damn" was the only word used, Mr. Pugh's use of the telephone ought not to have been cut off.

The question therefore is, if in a business communication a man somewhat excited as Mr. Pugh was at the time for failing to get proper communication, uses the word "damn" or "damned telephone" it is sufficient ground for cutting off its permanent use for which he has paid, and

depriving him of a vested right without notice or any examination of the facts of the case. It seems to me it was not and that the judgment of the court below should be reversed.

H. A. Morrill and Wm. Disney, for plaintiff.

Perry & Jenney, and Goss & Peck, for Telephone Co.

EVIDENCE—NEW TRIAL.

[Hamilton District Court, January 23, 1883.]

HEISEL v. HEISEL.

1. Proof, in an action for purchase price upon sale by one partner to another, of an agreement that a note, though payable unconditionally on a day named, was not to be used until some unsettled accounts between the parties were adjusted, is not open to the objection of incompetency as varying the terms of the note.
2. Surprise as to what the opposite party swears to is not legal surprise as a ground for a new trial.

Error to the court of Common Pleas.

AVERY. J

There are various errors assigned, but the only exception of record is to overruling the motion for a new trial, made upon the grounds of surprise and newly discovered evidence, that the damages were excessive, that the court erred in excluding evidence and that the verdict was against the law and evidence. Plaintiff in error was defendant below. He and the plaintiff had been partners, and plaintiff had sold out to to him. The action was for the agreed price. There was no controversy as to the price, \$1,000, but the defense was that it had been agreed to take in payment \$700 worth of furniture and a note of plaintiff for \$312, held by defendant.

This furniture was afterwards, as the answer alleged, repurchased by defendant from plaintiff, and there replevied by the the brother-in-law of plaintiff, he claiming to own it, but as defendant had been since advised, in fact acting for plaintiff, and for this by way of setoff, damages were claimed to the amount of \$151, besides two other sums of \$25 and \$23 as for money had and received by plaintiff off defendant.

The plaintiff and defendant and a brother of theirs, who had at one time gone into the firm, but afterwards retired, were the principal witnesses. The plaintiff testified that the furniture had been transferred as security for a liability of defendant upon a note made by the brother, upon which the defendant and plaintiff were indorsers. As to the note for \$312, both the plaintiff and the brother testified that was given for money, which defendant had advanced for plaintiff to a building association. It was agreed that it should not be used until defendant had settled a balance remaining due from him on the accounts of the old partnership and which still remained unsettled before the brother had come into the firm.

It is objected that the accounts of the old firm were carried forward into the new firm, and that the sale of the plaintiff's interest in that firm settled any outstanding balance. But this is not the testimony. Plaintiff testifies that the old accounts of the firm were never balanced. The brother testifies that the shares of the partners, as by the old books were

entered in the new books, but that a shortage of cash, with which defendant was chargeable as between himself and plaintiff, was not considered in taking account of the new assets, but was left as a matter to be settled between the old parties. It is again objected that as to the note, it being payable unconditionally at one year, the evidence was incompetent. There was no objection to it, but upon the motion the weight of the evidence is to be considered, and if incompetent may affect that question.

The note, however, was not pleaded as a setoff. The answered alleged the agreement that it was to be taken upon the sale as part of the price and was a plea of payment. Now, while evidence that it was not to be used, except in a certain way, might be incompetent to defeat it if sued upon, the evidence was complete on the issue presented, as tending to disprove that it was to be taken as alleged in part payment upon the sale. The burden was on the defendant to make out such agreement, which was the only plea. The verdict was not against the weight of the evidence on that issue.

The question of surprise and newly discovered evidence turned upon the testimony of the plaintiff, which defendant, after the verdict, made affidavit, was a surprise to him, and upon a ledger that was not produced at the trial. But the matter was addressed to the discretion of the trial court. *Smith v. Bailey*, 26 O. S., 1. For all that appeared the defendant might have produced the ledger at the trial, and as to his surprise at the plaintiff's testimony, it is not legal surprise, however surprising in a moral sense, to find one's adversary in a lawsuit testifying to make out his own side of the case.

The only other question is the amount of the verdict. The testimony of defendant as to the \$23 claimed as a setoff was not denied and the set-off should have been allowed by the jury. But the judgment may be corrected by remitting the excess, and then affirmed. *R. R. v. Furnace Co.*, 37 O. S., 434.

Affirmed upon remittitur.

SUIT ON INJUNCTION BOND.

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[Hamilton Common Pleas, 1883.]

†AMANDA H. BISHOP AND JOHN W. BISHOP v. M. F. BASCOE ET AL.

Recovery on an injunction bond can not be defeated on the ground that the injunction was allowed by consent of parties, where the consent entry allowing it was also conditional to take effect on the execution of the injunction bond.

EVERY, J.

There are but two questions in the case; the right to recover on an injunction bond, and if the right exists, the amount of damages. The bond was executed by the defendants, Krug and Bruuer, in a suit by the defendant, Mildred J. Bascoe, against the plaintiffs herein, and the heirs and widow of James W. Bishop, deceased, brought to declare a deed absolute on its face to be a mortgage, and to enjoin them from interfering with or molesting her in the enjoyment of the premises. The condition of the bond was that she should pay them the damages which they or either of them might sustain by reason of the injunction if it should

† A contrary opinion is found in *Krug v. Bishop*, 44 O. S., 221, in which it appears that this decision was overruled.

be finally decided that the said injunction, ought not to have been granted. Service was obtained only on the plaintiffs. The injunction was against prosecuting an action in forcible entry and detainer, before a justice of the peace, or in any way disturbing her possession in and to the premises described in the petition. The entry was as follows: "By consent of parties in open court, a temporary injunction is granted herein and the defendants and each of them are hereby restrained and enjoined from prosecuting the action in forcible detainer against the plaintiff before Nathan Marchant, justice of the peace, or in any way disturbing the possession of the plaintiff in and to the premises in the petition described until the final determination of this action by this court. This order of injunction to take effect upon the execution by the plaintiff to the defendants with surety to the approval of the clerk of this court of an injunction bond or undertaking in the sum of two hundred and fifty dollars (250)." All this was on April 5, 1880. On May 16, 1881, the suit was dismissed by the following entry: "This day, this cause came on for hearing upon the motion of Jno. W. Bishop and wife to dismiss for unreasonable neglect to make service upon the other defendants who are necessary parties to the determination of the controversy, and the court being fully advised in the premises grants the same and it is ordered that the action be dismissed without prejudice at plaintiff's costs."

The objection, against recovery on the bond is that the injunction was by consent. But it was not by consent, except on condition of giving the bond. The order was only to take effect upon execution by the plaintiff of an injunction bond, that is, on giving bond executed by sufficient surety. Section 5576, R. S.

The objection, again, is that the condition was that it should be finally decided that the injunction ought not to have been granted, and that there has been no final decision, but merely a dismissal without prejudice and without passing on the injunction. The dismissal of the action in itself, however, dissolved the injunction. *Hoyn v. Carter*, 7 How., 140; *Hope v. Acker*, 7 Abb., 308; *Daniels Ch. Pr.*, 1675; *Green v. Pulsford*, 2 Beav., 70, 75. The dissolution was a decision, that it ought not to have been granted, within the construction to be put upon the language of the condition. *Roberts v. Dust*, 4 O. S., 502, 505; *Pacific Mail Steamship Co. v. Leuling*, 7 Abb., N. S., 37; *DeForest v. Baker*, 1 Rob., 700, 703; *Loomis v. Brown*, 16 Barb., 325, 320. In *Palmer v. Foley*, 71 N. Y., 106, cited by counsel, the discontinuance was by consent of defendant's counsel upon stipulation by plaintiff to pay \$100 costs. It was quite different, say the court, from a voluntary discontinuance, or dismissal by the plaintiff of his own motion, pp., 111, 112.

The question of damages is not affected by considerations as to whether the justice of the peace had jurisdiction of the proceedings in forcible detainer that were enjoined. The injunction was not confined to those proceedings, but was against disturbing in any way the possession of the premises. It does not lie now in the mouth of the defendants to say there was nothing to enjoin, or that, with a deed absolute on its face, which it was the object of the suit, in which the injunction was obtained, to declare to be a mortgage, the plaintiffs have not meanwhile been kept out of possession. If, because the dismissal was without prejudice, recovery may be made to depend on the right of possession, as though this were again a suit between the same parties as the suit already dismissed, the plaintiffs would be in a worse position than if the suit had not been dismissed, since the question would not only remain to be tried over again but the burden would be upon the plaintiffs of maintaining the affirmative. Certainly, such result ought not follow the disposition of a suit, which a plaintiff can not be prevented from making any time. To compel the parties now to try with the sureties the same issues as in the suit which for want of prosecution has been dismissed, and to leave the plaintiffs in that suit to proceed again, as necessarily must be, in a new action upon the same issues, no matter what may be the determination in this, would be anomalous.

The right of possession under the deed, during the continuance of the injunction, is not open to question by the sureties. They are estopped to deny that the injunction had the effect it was intended to have. *Bulkley v. Stephens*, 29 O. S., 620, 624. The reasonable value of the premises during that time would appear to be fifteen dollars a month, amounting from April 5, 1880, to May 16, 1881, to \$200.50, for which with interest judgment may be entered. The claim for counsel fees is disallowed, the case in that particular being governed by *Riddle v. Cheadle*, 25 O. S., 278, except that here a motion to dissolve was filed. But it is as true here as there, that no additional attorney's fees beyond those involved in defending the action were rendered necessary by the injunction. The entry was by consent allowing the injunction until final hearing on condition of giving the bond. This left the question of dissolution to wait until determination of the action, and did not co-

template the making of motions, or fees of counsel except for defense of the action. Reasonable attorney's fees necessarily incurred in procuring the dissolution of an injunction may be recovered on the bond, *Noble v. Arnold*, 23 O. S., 264; but here the injunction was only auxiliary to the action, and there was no dissolution, save as incidental to dismissal of the action. Nothing was done, at all events nothing was effected under the motion.

Judgment for the plaintiffs.

P. A. Reece, for plaintiff.

Gen. W. H. Baldwin, for defendants.

LANDLORD AND TENANT.

112

[Hamilton Common Pleas, 1883.]

LEE CAHN v HAMMON BUILDING CO.

A lessor of a room in his building, who, by arrangement with the lessee, is to allow a present tenant to remain for a year, suspending the lessee's possession until then, has sufficient possession to prosecute forcible entry, after the year, against the tenant, in order to be able to give possession to the lessee, and the tenant is estopped to deny the landlord's possessory title, although the lessee could have assumed the burden of the action.

This cause came on for hearing upon an application to file a petition in error to reverse forcible detainer proceedings.

BUCHWALTER, J.

Various errors of fact and law are complained of, but the error of law especially relied on is that the justice ruled out as evidence a lease from the Hammon Building Co. to the P. C. & St. L. R. R. Co., executed in 1879, for a term of years, giving possession of the corner room, Fourth and Vine, and contracting the right of possession to Cahn's cigar store adjoining, after January 1, 1881.

It was in evidence without objection that by the R. R. Co.'s possession and suspension of their right, the Hammon Building Co. did lease to Cahn this store for two years from January 1, 1881, to January 1, 1883.

The counsel claim this ruling to be an error to Cahn's prejudice, because the lease tends to show that plaintiff below parted with its title and its right of possession, and that the R. R. Co. and not it could maintain this action of forcible detainer.

The notice to quit, relied on in this case, was served January 2, 1883, although a general notice in writing was given Cahn October 5, 1882.

This evidence is not competent. For by the permission of the R. R. Co., the Hammon Building Co. acquired a possessory title and the right of possession for the two years, viz., 1881 to 1883, and it was Cahn's duty as its lessee to attorn rent and final possession to it; and he could not deny even the possessory title of his landlord. See 3 O., 295; *Moore v. Beasley*.

The lease title to R. R. Co. was older than Cahn's.

The Hammon Building Co. had the same title when it executed lease to Cahn that it had when it demanded possession from him. Holding under the same he cannot deny such title.

But the R. R. Co., by the terms and covenants of its lease, was entitled to get, to have, as well as "to hold, peaceable possession." That right was only suspended by agreement till January 1, 1883.

The Hammon Building Co. was bound by its contract to put it in possession. 5 Bing., 440; *Coe v. Clay* hold that "a person who lets premises, agrees to give possession and not merely to give a chance of a law suit," 11 Exchr., 775; *Jenks v. Edward*, 1; *M. & W.*, 747; *Neale, v. McKenzie* holds that "if the landlord or lessor does not give possession, the lessee may recover damages against him, and is not obliged to bring an ejectment suit against an occupier who wrongfully holds over and refuses to quit."

Wood, on Landlord and Tenant, section 348 and 565. says:

"But where there is an actual demise for one year or more, the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so by reason of a previous tenant wrongfully holding over the lessee may recover damages, and is not driven to bring ejectment against the previous tenant. See, also, 99 Mass., 11 and 13. (2 cases.)

I am clearly satisfied that the burden was and is on the Hammon Building Co., and not on the R. R. Co., to get the possession as against Cahn wrongfully holding over; although the lessee of the R. R. may have been entitled to assume the burden to obtain possession at its election. The opinion of this court simply is that the lessee is not compelled in law to take the burden of a suit in forcible detainer to get possession, of the premises, but that burden rests upon the lessor of a lease in the terms and covenants as set out in the lease proffered as evidence in this case.

I have carefully considered the issues of fact and law raised, and am clear no error has intervened to the prejudice of the plaintiff in error.

Leave to file petition therefore refused.

O'Conner, Glidden & Burgoyne, for plaintiff in error.

Ramsey & Matthews and Campbell, Bates & Von Martels, for defendant in error.

CONTRACT TO DELIVER MERCHANDISE.

[Hamilton Common Pleas, 1883.]

PAPPENHEIMER HARDWARE CO. v. HARRISON WIRE CO.

1. As a request for prices of merchandise, delivery to begin in January, and an answer merely giving prices, would give the seller until the end of the last day of January to begin shipments, a reply accepting the prices and providing for shipments to begin January 15, varies from the office, and there is no meeting of minds and no contract.
2. If one party renounces an executory contract to sell goods, the other party treating it as at an end, may sue without waiting for the time of performance.

The claim of the plaintiff that a contract was made between the parties is based upon three letters of which the following are copies, viz:

(1.)

"The Pappenheimer Hardware Co.

"Cincinnati, November 19, 1881.

"Harrison Wire Mill, St. Louis, Mo.

"Gentlemen:—Please quote us your bottom cash price on, say 500 to 800 tons galvanized steel wire, long length, No. 12½ and 13, deliverable

here or such other points as we may direct, with freight allowance to Cincinnati, and shipments to be 100 tons per month, commencing in January next. Your early answer will oblige,

"Yours very respectfully,
"L. Pappenheimer, Pres."

(2.)

"St. Louis, 21st November, 1881.

"The Pappenheimer Hardware Co., Cincinnati, O.:

"In reply to your letter 19th, we quote No. 12½ galvanized soft steel wire, at \$4.55, four and 55.100 dollars per 100 pounds, and No. 13 galvanized barb wire, \$4.80 per 100 pounds, freight free car load lots to Cincinnati, O. Prices for immediate acceptance.

"Very Respectfully,

"Harrison Wire Co.,
"A. A. Lasar, Secr."

(3.)

"The Pappenheimer Hardware Co.

"Cincinnati, November 13, 1881.

"Harrison Wire Co., St. Louis Mo.

"Dear Sirs:—We have accepted your offer of the 21st inst., received to-day and so informed you by telegraph. You will please enter our order for 400 tons galvanized steel wire, No. 12½, long lengths, and 100 tons galvanized steel wire, No. 13, long lengths, suitable for manufacture of barbed fence wire. Shipments to commence January 15, 1882, at the rate of 100 tons per month, and to continue in successive months of February, March, April and May, until completed, and each shipment to be four-fifths of No. 12½, and one-fifth of No. 13 wire. Please acknowledge receipt.

"Very respectfully yours,

"Pappenheimer Hardware Co.,
"L. Pappenheimer, Pres."

The defendant denied that any contract was made between the parties, and also set up as a further defense that its secretary through mistake, quoted the price of the wire at one cent a pound too low, etc. At the close of the plaintiff's testimony the defendant moved to arrest the testimony from the jury, and for judgment, and the opinion of the court on that motion was as follows:

CONNER, J.

In this case the plaintiff having put in its evidence and rested its case, a motion is filed to take the case from the jury, and for judgment for the defendant, on the ground: First, that there is a variation between the letters passing between the parties, plaintiff and defendant, on which the plaintiff relies, as creating a contract and upon which variance the defendant denies the existence of a contract. It is claimed that there is a variation as to quantity and quality of the wire to be shipped, as to the amount, as to place of delivery, and as to time for its shipment. Second, it is claimed that the action is prematurely brought. Third, that no damages have been proved. No special damages are alleged, and now the question is, what damages can be recovered, and whether a tender before

suit is brought is necessary, before there can be a recovery for nominal damages. I will treat these questions in a little different order from that argued by counsel. First, as to whether the action was prematurely brought. Wharton in his work on Contracts, section 885 a, says: "A promisor, by absolutely putting it out of his power to fulfill a contract entered into by him, may make himself liable without demand, from the time he thus incapacitates himself, even though the time for performance had not yet arrived. He may, for instance, expressly repudiate the contract, in which case he may at once be sued, though the other party, if cannot afterwards insist repudiation, electing to sue immediately for the on the performance."

In 2 Parsons on Contracts, 676, the principle as laid down is this: "If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract, but if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party."

This is the statement of Parsons, and he cites *Phillpots v. Evans*, 5 M. & W. 447; *Ripley v. M'Lure*, 4 Exch., 345; *Leigh v. Paterson*, 2 J. B. Moore, 588; *Cort v. Ambergate, etc., Ry. Co.*, 17 Q. B., 117, 6 Eng. L. & Eq., 230; and the same doctrine is maintained in a very able decision in the 114 Mass., 531, *Daniels v. Newton*, as well as in various other decisions in the state of Massachusetts.

The contrary doctrine has been established in the cases of *Hochster v. De Latour* 2 Ell. & Bl. 687; *Avery v. Bouden*, 5 Ell. & Bl., 714; *Wilkinson v. Verity*, L. R. C. P., 206; *Dingley v. Oler*, 11 Fed. Rep., 373; *Frost v. Knight*, L. R. 7 Ex., 11; *Howard v. Daley*, 61 N. Y., 362; *Fox v. Kitton*, 19 Ill., 519; *Halloway v. Griffith*, 32 Ia., 409; *Zuck v. Rafferty*, S. C., Pa., Nov. 1881, 14 Central Law Journal, 258. I have given the names of these authorities for the purpose of explaining the character of the various cases. The case of *Hochster v. De Latour*, 2 Ell. & Bl., is the case of a contract for the employment of a courier. The case of *Avery v. Bouden*, 5 Ell. & Bl., is a ship freight case, the case of *Wilkinson v. Verity* is a bailment case; the case of *Frost v. Knight*, L. R. 7 Ex., 11 is a breach of promise case. *Howard v. Daley*, 61 N. Y., is a contract for services. *Fox v. Kitton*, 19 Ill., 519, is on a foreclosure of a chattel mortgage upon a vessel; the case of *Halloway v. Griffith*, 32 Ia., is also a breach of promise case. *Daniels v. Newton*, 114 Mass., 53, is a breach of contract for the sale of land, as to the case of *Zuck v. Rafferty*, supra. I am not informed of the character of it. The case of *Dingley v. Oler*, 11 Fed. Rep. 373, is upon a contract for the delivery of ice, and the only case of breach of contract for the sale of merchandise I have been able to find.

There is no question at all, however, that the modern and later authorities in England, are to the effect that when a promisor has given notice of his intention not to be bound by his promise, and the promisee has taken action upon that notice, that then the promisee may bring his action for damages. This conclusion is sustained by all the decisions in the United States that I have been able to find, except those in the state of Massachusetts. The last case in contravention of this ruling is that of *Daniel v. Newton*, 114 Mass. 531, decided by Judge Wells, and which has been commented upon by Judge Lowell, in *Dingley v. Oler*, 11 Fed. Rep., 373; and that learned judge looking at the cases, comes to a differ-

ent conclusion and deems the reasoning in the later English authorities and the American cases above cited to be better than that of Judge Wells, and holds that where a promisor has given notice that he would not be bound by the contract, and the promisee receives such notice and has taken action upon it, that then the promisor cannot complain that the promisee has taken him at his word.

Judge Lowell, in this case of *Dingley v. Oler*, supra, lays down the doctrine as follows: "That in contracts for services, for marriage, for delivery of merchandise, if the principal before the time for performance arrives, renounces the contract, an immediate action will lie." That was a case where a contract for ice was made, deliverable during the season of 1880, and in July, 1880, the ice was worth five dollars a ton in the market; when the contract was made in 1879, for such delivery in 1880, the ice was worth but fifty cents a ton, and in the latter part of July the defendants notified the other parties to the contract that they would not deliver the ice, and on the notice being received an action was brought. That case, it seems to me, is more nearly on all fours with the case at bar than any other I have found. Therefore, I hold that this action was not prematurely brought.

2. The next question is whether or not damages have been shown in this action. It was decided in the old case of *Leigh v. Patterson*, 8 Taunt., 540:

"If a vendee has until a given day to deliver goods, and on a prior day when the prices are low, he refuses to proceed with the contract, after which the price rises, the purchaser not rescinding is entitled to recover the difference between the contract price and a higher price which the goods bear on such day upon the future fulfillment of the contract."

That decision has been followed in all the English decisions bearing upon this subject, notably in *Frost v. Knight*, 7 Ex., L. R. S., 111; and the same rule is followed in *Howard v. Daley*, 61 N. Y., 362: And in this ice contract which I have referred to in *Fed. Rep.*, 373, Judge Lowell held, that the measure of damages was not the difference between the contract price and the market price at the time of the refusal to comply with the contract, but was the difference between the contract price and the lowest market price during the ice season; for the judge says: That it was reasonable to suppose that if the parties were bound to furnish the ice they would have furnished it at a time when it would have been at the least loss to themselves. Therefore, the measure of damages, in such a case on contract is not the difference between the contract price and the market price at the time of the breach of the contract in the refusal to fulfill it; but the difference between the contract price and the market price on the various dates of delivery. But, it has been claimed that at least there should be a recovery of nominal damages in this case. On the other hand it is claimed that there can be no recovery of nominal damages because there was no tender; but, I do not find that it is necessary for the plaintiff in this case to have made a tender to the defendant before it was entitled to recover on this breach of contract. Therefore, if there was a contract between these parties, this action not being prematurely brought, they would be entitled to recover nominal damages.

3. I now come to the main question of the whole case, whether or not there were variances between the letters of the parties, the Pappenheimer Hardware Co., and the Harrison Wire Co., and whether those va-

riances prevent the existence of a contract. These variances as I have said before; are, first, as to the quantity and quality of the wire. The letter of the Pappenheimer Hardware Co. called for the price of "Galvanized Steel Wire." The answer of the Harrison Wire Co. gave quotations of "Galvanized Soft Steel Wire of one size and of "Barbed Wire" of another size. The reply of the Pappenheimer Hardware Co. was an order for those two sizes of wire "suitable for barbed wire fencing." I have already ruled in this cause, if there was a custom in the trade by which the plaintiff and defendant must have known that the meaning of the qualities called for in the first letter was that it was wire suitable for barbed wire fencing, there was no variation; therefore, I say no more now upon that point. Second, as to the amounts to be shipped: The letter of the Pappenheimer Hardware Co., called for shipments of a hundred tons per month, the answer of the Harrison Wire Co. quoted for shipments by car-load lots, I do not think, however, that there is any material variation or any variation between these statements; because, I can readily conceive that both parties understood that the wire was to be shipped in car-load lots; since that would be the cheapest way for both parties, as well as the usual way for the shipment of such heavy and so large lots of freight; how many tons make a car-load I cannot deem important; therefore, I think there is no variation in respect to the quantity to be shipped.

In the third, place, it is claimed there is a variation as to the place of delivery. The letter asking prices called for quotations delivered in Cincinnati, or such other points as the hardware company might direct with freight allowance to answer of the Harrison Wire Co. gives quotations for the wire, "F. O. B.." free on board the cars," I suppose is the meaning of the initials and the reply of the Pappenheimer Hardware Co., to this letter does not necessarily conclude that the wire is to be delivered otherwise. Taking the two letters of the hardware company together, I am not satisfied that there was a variation as to the place of delivery; but I think a fair construction of the three letters is, that the wire was to be delivered at Cincinnati, or if delivered at any other point it was simply to allow the difference of freight.

The fourth claim of variance is as to time of commencement of shipment. The first letter of the Pappenheimer Hardware Co. called for shipments, "one hundred tons a month, commencing in January," the answer of the Harrison Wire Co., says nothing at all as to the time of shipments; the reply of the Pappenheimer Hardware Co. to this letter of the Harrison Wire Co. calls for the delivery of this wire, "one hundred tons per month, commencing on the 15th of January." Now, it is claimed by the counsel for the defendant, that here was not only a variation, but such a variation as would prevent the existence of a contract between the parties without a subsequent assent thereto by the Harrison Wire Co., which it is admitted was never given. On the other hand it is claimed by the counsel for the plaintiff, that this was not a variation; that the first application of the Pappenheimer Hardware Co. was accepted by the answer of the Harrison Wire Co., and that the time of the delivery was left open by the first two letters, and that this giving of the date of January 15, in the third letter was a mere suggestion on the part of the Pappenheimer Hardware Co., that the delivery should then commence.

There is no dispute between counsel at all, that the acceptance of an offer must be met in every respect, and that if it differs there is no

meeting of the minds, and no contract. Now, was this change of the time of delivery from sometime in January to a definite period in January, a mere suggestion, or such a change in the terms of the proposed agreement as prevented the meeting of the minds? There is no question at all, but the defendant under the first letter had all of January to commence the delivery of the wire, and was only bound to deliver one hundred tons in that month; that they had the right to deliver it at any time during the month of January; and that it would be their right to postpone the commencement of the delivery up to the last hour of January, providing they could then deliver the one hundred tons for that month. By the answer of the Harrison Wire Co., nothing at all is said as to when this delivery of wire shall be commenced. It may be presumed they relied upon their right to deliver the one hundred tons at any time during the month, and certainly they had the legal right to do so. Now, I can well understand that the delivery of the amount of wire proposed, between the 1st and 15th. of January, might be very different from a delivery of the same amount between the 15th and 31st of January, as they might have more orders to fill in the latter part of the month than in the early part, or they might have a stock on hand early in the month and less in the middle of the month, or there might be a variety of circumstances that might affect their opportunities of shipment. I can understand that if there was any difference to the Harrison Wire Co. in the time of delivery, if it was any hardship for them to deliver on January 15th, or the latter part of the month, then their minds did not meet with the Pappenheimer Hardware Co. as to the time of delivery and there was no contract. It seems to me in the light of all the cases, that this was a material change of the terms of the proposed contract, and being a material change that there was no contract in fact between the parties.

The motion, therefore, will be granted, and the case will be arrested from the jury.

Wm. M. Ramsey and C. B. Matthews, for plaintiff.

Herbert Jenney, for defendant.

WILLS—DEVISE.

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[Mahoning Common Pleas.]

*ELIZABETH H. RHODES ET AL. v. HARRIET WELDY ET AL.

Where a testator devised his real estate to his wife for life "and after her death to the heirs of her body begotten" a child born to him after the execution of the will is "provided for in the will" within Rev. Stat., 5959.

ARREL, J.

John Young, father of the plaintiff, on the 12th of August, 1862, executed a will containing the following: "Item first. I will and devise to my wife, Harriet Young, all my real estate, wheresoever situated, to use and occupy as to her may seem proper during her natural life, and after her death to the heirs of her body begotten, but should she die without issue, then I will and devise the same to Frank Young and Jennie Young, children of my brother, William Young, and to Eben Kirkpatrick, son of John Kirkpatrick, equally."

Item second bequeathed the entire personal estate of testator to the wife absolutely.

*This judgment was reversed by the Supreme Court. See opinion, 46 O. S., 234. The case is cited, 48 O. S., 468, 486.

At the date of the execution of the will, Harriet, wife of the testator, was *anceinte* of Elizabeth, the plaintiff, who was born December 24, 1862.

Items first and second disposed of the entire estate of testator.

In August, 1862, shortly after making his will, the testator enlisted in the army, and subsequently died; just when is not very clear, but it happened about April, 1865.

April 11, 1865, the will was probated.

Harriet, the widow of testator, has since intermarried with Samuel Weldy, by whom she has other children.

Plaintiff brings this suit to set aside the will, and secure her share of the estate of her father, as afterborn child, upon the ground *inter alia*, that the will was void as to her, under section 5959 of the Rev. Stat.

The question involved is, did the testator make, by the terms of his will, provision for the child in *ventre sa mere*, that would satisfy the requirements of that section?

The will creates a life estate in the widow, with remainder "to the heirs of her body begotten," which would include the unborn child, and which became a vested remainder, the fee of which descended immediately upon the death of the testator. Such a vested remainder is recognized as property of a present value. Washburne on Real Property, 553; Gilpin v. Williams, 25 O. S., 283.

This court therefore holds that the will of John Young did make such provision for the unborn child, the plaintiff, as satisfied the requirements of section 5959.

Williams' Appeal, 68 Penn. St., 327, is unlike the case at bar in three important particulars. First, the Pennsylvania statute differs from the Ohio statute. Second, the testator had made special mention of and specific bequests to his living children, his heirs, thus recognizing them in a discriminating manner. Third, the only claim the posthumous child could make would be under the general reversionary clause, which construed in the light of the context, would be held to apply as well exclusively to the then living children as to include the claimant.

(Submitted to Judge Arrel, February 19, 1883, and approved.)

PAYMENT—DEPOSITIONS.

[Superior Court of Cincinnati, General Term, February, 1883.]

Force, Harmon and Worthington, JJ.

*J. S. CROSBY v. W. H. HULL.

1. An immaterial issue having been submitted to the jury by agreement of counsel, and the jury being unable to agree, if there be no other issue it is not error to withdraw the issue submitted, and instruct the jury to return such verdict as the facts require.
2. Payment to a broker is not payment to his principal where the latter has not authorized the broker to receive payment, or contract in his own name, and has not acted so as to give the payer reason to believe the broker was so authorized.
3. Objection to the deposition of a party because his name does not appear in the notice is waived if not made as required by sec. 5284, Rev. Stat., and rule xvi of this court.

WORTHINGTON, J.

This is an action to recover the value of certain goods; it was tried before a jury, and verdict having been given for the plaintiffs, was reserved on a motion for a new trial.

After the evidence was closed by agreement between counsel, a single question of fact was submitted to the jury. Upon this question the jury reported they were unable to agree. The court then instructed the jury to bring in a verdict for the plaintiffs for the value of the goods. To this counsel for defendant excepted, and requested certain special charges, which were refused. The action of the court

* This judgment was affirmed by the Supreme Court. See opinion, 39 O. S., 100.

in thus annulling the previous submission, and also in refusing the special charges, is now urged as error, and ground for new trial.

If the final instruction of the court to find for the plaintiffs was correct, the question submitted to the jury was immaterial; if immaterial, it is erroneous to submit it; and though consent of counsel would waive any objection on the part of either to the error, yet it could not preclude the court from retracing its steps, correcting the error and avoiding a new trial. *Lloyd v. Moore*, 38 O. S., 97. Of course in making the correction the court must see no prejudice is done to any real ground of claim or defense there may be in the case. But no prejudice could result from the action of the court here, if its final charge was correct, for it left nothing to be argued or discussed.

So, too, refusing the special charges asked was not erroneous if the peremptory instruction given was correct. *Bond v. State*, 23 O. S., 249.

Therefore, the real question presented by these objections is—did the court err in directing a verdict for the plaintiff?

To determine this requires a statement of the admitted facts and the evidence. The petition avers that the plaintiffs were partners engaged in the lumber business at Greenville, Mich., that about March 12, 1881, one W. H. Roth, a lumber broker in this city, represented to plaintiffs that as such broker he had sold for them to defendant one car load of shingles at \$.55 per 1000; that thereupon the plaintiffs shipped to their own order one car of shingles, deliverable to defendant by the railroad company upon payment by him to it of the freight due; that about March 31, 1881, defendant paid the freight due and took the shingles away; that the shingles were worth the price above named less freight, to-wit, \$197.50 and that defendant had not paid for them.

The answer avers that the defendant purchased the shingles from Roth and that he paid Roth therefor without knowledge from whom Roth purchased them, or that the plaintiffs claimed any interest in them. It contains also a denial that at the time the defendant took the shingles the plaintiffs were the owners; but this was abandoned at the trial and the ownership of the plaintiffs was admitted.

The reply denies that the defendant paid Roth in ignorance of the plaintiffs' claim. Taking the admissions made by the pleadings and on the trial together, the only issue was whether payment to Roth was payment to plaintiffs, the allegations in the petition being substantially admitted, except that of non-payment.

On the trial the plaintiffs offered evidence, which was not contradicted, tending to prove that Roth, in advising them of the sale, directed them to ship the goods to Glendale, and to send the invoice to Cincinnati; that thereupon they shipped the goods to Glendale to their own order, and at the same time mailed to the defendant at Cincinnati an invoice from them to defendant, together with an order on the railroad agent at Glendale to deliver the goods on payment of freight.

The defendant offered evidence, also uncontradicted, that he dealt with Roth as a principal, not knowing he was a broker; that defendant never received the invoice and delivery order; that from the time of making the contract with Roth until the middle of April he was a member of the legislature, and living in Columbus attending its session; that he there received notice from Roth the shingles were about to arrive; that he thereupon instructed his agent to receive them and pay freight, which was done; that he paid Roth for the shingles in April 21, 1881; and that he never heard plaintiffs claimed any interest in them until after May 26, 1881, when they wrote demanding payment.

As the charge was peremptory and left nothing for the jury to consider, the evidence offered by the defendant must be considered as true.

Hence, therefore, we find that Roth was a broker; so far as the plaintiffs were concerned they knew him in the transaction only as a broker acting for them, they are not shown to have entrusted him with the possession, actual or constructive, of the goods. On the other hand the defendant knew Roth only as a principal, and dealt with him only as such. Counsel for plaintiffs relies upon *Hamet v. Letcher*, 37 O. S. 356, and *Brockhaus v. Klein*, ante 487. These cases are like this so far as the relations between the buyer and the intermediary are concerned; in each case the buyer dealt with the intermediary as a principal, in ignorance of the state of his relations with the seller. But in these cases the court held that the material question was not the relation between the intermediary and the buyer, but between him and the seller. In these cases the intermediary represented himself to the seller as acting for the buyer; he was

trusted with no authority to act for the seller; therefore the buyer's dealings with him did not affect the rights of the seller.

Here the intermediary represented himself to the sellers as contracting for them as a broker; by adopting this contract the sellers recognized the intermediary as their broker, and clothed him with all the powers lawfully exercisable by brokers, but with no other powers; the contract thus adopted was the contract reported to them, made in their name as principals, and not any other contract made in the name of the broker as principal; their action was a ratification, and the very essence of ratification is that it applies only to things reported or known to the ratifier, and not to things unknown. *Bennecke v. Ins. Co.*, 105 U. S., 360. If this contract, so adopted and ratified, did not authorize Roth to receive payment, the principle that controlled the decisions in the two cases in this state last cited must control here; if, in other words, Roth was not the plaintiffs' agent to receive payment, payment to him is no defense.

The charge given was correct, therefore, unless payment to a broker who has never had actual or constructive possession of the goods, is payment to the seller, where the broker, without the knowledge of the seller, contracted in his own name as principal. That this is no payment is, we think, conclusively shown by the cases of *Baring v. Corrie*, 2 B. & Ald., 137, and *Drakeford v. Piercy*, 7 B. & S., 515. The former case has always been considered as settling finally that mere employment of a broker gives him no authority to contract in his own name; to affect his principal by such contracts there must further appear a grant of power so to act, either express, or implied, from other circumstances than the fact of employment. Bayley, J., in that case, says: "A proprietor, generally speaking, is entitled to receive the price of his own goods, unless, by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means, to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern v. Nichols*, Salk., 289. There arise then three questions: first, did the plaintiffs (the sellers) enable Coles & Co. (the brokers) to appear as proprietors of the goods, and to practise a fraud upon the defendants (the buyers)? Secondly, did Coles & Co. actually practice a fraud? and thirdly, did the defendants use due care and diligence to avoid such a fraud? He then goes on to say that in the case before him each of these questions must be answered in the negative; but it is apparent that in his judgment a negative answer to any one of them would overthrow the defence. The arguments used by all the judges in that case to show that a negative answer must be given to the first of the above, viz.,—that the intermediary was employed solely as a broker, and was not entrusted with the goods or the muniments of title—apply with equal force to this case—nor is this answer affected by the fact that here as late as three weeks after receiving the goods the defendant was still without knowledge of the interest of the plaintiffs in the goods. His ignorance does not even tend to prove laches on the part of the plaintiffs; the plaintiffs knew him only as a purchaser at Cincinnati, while in fact, though a resident of Cincinnati, he was in Columbus. His ignorance therefore is perfectly consistent with an attempt on the part of the plaintiffs to communicate with him; and that such an attempt was made is proved by undisputed evidence. Where there is an absence of evidence tending to prove negligence, it is not error for the court in charging the jury to assume that such negligence does not exist. *Railroad v. Fleming*, 30 O. S., 430.

The case of *Drakeford v. Piercy*, 7 B. & S., 515, covers the case at bar on every point. The declaration was for goods sold and delivered. Plea, that the plaintiff sold and delivered the goods by Davies, his agent, but as vendor on his own account; that Davies sold and delivered as such vendor; that defendant had no notice that Davies was an agent, or acting otherwise than as actual vendor, until after he paid for the goods, and that he paid Davies believing he was actual vendor, and entitled to receive payment. To this there was a demurrer, and the demurrer was sustained because there was a failure to aver that the plaintiff by improper conduct enabled Davies to appear as proprietor of the goods, or clothed him with real or apparent authority to receive payment; and that while the allegations in the plea might justify a jury in finding these facts, yet being conclusions of fact, they must be averred, and could not be omitted from the plea.

The facts that were omitted from that plea are omitted also in the answer here. On the pleadings, therefore, the plaintiffs were entitled to judgment after the denial of ownership in the plaintiffs had been withdrawn on the trial. The evidence offered was insufficient to justify an amendment of the answer setting up these omitted facts, for it utterly fails to show that Roth was employed otherwise than as a broker, or ever had any possession of, or control over, the goods,

or that anything was disclosed to the plaintiffs from which they could suppose that Roth had violated his duty to the defendant, whereby they might be required, at their peril, to see that defendant was truly advised. On the contrary, if the question of amendment be considered, it appears by evidence of such a character as to carry belief in its truth, that the plaintiffs did all that could reasonably be expected of them, with such knowledge as they had of the defendant's position, to advise him of their rights. And when it is desired to conform the pleadings to the proof, it is for the court to determine what has been proved.

We have been referred by counsel for defendant to the following authorities as supporting his defence: *Pratt v. Willey*, 2 C. & P., 350; *Bowmanville Machine Co. v. Dempster*, 2 Can. Sup. Ct., 21; and *Boston Ice Co. v. Potter*, 123 Mass., 28.

In the first of these cases, *Best*, C. J., left to the jury the same issue that counsel agreed in this case to submit, and the jury found the issue for the plaintiff. The materiality of the issue was not discussed. The second case is very meagerly reported; a fuller report is found in reports of the inferior court, 2 Russ. & Ches., (Nova Scotia, Law), 273, from which it appears that the issue submitted was whether the plaintiff had authorized the agent to contract in his own name as principal. The jury found that he had, and the court held the evidence warranted the finding. Here it is conceded the plaintiff gave no such authority.

The last case relied on in no way resembles this: It was an action on contract for goods sold and delivered; no express contract was proved; the plaintiff furnished the goods knowing the defendant had refused to buy them from it, and concealing the fact that it was the vendor, whereby any presumption of an implied contract was rebutted. The case has no bearing upon the duties of a vendee unwittingly contracting with the agent of an undisclosed principal.

The only case we have been able to find which does support the defendant's claim is the *Eclipse Wind Mill Co. v. Thorson*, 46 Ia., 181. But the court there cites no authorities in support of its conclusion, and the reasons assigned are not cogent enough to compel us to follow it in disregarding rules previously well settled. We are satisfied, therefore, that the final charge of the court was correct.

It is contended also that the court erred in admitting certain depositions of the plaintiffs themselves, because the notice failed to specify, as required by sec. 5273, Rev. Stat., that the deposition of a party was to be taken. No exception to the deposition was made and filed as required by secs. 5284 and 5285, Rev. Stat., and by rule xvi of this court, 1 Handy (Mills ed.) xxii. But counsel claims the objection is to the competency of the witness, and therefore under sec. 5285, no such exception was required. We think, however, the objection is a formal one; it goes not to the competency of the witness, but to the manner of introducing his evidence. The objection is much less forcible than that in *Cowan v. Ladd*, 2 O. S., 324, where the deposition failed to show the witness was sworn, and yet was held to have been properly received, no exceptions having been filed.

With reference to this very question of competency the court say: "The competency of the evidence does not apply to the form of its introduction, but to its inherent character, as legitimate and proper to prove the fact intended to be established. * * * The rule (a rule of court like our own) clearly applies to a case where the evidence is, within its meaning, competent, but where, from some other defect in the deposition, it is liable to be ruled out."

The object of section 5285 is to require all objections to depositions, to be made before the trial, saving only those which might be made if the witness were present in court, already sworn, and upon the stand ready to testify.

The grounds alleged in the motion are not well taken. The motion will therefore be overruled, and judgment entered upon the verdict.

Force and Harmon, JJ., concur.

DIVORCE—DOWER.

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[Superior Court of Cincinnati, General Term, February, 1883.]

Force, Harmon and Worthington, JJ.

MARGARET ROGERS v. SARAH M. TAYLOR ET AL.

A woman divorced from her husband by decree of another state, for her own willful absence, is not entitled to dower in his lands in this state after his death, under either dower or divorce acts.

FORCE, J.

The plaintiff was divorced from her husband, April, 1845, by the circuit court of Kenton county, Ky., by reason of her willful absence. In December of the same year, she living in Cincinnati, brought suit in this county for divorce and alimony. The court found that the parties had already been divorced and granted only a decree for alimony. She never married again. Her former husband dying in 1880, she instituted this action for dower.

It was held by the Supreme Court in *Mansfield v. McIntyre*, 10 O., 27, that the provision of the statute that if a divorce be granted by reason of the aggression of the wife she shall be barred of her dower, does not apply to foreign divorces, but only to such as are granted in Ohio. The fact that the plaintiff was divorced by reason of her fault, therefore does not affect the case, but it stands as if there were no finding by the court whether the ground of the divorce were her fault or her husband's.

At common law the mere fact of divorce extinguished the contingent right of dower. Coke says: "But if they were divorced a vinculo matrimonii in the life of her husband, she loseth her dower." 1 Thomas Coke, 572. And the context shows the reason to be that in such case, she was not his wife at the time of his death and therefore was not his widow after his death. This rule of the common law prevails generally throughout the United States.

In Ohio, the provision introduced into the statutes in 1824, that where a divorce should be granted by reason of the aggression of the wife she should be barred of her dower, raised a presumption at one time, that if the divorce should be granted not on that ground, she would not be barred; and the Supreme Court so held in *Mansfield v. McIntyre*, *supra*.

But in *Rice v. Lumley*, 10 O. S., 596, it was held that dower is allowed only to the widow who was the wife of the person dying at the time of his death. This decision was given by only a majority of the court. But this was affirmed in *Lamkin v. Krapp*, 20 O. S., 454, where it was also held that the right of dower given to a wife who is divorced by reason of the aggression of her husband is a provision outside of and in addition to the provision made by the dower act. Both these cases were cited and followed in *Charlton v. Miller*, 27 O. S., 298.

The plaintiff, not being the widow of Melanchthon Rogers, is not entitled to dower under the dower act; and the divorce not being granted by reason of his aggression, she has no claim to dower under the divorce act.

Judgment for defendants with costs.

Harmon and Worthington, JJ., concur.

Saylor & Saylor, for plaintiff.

Perry & Jenney, Mitchell & Holmes, and J. H. Bates, for defendants.

HUSBAND AND WIFE.

[Hamilton Common Pleas.]

HELMKAMP, KAUFMAN CO. v. J. H. H. KATER, ADMR.

The funeral expenses of a married woman may, under sec. 6090, Rev. Stat., be made a charge upon her separate estate, though such deceased left surviving her a husband having property.

MAXWELL, J.

It appears from the agreed statement of facts, upon which this case is submitted, that the plaintiffs, who are undertakers, furnished the materials and performed the services necessary for the funeral of Anna Steinman, a married woman; that they did this upon the request of the husband; that he has paid a portion of the bill, but that he has neglected or refused to pay the balance; that he has no property, and that she had, and has left a separate estate.

It is claimed on the part of the plaintiffs, that they furnished the material and performed the services on the credit of her separate estate, and that the estate is liable to them, and it is claimed on the part of the defendant, that the husband of the decedent, and not her estate, is liable for the bill of the plaintiffs.

Section 6090, Rev. Stat., provides that an administrator or executor shall pay "first—the funeral expenses, those of the last sickness, and the expenses of administration," and it might be argued that this law of distribution applies to all cases where there is any estate to be distributed, and that the rule applies to the estate and not to the person.

The defendant claims that at common law the husband was liable for the funeral expenses of the wife, and that, as no express statute on that subject has been enacted, the common law rule still applies. I think, the application of that rule depends upon the facts of the case to which it is sought to be applied. At common law, the husband was liable for the funeral expenses of the wife, even if she were living apart from him, upon the same principle that he was liable for necessities furnished her, i. e., to prevent her from becoming a charge on the public, or falling into destitution, and any one might furnish her necessities while she lived, and decent burial after death, and recover from the husband the amount so expended, as a matter of public policy. *Ambrose v. Kerrison*, 10 C. B., 776; *Bradshaw v. Beard*, 12 C. B. N. S., 344; *Cunningham v. Reardon*, 98 Mass., 538. It will be found, however, on examination of these cases, that they were all cases in which the wife had no estate, but was wholly dependent on her husband.

That a different rule from the foregoing applied where the wife had a separate estate, may, I think, be fairly inferred from another class of cases. In *Gregory v. Lockyer*, 6 Mod., 90; the wife had left a separate estate, and the husband, who was her executor, had charged her funeral expenses against that separate estate. The court permitted the account to stand. In *Bertie v. Lord Chesterfield*, 9 Mod., 30, it was sought by the devisee of the husband to cast the funeral expenses of the wife on her executor, on the ground that she had left a separate estate, but the court refused because it appeared that she had devised away all her separate estate, so that the executor took nothing.

But the courts have gone even further, under the common law. In *Willeter v. Dobie*, 2 Kay & J., 647, it was held that where a married woman had made her funeral expenses a charge on her separate estate, the husband might recover for funeral expenses paid by him. In *Parker v. Lewis*, 2 Dev., (N. C.) 21, the funeral expenses are held to be a charge on the estate of the decedent. In *Patterson v. Same*, 59 N. Y., 583, it is held that when the owner of some estate dies, it is the duty of the estate to bury him. In *Ellis v. Ellis*, 12 Pick., 178, it was held that the funeral expenses of a widow were a charge on her estate, and not on that of her deceased husband. In *Lawall v. Kreidler*, 3 Rawle, 300, it was held that the hus-

band's estate was not liable for the funeral expenses of the widow, it appearing that she had left some separate estate to her children.

The rule of the common law, as to the capacity of the wife to hold and use separate property, has been materially changed not only in many of the United States, but also in England. In our state, the wife may acquire and hold property, both real and personal, as if she were a feme sole, and the statutes, and the decisions of our supreme court, have extended her liability until her separate estate will be bound for any obligation which either appeared to have been incurred for the benefit of her separate estate, or which the testimony shows was incurred upon the faith and credit of her separate estate. In short, the difference between the rights and liabilities of a married woman and a feme sole is mainly in the procedure. As I have said, the rule is much the same in other states and in England. In *McCue v. Garvey*, 14 Hun., 552, the husband was allowed to charge the funeral expenses, which he had paid, against his wife's separate estate. In *Hodgson v. Williamson*, 43 L. T. Rep., 676, it was held that as to all others than the husband, the funeral expenses of a married woman should be a charge on her separate estate, and the court, in this last case, seem to imply, that this had long been the rule in England. See also *Schoyler on Husband and Wife*, secs. 412, 413, where the subject is discussed at some length.

My conclusion is that the provision of sec. 6090, Rev. Stat., quoted above applies as well to the estate of married women, as to others, and the judgment will therefore be for the plaintiff.

Cornell & Marsh, for plaintiff.

Alex. Paddack, for defendant.

[Hamilton District Court.]

CINCINNATI HOTEL CO. v. THEODORE MARSH.

A person who, representing himself to be agent, signs another's name to a promise cannot himself be held on the premises.

ERROR to the Common Pleas Court of Hamilton county.

SMITH, J.

This is a petition in error to reverse the judgment of the court of common pleas. The action is founded upon a stock subscription. The petition alleges in substance, that the Cincinnati Hotel Co. is a corporation duly organized under the laws of Ohio, for the purpose of building a hotel on the corner of Central avenue and Fourth street; that a certain amount of stock had been subscribed; that defendant assumed to have authority, and represented that he had the authority to subscribe for one Margaret Kyle and T. D. Marsh, and bind them to pay a subscription of \$1,000; that upon the faith of this and other subscriptions, the Hotel Co. proceeded to erect a hotel at the corner of said two streets; that said Marsh did not have authority to make said subscription for the stock; that the company afterwards tendered to him the stock said subscribers would be entitled to under that subscription, which he refused to receive, and the petition concludes with a prayer for a judgment for the amount of the subscription. Attached to the petition is a copy of the subscription paper

containing the terms of the subscription, and a partial list of the subscribers, including in that list of subscribers the name of Margaret Kyle and T. D. Marsh, \$1000. The defendant's name nowhere appears, either as principal or agent. To this petition an answer was filed by Marsh, admitting that he had no authority to sign the names of Margaret Kyle and T. D. Marsh, his sisters, to that subscription, but stating that this subscription was made with notice to the plaintiff, that it was not to be binding, until he had consulted with his principals, and that having consulted with them they had refused to ratify it, and he within two or three days so notified the plaintiff, and the plaintiff had agreed to erase their names from that subscription.

To this answer a reply was filed. The case came on for trial before the court and jury.

Numerous errors were alleged in the record, but there is only one which we think necessary to consider. The first special charge asked by plaintiff below is as follows: "If the jury find that the defendant signed the names of Margaret Kyle and T. D. Marsh and had no authority, the jury have a right to treat him, as acting for himself in taking that mode of binding himself." That instruction the court refused to give and in the general charge said as follows: "In this action the plaintiff seeks to recover the amount of his subscription and interest, and we say to you, that the defendant is not liable to the plaintiff in the present form of the action for the amount of the subscription, for the reason that the subscription paper does not contain words importing a personal liability."

This charge was in effect a direction to the jury to bring in a verdict for the defendant. The question how an agent may be sued, who purport to make a contract for a principal, without authority to make such contract, the other contracting party relying upon the alleged contract, is a matter upon which the decisions are more or less in conflict. As appears from the allegation of the petition in this case and admitted in the answer, Mr. Marsh signed the names of his two sisters to that subscription, without any authority, and the plaintiff proposes to hold him liable on that subscription as though he were the contracting party. The form of remedy to be pursued in such cases has been considered in a large number of cases both in this country and in England. There is one class of cases which deny the right to sue on the contract, but the alleged agent may be sued in tort for the damages sustained, for assuming to act without authority. Cases representing that doctrine are *Jeffis v. York*, 4. Cush. 371; Same case, 10, Cush., 392; *Noyes v. Losing*, 53 Me., 411; *Wharton on Agency*, sec. 524.

There is another class that hold that if an agent, or party assuming to be an agent, enters into a written contract without authority, then there is an implied warranty that he has authority, and that he may be held and sued upon the contract itself as upon an implied warranty. *White v. Madison*, 26 N. Y., 117; *Dusenbury v. Ellis*, 3 Johnson's Cases, 70; *Boltyer v. Nicolai*, 53 N. Y., 469. But it will be found in this and other cases of this class that the name of the agent appears in the instrument, and is either a contract purporting to be made by the agent for the principal or a contract made in the name of the principal by the agent, the agent's name appearing upon the written instrument itself; and the ruling has been that when such written contract is made by the agent without authority, all that part of a contract which tends to show the liability of the principal is

surplusage and the agent is held liable as upon his own contract. But the case at bar differs from these. Here there is a written contract, but the agent's name nowhere appears upon it.

In the case of *Grafton Bank v. Flanders*, 4 N. H., 239, similar to the case at bar, the agent was held liable as upon his own contract, but this case was not noticed in *Savage v. Rix*, 9 N. H., 263, and *Moore v. Wilson*, 6 Foster, 332, subsequently decided by the same court, where it was said that there must be apt words to bind the agent, and if such words appear, then whatever indicates that he might be an agent must be regarded as descriptive. This is the same doctrine, as held in *Dusenbury v. Ellis* above cited. See also the notes to *Rathburn v. Bulong*, 1 Am. L. Ca. 768, 4 ed. Such being the case it seems to us that the agent cannot be sued upon his own contract. As stated by Prof. Parsons in his treatise on Notes and Bills, vol. 2, page 466, if A, without authority, signs the name of B, to a note, and A's name doesn't appear upon the note, neither party is liable upon the note. First, A, is not liable, for his name does not appear upon it and B, is not, for A, signed the note without B's authority. And the same doctrine applies to this case. Here is a written contract made by a man assuming to make it without authority, and the persons in whose name it is made are not liable because the agent had no authority, and the agent is not liable, because his name does not appear in the contract itself. There is no adjudged case by our Supreme Court precisely in point, but the following tend to support the views here pronounced.

In *Titus v. Kyle*, 10 O. S., 445, there was a note given by persons representing themselves to be the directors of the turnpike company. The note was for the benefit of the turnpike company, but the court held that their names appearing on the note the defendants were individually liable.

In *Collins v. Buckeye State Ins. Co.*, 17 O. S., 215, there was a note signed by a party as "agent," and claiming to be an agent, but the body of the note contained apt words to bind him. The court held he was liable according to the terms of the contract, and in *Anderton v. Shoup*, 17 O. S., 126, a note was signed by an agent as "agent," and the attempt was made to hold an unknown principal, because it appeared that he had acted for another, the court refused to allow him to show it, holding that though that might be the rule as to simple contracts, it was not as to negotiable paper, and no one could be made liable thereon unless his name appeared thereon.

It appears therefore that we have no specific guide in the decisions of our Supreme Court. In the other cases cited, where the agent acting without authority, has been held liable upon the contract itself, his name appeared in the contract, and the reasoning of those cases rests upon the fact that his name does thus appear, and the contract contains apt words to charge him. There are no such words in the contract sued upon in this case to charge Mr. Marsh. His name nowhere appears upon the subscription. We therefore think the ruling of the court below that he was not liable upon the contract itself was correct, and the judgment should be affirmed.

Jordan, Jordan & Williams, for plaintiff.
S. F. Hunt, for defendant.

OFFICE AND OFFICER.

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[Superior Court of Cincinnati, General Term, February, 1883.]

HENRY KNORR v. BOARD OF EDUCATION.

A city treasurer, being ex-officio treasurer of the school fund, for which he cannot have compensation, and is required to serve until his successor is qualified, his successor qualified as city treasurer, but failed for five months to qualify as school treasurer, during which time the school board refused to release him and requested him to continue, which he did: Held, he cannot have compensation. If he was city treasurer during that time the law denies compensation: If he was not, his holding the school funds was an unlawful act.

FORCE, J.

The plaintiff states that in April, 1879, he was elected city treasurer of Cincinnati, and qualified as treasurer of the city and also as treasurer of the board of education, which averments are explained as meaning that he qualified as treasurer of the city funds and also treasurer of the school funds, which latter are the terms used in the statutes. That in April, 1881, his successor was elected city treasurer, was qualified as such, but failed to give bond as treasurer of the school funds to the acceptance of the board of education till the September following. That is to say he qualified as treasurer of the city funds in April, but not as treasurer of the school fund till September. That upon qualifying as treasurer of the city funds, he entered upon the office of city treasurer. That during the five months from April to September, and until such successor qualified as treasurer of the school funds the defendant refused to release the plaintiff from the safe-keeping and disbursement of the school funds, or permit him to turn them over to his successor, but requested plaintiff to keep and disburse the same, which he did to the satisfaction of the defendant. It is not expressly stated, but it is necessarily implied that plaintiff's successor during these five months drew the salary of the office of city treasurer, and plaintiff asks for reasonable compensation for his labor and responsibility. Defendant demurs.

It is provided by sec. 3880, Rev. Stat., that every city having a population of ten thousand or more shall constitute a school district and be styled a city district of the first class. By section 4042, "in each city district the treasurer of the city funds shall be ex officio treasurer of the school funds." By section 1768, the city treasurer shall be treasurer of the city funds. By section 1739, the city treasurer shall give bond before entering on the duties of his office. By section 4043, "each school district treasurer, or county treasurer who is ex officio treasurer of a school district, shall, before entering on the duties of his office, execute a bond"—"to be approved by the board of education." By section 4056, "treasurer of city districts shall not be allowed any compensation for disbursing the school funds." By section 1713, the city treasurer shall serve until his successor is qualified.

The statute, therefore, is explicit as to who shall be treasurer of the school funds of Cincinnati. It is the city treasurer for the time being. It is equally explicit that he shall receive no compensation for disbursing the school funds: his salary is compensation for performing all the duties of the office. There cannot be two city treasurers of Cincinnati at the

same time, for the one in office remains till his successor is qualified, and ceases to hold the office when his successor is qualified. The plaintiff either was city treasurer, or he was not. If he was city treasurer, the statute prohibits the defendant from paying him for the services which he rendered. If he was not city treasurer, he had no authority to hold and disburse the school funds, and could not be required to do so, and he cannot demand compensation, for doing an unlawful act. In either case, the plaintiff fails in his demand.

This is all that the case requires us to say. But the argument of inconvenience was pressed so warmly, that we feel constrained to add a further remark. Granting that the city treasurer is required by section 4043, as both parties admit he is, to give an additional bond before he takes charge of the school funds, then if the city treasurer can enter upon his office for all other purposes and draw the salary for five months without giving such additional bond, he certainly can do so for his whole term. And, if he can do so, his successors can do so. Hence, if the plaintiff was rightfully held for five months, he could be held for life to the performance of duties for which the law expressly denies him compensation.

But when the statute says that "the treasurer of the city funds shall be ex officio treasurer of the school funds," it does not make one man fill two offices; it only annexes to the office of city treasurer the charge of both funds. Each charge is alike and one just as much as the other, a function of that office. This principle or rule was stated by Judge Swan in his opinion in *State v. Kennon*, 7 O. S., 546, see p. 572, and declared by the court in *Walker v. Cincinnati*, 21 O. S., 14, and in a case more nearly resembling the present, *Dawson v. State*, 38 O. S., 1.

When a person elected to the office of city treasurer has qualified for that office, he is authorized to perform all the duties which that office requires him to perform. Until he has qualified for the office, the statute keeps the old incumbent in the office. Whether the treasurer elect is qualified for the office of city treasurer by giving a bond, or only upon giving two bonds, we have no opinion to express. The question is not before us for adjudication, and when it does arise, it is to be determined on quo warranto or mandamus. The plaintiff might have brought the question before the district court. That not having been done, we can say nothing about it. But it is enough for the present case to say that, whether the plaintiff was city treasurer or entitled to be such or not, during those five months, in either case he fails in his present claim.

Demurrer sustained and judgment for defendant.

Paxton & Warrington, for plaintiff.

Philip Kumler, city solicitor, for defendant.

REPRESENTATION TO MERCANTILE AGENCY—ESTOPPEL 183

[Hamilton Common Pleas.]

*JOHN W. SOHN v. HENRY FREIBERG ET AL.

If one represent to a mercantile agency that he is a partner of another, he will be estopped to deny the truth of his representation, as against all subscribers of the agency to whom this representation may have been communicated by the agency, and who may have dealt with such other person on the faith of such representation. But the person setting up such estoppel must be a subscriber to the agency, and it will not be sufficient to be a stockholder in a bank which is a subscriber or a member of a firm which is a subscriber, if the business of such firm be separate and distinct from the business of the person setting up the estoppel.

MAXWELL, J.

The plaintiff sues Henry Freiberg and Julius Freiberg, as partners under the firm name of "H. Freiberg," upon three promissory notes, dated April 1, 1878, payable in six months after date, and amounting to \$6,400.

Henry Freiberg makes no defense, but Julius Freiberg answers, and denies that he is, or ever was, a partner with Henry Freiberg, or that he is in any way liable on the notes.

It is conceded by the plaintiff that Henry Freiberg and Julius Freiberg were not in fact partners, as between themselves, but it is claimed that Julius Freiberg is estopped to deny his liability to the plaintiff on these notes, by reason of certain representations he is alleged to have made as to his business relations with Henry Freiberg, which representations, it is alleged, were intended to be, and were, communicated to the plaintiff, and which, it is alleged, the plaintiff relied on in selling the leather for which the notes sued on were given.

The facts in the case are as follow: At and prior to the making of the notes sued on, the plaintiff was engaged in the business of a tanner at Hamilton; the defendant, Henry Freiberg, was engaged in the business of a tanner in this city, and the defendant Julius Freiberg was engaged in the liquor business, being the senior member of the firm of Freiberg & Workum.

The plaintiff and Henry Freiberg had had a personal acquaintance and personal dealings with each other from the year 1875 to the time of making the notes sued on, but the plaintiff and Julius Freiberg had had only slight personal acquaintance, and no business dealings with each other.

The holding himself out as a partner by Julius Freiberg, upon which the plaintiff relies, consisted solely in statements or representations alleged to have been made to a commercial agency. The testimony is, that, about August 8, 1877, one A. B. Allen who was at that time a reporter for Bradstreet's agency, called upon Julius Freiberg, and informed him that there was a report in the office, rating the firm of Henry Freiberg at \$300,000 to \$350,000, and asked him if he was still a partner with his brother Henry; that Julius Freiberg replied that he was, and fully responsible for the debts of the concern. Allen reported this to the office of the agency. The report which Allen referred to in the interview, and the one which he made in addition, are as follows: "Freiberg, Henry, Tanner, Livingston St., Cincinnati, Ohio. Learn—age 45 to 50. In business since 1866. Represented as honest, of good capacity, and thought making money. His brother, Julius Freiberg, (of Freiberg & Workum), states that he is full partner in this business, and personally responsible for liabilities. The trade considers the firm good for all contracts, and estimated worth \$300,000 to \$350,000, January 19, 1876."

"Additional.—Mr. Julius Freiberg, of Freiberg & Workum, says he is a full partner in the above business and fully liable for the debts of the concern. This we learn makes the concern amply good for all their contracts and worth \$300,000 to \$350,000, August 8, 1874."

Julius Freiberg denies having made such a statement, but says, that about the date named, Allen called upon him and asked him if he was in the same relation with his brother that he had been theretofore, and that he answered yes,

* The judgment in this case was reversed by the district court. See opinion 6 Dec. R., 1175. (s. c. 11 Am. Law Rec., 736.)

meaning that Henry was his brother. Taking Julius Freiberg's version of the interview, I think the construction put upon his answer by Allen was correct. He knew that Allen was a reporter for a commercial agency, and that this question was of a business nature, and I think he must be held responsible for the idea his language was suited to convey to the mind of Allen. See *Palmer v. Pinkham*, 33 Me., 32.

Considering, however, the fact that Allen reduced the substance of the conversation to writing at the time and that he has no interest in the controversy, I think his version is more likely to be correct.

The plaintiff was not a subscriber to Bradstreet's agency, but he was a stockholder and an officer in the First National Bank of Hamilton, which was a subscriber, and was a member of a firm in Hamilton, which was, but which had no connection with, or interest in this tanning business. The weight of the testimony is, however, that he had not consulted Bradstreet's book at either place to learn the rating of Henry Freiberg.

On November 14, 1877, the plaintiff went to the bank to get one or more of the notes of Henry Freiberg, which had been taken for leather, discounted. After the note had been discounted, the cashier asked the plaintiff if Henry Freiberg was good, and the plaintiff replied that he thought he was; that he understood Julius Freiberg was interested in the business. Thereupon the cashier said he would inquire, and he wrote to Bradstreet's agency, here: "Please give us what information you can in regard to the character, standing, etc., of H. Freiberg, tanner. Is Julius Freiberg a special partner?" signing it as cashier of the bank. He also, at the same time wrote to two of the banks here, but his letters to them, and their replies, are not material. In answer to the letter to the agency he received the next day the report which I have already quoted in full. This had printed across its face the caution: "This report is transmitted to you in strict confidence, for your exclusive use and benefit in accordance with the terms of the contract existing between us." The clause in the contract referred to, was as follows: "And we further specially agree that all printed matter, and written or verbal reports furnished to us; shall be held in strict confidence by us, that we will neither ask for information for use of other parties, nor permit it to be done." As soon as this report came to hand the cashier handed it to the plaintiff.

The facts may be summarized as follows: Julius Freiberg was not in fact a partner of Henry Freiberg, but on August 8, 1877, he so represented or admitted himself to be to Allen, knowing him to be a reporter for Bradstreet's agency, and knowing that Allen was making the inquiry in the usual course of his business of procuring information for the agency. Bradstreet's agency, upon the request of the First National Bank of Hamilton, a subscriber, made on November 14, 1877, furnished them the report, and the bank turned the report over to the plaintiff who was not a subscriber. The plaintiff believing the report to be true, and relying thereon, on April 1, 1878, sold the bill of leather for which the notes sued on were given.

The legal question to be determined is, whether or not, as to the plaintiff, Julius Freiberg is estopped to deny that he was a partner with Henry Freiberg on April 1, 1878.

There are two preliminary questions to be disposed of. It being conceded that Julius Freiberg was not a partner with Henry Freiberg, it is claimed by his counsel that the action against him cannot be maintained in its present form. I think it can. See *Rice v. Barrett*, 116 Mass., 312.

Again it is claimed, that under the authority of the case of *Cook v. Slate Co.*, 36 O. S., 135, reports of a mercantile agency are not competent evidence to charge one as a member of a firm. An examination of the case shows, however, that there was no evidence on the trial below tending to show that the defendant had communicated to the agency, the statements which they had made to the plaintiff below, and the case seems to have been disposed of on this question of fact. I think the testimony in the case at bar is competent. See *Eaton v. Avery* 83 N. Y., 31.

As this case must be determined in accordance with the general doctrine of estoppel in pais, *Wood v. Pennell*, 51 Me., 52, it is important to get as concise a definition of that doctrine as possible. The definition given in *Pickard v. Sears*, 6 Ad. & El., 474, is this: "When one, by his conduct or words wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In 2 Exch. Rep., 654, wilfully is defined as meaning that "a party intended his representation to be acted upon, and it is acted upon." In *Jordan v. Money*

5 H. of L. Cas., 212, it is said: "If a party mislead another, it must be under such circumstances that he had reason to suppose that the person misled was to act upon it, and that it will not do for a stranger to act upon it, and then come to him to make it good." Bigelow, 3 ed. 384, says: "An estoppel by matter in pais, may be defined as an express or implied admission, become indisputable by reason of the circumstance that the party claiming the benefit of it has, while acting in good faith and in accordance with the real or presumed assent of the other party, been induced by it to change his position;" and on page 508 he says: "Only those to whom the representation is made or intended to influence and their privies may take advantage of the estoppel." The limitation as stated in *Mayenberg v. Haynes*, 50 N. Y., 675, is: "The declaration of A to B not made with the purpose or belief that it would be communicated to C., or would influence his action, constitutes no estoppel upon A., although C. afterwards hears of it and acts upon it." See also *McCracken v. West*, 17 O., 16; *Morgan v. Spangler*, 14 O. S., 102; *Townsend Savings Bank v. Todd*, 47 Conn., 217, bottom of page. Bigelow on Estoppel, p. 484, analyzes the elements of estoppel by conduct, and, in a foot note, says they "should be considered in connection with the elements of the action of deceit, to which there is the closest correspondence." Bigelow, Torts, 33 says: it must appear, "moreover, that the plaintiff was entitled to act upon the representation; and this will depend upon the intention of the defendant. The representation may have been intended for one particular individual only, in which case he alone is entitled to act upon it, or it may have been intended for several or for many, or for any one of a class, or for any of the public."

See also *Swift v. Winterbotham*, 8 Q. B., 244; *Peck v. Gurney*, 43 L. J. Ch., 19.

As applicable to this case, I believe the following to be a correct statement of the law. If one voluntarily hold himself out to the public, or to a third person, or to a class of persons, by his acts or language, as a partner of another person, and the public, or any one of the class, or the third person, deal with that other on the faith of such holding out, then the persons so holding himself out will be estopped to deny that there was in fact such a partnership, and the holding out need not be to the person to be induced to rely on it; the only question is, for whom it was fairly intended. *Commonwealth v. Call*, 21 Pick., 515; *Commonwealth v. Harley*, 7 Met., 462. As I have said, if the plaintiff relies on the estoppel, he must show that the holding out was to the public. *Wheeler v. McEldowney*, 60 Ill., 358; *Martyn v. Gray*, 8 C. B., 822, or that the holding out was to a class of whom the plaintiff was one. *Swift v. Winterbotham*, 8 Q. B., 244; *Peck v. Gurney*, 43 L. J. Ch., 19, or that the holding out was to him. *Dickinson v. Valpy, B. & C.*, 128; *Irvin v. Conklin*, 36 Barb., 64; *Langridge v. Levy*, 2 M. & W., 519, as qualified by *Barry v. Croskey*, 2 Johns & H., 24. But it cannot be claimed in this case that the holding out was to the public, for there was but one statement, and that was made to the mercantile agency, for the use of their subscribers nor can it be claimed that the holding out was to the plaintiff as an individual. It follows then that the plaintiff must show that he belonged to the class to which the representation was made, to-wit: the subscribers to Bradstreet's agency; for if he cannot, his action must fail.

It is urged that because the plaintiff was a stockholder in the bank which obtained the report quoted, he was entitled to use the information, and it not on that ground, that he was certainly entitled to use it, because he was a member of a firm who were subscribers. I do not think he was entitled to the information on either ground. To hold that he was entitled to it on the first ground, would be to hold that every business man holding a share of stock in any corporation, would be entitled to the services of the agency, a consequence certainly not within the interpretation of the contract under which a corporation becomes a subscriber to the agency. The second claim seems more plausible, but let us see what the logical result of it is. Suppose the firm of Smith & Co. to be subscribers to the agency, Brown is a member of that firm and also carries on an entirely distinct business under the firm name of Brown & Co. As a member of the firm of Smith & Co., Brown is entitled to use for the benefit of the business of Brown & Co., the information obtained from the the agency by Smith & Co. Jones is a member of the firm of Brown & Co. and of course comes into possession of the information used by Brown & Co., obtained through Smith & Co. Jones also carries on a separate business from that of Brown & Co., under the firm name of Jones & Co., and having come into possession of the information originally obtained through Smith & Co. uses it in the business of Jones & Co. It follows logically, that if Brown & Co. are entitled to the information, Jones & Co. are also. But Brown & Co. clearly are not ergo Smith & Co. are not. Hence it seems clear to me that the use of

the reports cannot be extended beyond the person with whom the contract is made.

The fact was, that the plaintiff was not a subscriber, that the bank made the inquiry for his use and benefit, and turned the answer over to him; without authority, against the terms of their contract with the agency, and against the express terms of the caution on the face of the report, and the plaintiff took it with the notice on the face of it. As the plaintiff does not belong to the class for whom the representation was intended, and the communication of it to him was unauthorized, he is not entitled to rely on the representation, and the judgment must be for the defendant.

Follett, Hyman & Dawson, for plaintiff.

Long, Kramer & Kramer, for defendant.

186 BREACH OF CONTRACT FOR SERVICES—DAMAGES.

[Allen Common Pleas.]

*GEO. W. JAMES v. COMMISSIONERS OF ALLEN COUNTY.

An employee was wrongfully dismissed from service before the expiration of the time of employment. He was paid in full for the time actually served. His wages were to be paid monthly. The contract time has not yet expired. He has been ready and willing to serve and has tendered his services from time to time to his employer, who refuses to accept the same. At the end of two months after his dismissal he brought suit and recovered judgment for two months lost wages. He now brings this suit to recover lost wages for the two succeeding months: Held, that the employee's remedy rested in an action for damages, for a breach of the contract, and that he was limited to one recovery. The first recovery is a good bar to the present action.

HUGHES, J.

The facts in this case, so far as they are necessary for a proper understanding of the questions raised by the demurrer, and which for the purpose of the demurrer are admitted to be true, are, in substance, as follows:

The plaintiff and the board of the county commissioners of Allen county, Ohio, defendants, on December 13, 1881, entered into a written contract, by the terms of which it was agreed that the plaintiff should be and was thereby employed by the defendant, as such board, as a superintendent, under the direction and control of said board of commissioners, to superintend the stone and brick work in the erection of a court house in said county, then in process of erection; to inspect said materials and pass upon their quality and fitness for said building, under the contract of said defendant with the builders of said building; and to do divers and sundry other things, properly pertaining to the position of a superintendent of such work, which were set out and named in said contract.

The plaintiff was to put in all his time during reasonable working hours, (Sundays excepted) until said brick and stone work was completed. The time of his employment by the terms of said contract, was to continue until all the stone and brick work in said building was completed. The time of employment was not otherwise defined or limited.

By the terms of said contract, the plaintiff was to receive and be paid by said defendant for said service, at the end of each and every month, the sum of one hundred dollars. Under this contract the plaintiff entered upon the services and into the employment of defendant and performed fully and all the duties required of him by the terms of said contract, until April 6, 1882, when without his fault and against his protest, he was dismissed from said service, by said defendant without sufficient cause or excuse therefor. The plaintiff has at all times since the date of the filing of his petition in this case been ready and willing to perform the duties and services contemplated by said contract, and has from day to day during that period, tendered to said defendant his services under said contract. The defendant, at the date of said dismissal, notified said plaintiff that it would no longer accept his services under said contract, and has at all times since that date refused to accept his said services, and has by such dismissal and refusal, ever since then, prevented the plaintiff from performing his said services under

*This judgment was affirmed by the Superior Court. See opinion 44 O. S., 226.

said contract. The defendant paid to the plaintiff the full amount of wages contemplated by said contract, without suit, up to April 13, 1882, being in full for the current month unexpired at the date of plaintiff's dismissal, which was accepted by the plaintiff. The brick and stone work of said courthouse building is still in progress, but not yet completed.

On November 27, 1882, the plaintiff recovered a judgment in this court against the same defendant, for the sum of two hundred and five and thirty one-hundredths dollars, and costs, which is unreversed and has been paid and satisfied, in an action therein and theretofore commenced, between the same parties. In the petition in which case, the plaintiff set out the same contract set out in this case: his employment and service thereunder, his wrongful dismissal, his willingness and readiness to serve the defendants under said contract, his tender of services, and the refusal of defendant to accept his services, and its refusal to permit him to serve it under said contract, substantially as they are set out in this case, supplemented by the following averment:

Plaintiff has thereby lost the wages he would have obtained from said employment from the 13th day of April, 1882, to the 13th day of June, 1882, and which defendant has wholly refused to pay him, to this plaintiff's damage in the sum of \$200.00. Upon this petition judgment was asked and obtained against the defendant, as heretofore stated.

In addition to the facts heretofore stated, as constituting the plaintiff's present cause of action, the plaintiff's petition contains the following averments:

"Plaintiff on the 18th day of August, A. D., 1882, duly requested the defendant to pay him his wages due him for his services upon and by reason of said contract for the period of two months from the 13th day of June, 1882, to the 13th day of August, 1882, and on the 29th day of August, 1882, the defendant refused to allow or to pay said bill, a true and certified transcript of the proceedings of the defendant in said cause is hereto attached, marked "B." Plaintiff has lost the wages which he otherwise would have obtained from said employ from the 13th day of June, 1882, to the 13th day of August, 1882, and which defendant has wholly refused to pay him, to this plaintiff's damage in the sum of \$200.00, for which amount he asks judgment, with interest from August 13, 1882."

The defendant, by its second defense, in its answer in this case, pleads his former suit and recovery heretofore set out, as a bar to the plaintiff's right to prosecute his present action, and to this defense a demurrer is filed, which raises the question we are now called upon to decide.

That we may intelligently comprehend and determine the question raised by this demurrer we must first determine what is the cause of action stated in the plaintiff's petition in the case at bar and what was the cause of action in the case in which recovery has already been had, and which recovery is here plead in bar of the right of plaintiff to recover in this action. If they are identical the plaintiff cannot recover in this action; if they are not, the former recovery is not necessarily a bar to the present action.

It is a well understood and universally recognized principle of law that a party cannot divide the same cause of action so as to prosecute two or more suits thereon, but is limited to one suit and recovery upon the same cause of action. It is his right and duty to set out and prove all that can properly be embraced in his cause of action, and his recovery, whether great or small, must and does terminate the controversy. Courts will not thereafter, and in another suit, listen to the plea that his recovery has been inadequate, or that in his former suit he was guilty of mistakes or omissions, which have resulted in injustice to him no matter how great or disastrous. He has his own election when and how he will prosecute his suit, within the range of a proper jurisdiction, and the extent of recovery, which he will seek against his adversary. But he must embrace all that can properly be embraced in the same cause of action. Whatever is not thus embraced will be held to have been waived and abandoned. No future action can be brought thereon. This rule is supported by an unbroken line of authorities, some of which we cite: *Ewing v. McNairy et al.*, 20 O. S., 322; *Covington, etc., Bridge Co., v. Sargent*, 27 O. S., 233; *Swensen v. State*, 28, O. S., 668; *Hites v. Irvine's Admr.*, 13 O. S., 283; 30 Ia., 433; 1 Johns., 436; 25 Cal., 266; 9 Wis., 23; 3 Comst., 511; 5 Sandf., 135.

What, then is the cause of action set out in plaintiff's petition in this case? After setting out the contract of employment, his entering into service for defendant under the contract, his readiness and ability to perform and tender of performance of his duties under the contract, his improper dismissal, his readiness and ability to perform and tender of performance of his duties under the con-

tract, and the refusal of defendant to receive and accept his proffered services, he thereby lost the wages which he otherwise would have obtained from said employment, from June 13, 1882, to the * * * to the plaintiff's damages in the sum of \$200.00.

What was the plaintiff's cause of action set out in his petition in the first suit, which is here plead in bar of this action? A repetition of what has just been given as to the contract, entering upon service, wrongful dismissal, capability and proffered services, refusal to accept service, etc., are the same in the first as in the present case. As to the matter of time for which the recovery is asked, the averments differ, and in the first case they are as follows: "Plaintiff has thereby lost the wages he would have obtained from said employment from the 13th day of April, 1882, to the 13th day of June, 1882, * * * to this plaintiff's damage in the sum of \$200.00."

Discarding all matters of form and phraseology in the manner of statement, let us go down to the substance of what is claimed in these respective cases, and inquire, "what is the gist of the action in each case?" It is known and understood, of course, that the time covered in both of the cases, as the measure of recovery respectively, is subsequent to the date of the wrongful dismissal, and covers no period during which the plaintiff claims to have performed actual service.

Therefore the right of the plaintiff to recover in either case (there being no claim of actual service performed) must rest upon one of two basis: either, first—Upon the theory of constructive service; or, secondly,—Upon the breach of contract on the part of defendant, by reason of the wrongful dismissal of the plaintiff from its service. I know of no other basis upon which to rest the right of the plaintiff to recover in either case.

If the doctrine of constructive service is tenable, then the plaintiff would have his right to commence and maintain his action at the end of every month, so long as he is capable, willing, and tenders his services under the contract, until the completion of the work for which he was employed to superintend.

If on the other hand, this doctrine of constructive service is not tenable, then he is relegated to his action for a breach of the contract on the part of the defendant, and to a single action, unless the breach of the contract complained of is divisible, so that, at the end of each and every month that he is not paid, he could claim a distinct and independent breach of the contract.

We will examine these propositions separately and in their order:

The first inquiry which suggests itself, is, what is the thing called "constructive service?" Is there any such thing as constructive service within the purview of the cases under consideration? I am at a loss to give the phrase "constructive service" any intelligent meaning, when applied to the contract under which plaintiff claims. The subject matter of the contract—the commodity contracted for, and the delivery of which has been tendered to defendant—is personal service, and the peculiar service named in the contract, necessarily embraces skill, knowledge, experience, and judgment, coupled with and concentrated in the person of the plaintiff, and inseparable from his person. A commodity that has no independent existence, although substantial in its character, like his shadow, it migrates with his person, and is blotted out when he ceases to exist. It is not the subject of delivery by proxy, nor is it capable of fruition or performance except through and in connection with the person of the plaintiff.

The term "constructive," in its primary sense, implies a capability to do or perform, and when applied to a thing done, it necessarily implies the application of this power—the use and employment of it—in and about the accomplishment of the thing claimed to be done.

True, this term has, by common consent and usage, in the profession and by courts, taken its place in the nomenclature of the law, and we must deal with and apply it according to the force and definition that is there given it. We find the word used variously in connection with other words, such as "constructive delivery," "constructive performance," "constructive service," when applied to the subject of notice, as a precedent step to jurisdiction and judicial action, and perhaps in other instances, not analogous to the question under consideration. But in all these cases, so far as I am now able to recall them, the force and effect given to these phrases, rest, in the necessities of the case, and as a rule of evidence, whereby a waiver may be established, jurisdiction conferred, or a tender of performance shown. *Reckner v. Warner*, 22 O. S., 275; *Anderson v. McKinney*, 24 O. S., 467; *Cupp v. Com's*, 19 O. S., 173; sections 5048, 4460, 5418, 4645, 4647, Rev. Stat., of Ohio, etc.

They do not in any instance constitute the basis of a cause of action, upon which, standing alone, a recovery can be predicated, but they are always coupled with averments of the default and breach of the opposite party, which default and breach always constitute the gist of the action, in suits for damages, as distinguished from actions to compel specific performance. These matters of "constructive service," "constructive performance," etc., when used in connection with damage suits, are so used, not to show actual delivery, actual performances, etc., but to show that the party suing is himself without fault, which is always a condition precedent to his right to recover. The gist of the action rests in the default of the party against whom the recovery is sought, and the measure of recovery rests in what the complaining party has lost by the default.

The doctrine of specific performance, whereby courts of equity compel parties to fulfill and perform their contracts, rests upon principles peculiar to those courts, and as a general rule these courts will not grant relief by compelling specific performance where the party asking such relief has a plain and adequate remedy at law for damages for the breach of the contract.

The doctrine of "constructive service" as applied to the contract under consideration, and carried to its logical consequences, by repeated suits to the end of the time embraced by the contract, as is the indicated purpose of the plaintiff, would be tantamount to compelling a specific performance of this contract against the defendant, while it has not, in fact, received anything of the commodity contracted for. This would be working out by indirection that which it will be admitted, could not be done directly.

As another test of the correctness of this doctrine of "constructive service" it may be pertinent to inquire, wherein this contract under consideration differs from other contracts, so as to call upon a court to give under it remedies which are unknown to the law, in its dealings with other contracts.

This contract is strikingly analogous to a contract of sale and purchase. In effect the plaintiff contracts to and does sell to the defendant his "personal services," and agrees to deliver the commodity continuously according to the terms and during the time contemplated by the contract; the defendant contracts to receive and pay for this commodity according to the terms of the contract. This commodity the defendant has refused to accept and receive. It has violated and put an end to the contract so far as it is concerned, except that it must respond in damages to the plaintiff for its violation. Now, under an ordinary contract of sale or purchase, when the subject-matter has not in fact been delivered and received, it will not be claimed that the gist of an action against the purchaser for a breach of such contract, would rest in the contract price of the thing purchased. I take it that no such action has ever been brought and maintained in a respectable court. Universally the cause of action rests in the breach of the contract and the measure of recovery is determined by what the plaintiff has lost by reason of such contract. Where the subject-matter of the contract is a marketable commodity, the measure of damages is uniformly fixed at the difference between the contract price and the marked value. The seller cannot throw away or destroy the things sold, and then sue for the contract price; he must preserve and utilize it so far as he can, and can only recover his actual loss. It is his duty to protect the other party to the contract from loss so far as he can do so, by reasonable exertions, and if he fails to do so, he fails in a social, moral and legal duty.

Miller v. Mariner's Church, 7 Greenl., 55; Taylor v. Read, 4 page, 572.

If the subject matter of the contract is not a marketable commodity, then the rule of recovery is varied so as to secure justice, and make the aggrieved party whole, even to the extent of the contract price when necessary, but the basis of the action is never different. I can see no good reason why these wholesome rules and injunctions of the law should be thrown aside when dealing with contracts for "personal services," nor how the plaintiff in this case can reasonably obey this sound injunction, "to make the loss as light as possible upon the defendant," and still cling to the doctrine of "constructive service."

"It cannot with any propriety be claimed that an action for wages can be sustained when the employee has in fact rendered no service. Such a claim is in defiance of the meaning of the term and rests on no solid foundation, either in principle or policy." Not in principle for the reasons heretofore suggested. "Not in accordance with sound public policy, because it encourages indolence."

I cannot better express a summing up of my views upon this doctrine of "constructive service," than to use the language of Judge Dwight, in Howard v. Daly, 71 N. Y., 352. "This doctrine is so opposed to principle, so clearly hostile

to the great mass of authorities and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. This doctrine of "constructive service" is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service, equal with those who perform with willing hand their stipulated amount of labor. * * * No rule can be sound which gives wages to an employee while he remains in voluntary idleness."

While it is conceded that there is some conflict of authority, I take it that our views and conclusions upon this branch of the case are sustained by the great weight of authority both in England and America, a few of which I here cite: *Goodman v. Pocock*, 15 Ad. & Ett., N. S., 1; *Fewings v. Tisdal*, 1 Ex., 298; *Chamberlain v. Morgan*, 68 Penn. St., 169; *Jones v. Jones*, 2 Swan (Tenn.), 605; *Walworth v. Pool*, 9 Ark., 394; *Ricks v. Yates*, 5 Ind., 115; *Willoughby v. Thomas*, 24 Gratt. (Va.), 522; *Howard v. Daly*, 61 N. Y., 362; *Moody v. Leverick*, 4 Daly 401, N. Y.; *Chamberlain v. McAllister*, 6 Dana (Ky.), 352; *Miller v. Goddard*, 34 Me., 102. The cases to the contrary seem to rest principally upon the decision of Lord Ellenborough in *Gandell v. Pontigny*, 4 Comp., 375.

The plaintiff's action not being maintainable upon the theory of "constructive service," they can only be maintainable upon the grounds of the breach of the contract by the defendant. And the question whether the first recovery plead in bar, will defeat recovery in the present action, is solved by the answer to the question: "Was there but one or more than one cause of action growing out of the breach of this contract in the wrongful dismissal of plaintiff by defendant?" Had the plaintiff continued in service, and the defendant refused to pay him at the end of each month, it is clear upon principle and authority, that an independent cause of action would spring up in his favor upon each default upon which he could maintain separate suits. Such suits would be entirely consistent with the continuance of the contract of employment, and of actual services thereunder, but they are wholly different and disconnected in their nature and origin from a cause of action growing out of wrongful dismissal. The former rest on the basis of services rendered and would be necessarily severable under this contract. The latter must necessarily be brought to recover compensation from the loss of a situation, and for not being allowed to serve and earn wages under the contract, and it necessarily proceeds upon the ground of an entire repudiation of the contract by the employer. Except upon the doctrine of "constructive service"—which we repudiate, I cannot see how this cause of action can be divisible—or in other words, how more than one cause of action can grow out of this breach and repudiation of the contract.

The peculiar language used by the plaintiff in his petitions in this case clearly indicates his purpose not to make a claim for general damages, for the breach of the contract, but to limit his claim and recovery to the times covered by the respective pleadings, and it is claimed in argument that no broader effect should be given to them. A suitor cannot thus limit and defeat a well established rule of law. If the nature, subject matter, terms and breach of the contract, stated and complained of, do not of themselves confer the right, he cannot acquire and enforce such right upon his own volition and manner of stating his cause. Courts must go behind these, and determine the right upon what ought to have been done, and not upon what the party has chosen to do to enlarge his right.

It would seem to be clear upon reason and authority that in order to maintain more than one action upon a contract and for the breach of it, the contract must still subsist as an executory contract between the parties, for some purposes at least, after the first cause of action arose, unless the breaches complained of are upon different stipulations in the contract, which are in their nature distinct and severable. How can a contract be said to subsist between parties, when one of the parties thereto has absolutely repudiated and put an end to the contract, whether rightfully or wrongfully? I take it that that puts an end to the contract as to both parties, leaving the party aggrieved to his remedy for the breach of it, unless it be such a contract that courts of equity will compel the specific performance of. It will not be claimed that the contract under consideration belongs to this latter class of contracts.

The rule laid down in *Secor v. Sturges*, 16 N. Y., 548, by Justice Strong, is clearly the true one: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts." Applying this rule to the cases under consideration, let us see what is the matter complained of against the defendant. It is not for the non-payment of wages from time to time, for no wages have been earned as wages—no services have been in fact performed, concerning which wages could be due, and repudiating the doctrine of "constructive services," there is but one thing left to complain of as a basis for a cause of action, to-wit: The single act of the defendant in the wrongful dismissal of the plaintiff, whereby he lost the benefits that would have accrued to him under the contract, it was but a single act, although in its effect, it repudiated the entire contract, and out of which but a single cause of action arose. Hence it follows that the first suit and recovery had by the plaintiff must be held to have been a suit for general damages for the breach of the contract, whether so intended by him or not, and being only entitled to one suit and recovery, it is a bar to the present action. It may be unfortunate for the plaintiff in having thus prematurely sought his remedy. Had he waited till the end of the time, contemplated by the contract, as he had the right and choice to do, his recovery might have been much greater. But the choice was with himself, and having made his election he must abide by the result, however inadequate his recovery.

Under the rules and policy of the law, as I understand them, the plaintiff is estopped from maintaining more than the one action for the breach of this contract. (See authorities first cited in this opinion.) Also *Farrington v. Payne*, 15 Johns., 432; *Smith v. Jones*, id., 229; *Miller v. Covert*, 1 Wend., 487.

I have examined with great care and labor most of the authorities cited by plaintiff's counsel in support of his right to maintain this action, and am compelled to conclude that they are not entitled to great weight. The cases cited from Alabama, Mississippi, Wisconsin and Connecticut, are all based upon the case of *Gandell v. Pontigny*, supra., and perhaps some of the New York decisions. This case, after repeated discussion by the English courts, has been overruled, and the doctrine of "constructive service" there first announced distinctly repudiated. All the earlier New York decisions cited advocating this doctrine have been distinctly overruled by *Howard v. Daily*, 61 N. Y., 362, and latter decisions. The Ohio, Mass., and other cases cited do not seem to be in point, so that the doctrine is left with but little or no live authority in support of it.

The demurrer to this defense will be overruled, and unless plaintiff desires leave to reply to and dispute the averments of this plea, judgment will be rendered for the defendant upon the merits.

Prophet & Eastman, for plaintiff.
Mead & Townsend, for defendants.

BUILDING ASSOCIATION—BILLS AND NOTES.

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[Superior Court of Cincinnati.]

AUGUST VOS v. CEDAR GROVE LAND & BUILDING ASS'N ET AL.

1. A building association, incorporated under the law of 1868, has no power to purchase land on credit to be allotted among the members.
2. Promissory notes of such a building association, given in part payment for such a purchase, are void in the hands of holders chargeable with notice of the consideration therefor, and deriving title through persons chargeable with like notice.

WORTHINGTON, J.

This is an action brought upon a promissory note, the building association being sued as maker and Cormany as endorser, and was reserved from special term on the pleadings and evidence.

As to Cormany there is no proof of demand and notice of non-payment; and as this defense is made in his answer, he is entitled to judgment.

As between the other parties, it appears that the note was given in part payment for a large tract of unimproved land conveyed by Joseph Leighton, the payee of the note, to one J. B. Sampson, as trustee for the members of the building association, for the purpose of being sold and conveyed to such members as might choose to buy; that the plaintiff and all prior holders of the note were chargeable with notice of this fact when the note was acquired by them; that the tract was subdivided by the association, and some of the lots conveyed to its members, payment therefor being made to the association; and that Sampson still holds the title to the residue.

The building association claims that in giving the note it acted *ultra vires*, and upon the above facts no recovery can be had. Other matters appear in the record, but in considering this question it is not necessary to refer to them.

The Cedar Grove Land and Building Association was organized under the act of May 5, 1868, 2 Saylor's Statutes, 1606, as amended by the act of May 9, 1868, *ib.*, 1649. (S. & S., 194.)

For the powers of the corporation we must look solely to the act creating it. For while it has been sometimes asserted that corporations possess all powers not prohibited them by their charters, in Ohio, since the decision of the leading case of *Bank of Chillicothe v. Swayne*, 8 O., 257, the supreme court has uniformly adhered to the contrary rule, that corporations have such powers, and such only, as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred; *Franklin Bank v. Commercial Bank*, 36 O. S., 350, 355. The same rule has been recently asserted by tribunals of the very highest authority as expounders of the common law on both sides of the ocean; *Ashbury Railroad Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Atty. Gen. v. Great Eastern Ry.*, L. R. 5 App. Cas., 473; *Thomas v. Railroad Co.*, 101 U. S., 71.

Before entering into an examination of our statute it is well to know what the general nature of building associations is, that we may see what the legislature probably had in mind in authorizing their formation. From the English law and the laws of the different states, a summary of which latter can be found in Endlich on Building Associations, sections 18 to 38, it appears that prior to 1868 there were two well known ways in which persons having little capital, but regular income, co-operated to obtain homes; the one was to purchase and sometimes improve a large tract of land in common, and to allot portions of this tract to the individual members, to be paid for in small installments; the other was to accumulate a fund by subscriptions payable in small installments, and make loans from this fund to members, who with the money thus loaned would themselves purchase or improve any property that might suit their several tastes. In England any given co-operative society could operate only in one of these ways. If it was designed to purchase and allot land, the society was called a Freehold Land Society; if to accumulate and loan money, a Benefit Building Society. The functions of these two classes of societies were kept entirely distinct; a society formed to give aid in one way could not give aid in the other; *Grimes v. Harrison*, 26 Beav. 435. In *re The Kent Benefit Building Society*, 1 Dr. & Sm., 610. In this country the line of demarcation between the two classes of societies has not been kept so dis-

tinct. Many of the states have authorized one society to act in both ways; others seem to have followed the example of England; and others again have authorized the formation of but one of the two classes of societies.

What, then, is the true meaning of the O. L., S. & S., 194. Section 1 provides that an association may be formed as provided in section 63, 64 and 65 of the general incorporation act "for the purpose of raising moneys to be loaned among the members and depositors of such corporation, for use in buying lots or houses or in building or repairing houses, or other purposes." Although reference is here made to the general corporation act, we think this is done only to indicate how the corporation shall be organized, and its rules of procedure when organized; and that the powers to the corporation so organized are to be determined from the grants contained in the acts of 1868 solely, and do not include powers given in the sections of the general corporation act referred to.

So construed, the main object of the Ohio law is to authorize the formation of societies like the English benefit building societies.

Section 2 grants to the corporation certain powers to raise money, and "also, to acquire, hold, incumber, and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of its business." It is claimed by counsel for plaintiff that the business of such associations is to help its members to own homes; that one method of giving such help is to buy land in large tracts, and allot it among the members in small parcels, in other words, to act as a freehold land society; and therefore that land acquired by the company for such purposes, is transferred to it in the due course of its business. But we think otherwise. The due course of business of the corporation is not to help its members, to acquire homes, but to lend them money, which they may use for any purpose; it is true that the obtaining or improving homes is the principal purpose to which it was supposed the members would apply the money; yet they are at liberty to apply it to any purpose. *Hagerman v. Building Assn.*, 25 O. S., 186; this is declared both in the title and in section 1. Lands acquired by the corporation because of loans of money it may hold, but only such lands; this is clearly the meaning of the first part of the passage, quoted, for it refers specifically to lands pledged for previous loan; and we think it equally clear as to the last part from the reference to the business of the association. The words were probably used out of abundant caution to cover cases of a lot received in payment of a loan not previously secured by mortgage on that lot, and of property suitable for office purposes; and possibly they may include cases of dealings as to specific lots upon which specific members desire to obtain loans. When we find the business of a building society was always considered as essentially different from that of a land society, and where it was intended to grant powers to act in both capacities; the law making powers have ordinarily used express words showing clearly their meaning, and when we find also that the act purports to be only in aid of the formation of building societies, it is impossible for us—having in view "the general rule that all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person." *Steamboat v. Pressler*, 13 O. S., 255, 262—to bring our minds to believe that by the use of a few general words, fairly explainable as intended to cover which strictness of construction might hold not

included in terms just used, the general assembly intended to authorize the formation of an essentially different class of corporations.

It is urged by counsel that power is given to the corporation to incur real estate, and that this carries a power to give a purchase-money mortgage, and so implies a power to purchase. But we think this unsound; if no express power to acquire real estate were given, the argument would have weight; but when we find such a power given, the power to incur is to incur what the corporation may lawfully acquire.

Other considerations, familiar to every lawyer, point to the same conclusion. An incorporated Freehold Land Society is a corporation whose main object might easily become speculation in real estate. The jealousy of the common law as to the acquisition of realty by corporations is well known. We are not aware of any instance, unless it be this, in which the general assembly has created corporations for the purpose of trading in land. And in revising the law as to corporations, among the few kinds of corporations forbidden are corporations of that character, section 3235, Revised Statutes. This legislative history, though covering a period since the acts of 1868, is not without value in determining the intent of the legislative mind.

The only other power given to acquire real estate is in section 5, which authorizes the corporation to expend a certain portion of its earnings "for the purchase of such real estate as may be necessary for the convenient transaction of its business." What we have said as to section 2, applies here. The business proper to be transacted was lending money. Such a tract as was purchased here is in no way necessary for the transaction of that business. Whether under this section lands can be purchased on credit, it is not now necessary for us to decide.

As the real estate purchased here was acquired not by reason of any loan made by the building association, nor in connection with its business of raising money to lend, but on the contrary was bought in bulk to be allotted among such persons as might become members of the association, and desire lots, we can find no power granted in the acts of 1868, enabling the building association to make the purchase. Having no power to buy the land, the building association transcended its powers in giving notes in payment for the land.

It remains to be considered what effect this fact has upon the right of the plaintiff to recover. And in determining this, it must be remembered that the plaintiff, and his predecessors in title to the note, are chargeable with notice that the note was given in part payment for this tract of land purchased for this purpose. He and they knew also that the corporation had no right to acquire this land, for the powers of the corporation in this regard are determined by public statute. So it is not necessary for us to inquire whether a building association has a general power to issue promissory notes; for if it had, yet if it had no power to issue this note, and this would affect the right of the payee to recover, it affects the plaintiff also, for he stands in the shoes of the payee.

Whether the grant by the legislature to a corporation of certain powers is a prohibition against their exercising any other powers, thereby making the exercise of those powers against law, are illegal; or whether it operates merely to create an artificial person, capable of acting in certain directions only, is a question upon which eminent judges differ, as an examination of the cases in the House of Lords cited above will show.

The point though several times mooted, has not been expressly decided by our supreme court as yet, so before expressing an opinion upon it, we have thought it best to examine the case at bar from both points of view, to see if the action will lie on either theory.

If the purchaser of this land and giving this note were prohibited by the charter, clearly this action will not lie.

It has been so laid down in Ohio in a long series of cases, beginning with *Bank of Chillicothe v. Swayne*, 8 O., 257, decided in 1838, and concluding with *Simpson v. Greenfield Building & Saving Institution*, 38 O. S., 349, decided October 17, 1882. It is true that in all those cases the corporation was plaintiff, while here it is defendant, but this, while a distinction, is here not a difference; the theory on which the cases go is, the contract being prohibited, neither promisor nor promisee had capacity to enter into the contract; therefore there was no contract and no right of action.

If we consider the contract of a corporation outside of its charter is not prohibited, but merely unauthorized, then the promise of the corporation in such a contract is the promise of one who in law had no authority to promise. On principle it would seem clear that such a promise is in fact not a promise, but only an apparent promise. A promise by one who has no capacity to promise is no promise at all, but mere empty words. So it has always been held as to married women, who have a general incapacity to promise, just as a corporation has a limited incapacity; *Pollock on Contracts*, 58; *Leake on Contracts*, 554; so it is held, as we have just seen, as to prohibited promises and this as between natural persons, as well as where a corporation is a party, a doctrine, which, at the bottom, rests on this same reason, want of capacity to promise. And, if there is no promise here by the defendant, there is no cause of action.

It is said, however, by counsel that here the corporation has received and retains the consideration for which it gave its promise, and for this reason it should be held. But, if the apparent promise be no promise, it can never be the foundation of an action, whatever other rights of action the dealings between the parties may create. An analysis of the different states of fact which may arise in actions upon contracts into which a corporation has entered without authority, and of the principle of decision applicable in each, may make our meaning clearer.

The unauthorized contracts of a corporation may be divided into two general classes:

1. Where the corporation is not authorized to do what it promises, but may receive what is promised to it.

2. Where the corporation is authorized to do what it promises, but may not receive what is promised to it.

In each class when suit is brought upon the contract, one of three states of fact will always appear.

- a. The corporation has in fact done what it promised to do, but the other party has not.

- b. The other party has in fact done what he promised to do, but the corporation has not.

- c. Neither party has done all that was promised.

If the first state of facts appears then the corporation is the complaining party. In such case, if the contract falls within the first class of cases, where the corporation can neither be promisor nor promisee, then the

corporation can never recover, for it is trying to enforce a promise to which it in law is not and cannot be a party; its claim is open to the same objection that was made in Swayne's case, and no court will assist it in obtaining that which it is not authorized to hold. The defense of the other party goes to the capacity of the corporation to accept the promise, and so to the very existence of the contract sued on. *Vanatta v. State Bank*, 9 O. S., 27.

If, however, the contract falls within the second class of cases, where the corporation cannot be promisor, but may be promisee, a different reason, and therefore rule, applies. Here, all that was ultra vires on the part of the corporation has been actually done, and stands as a fact accomplished. Want of capacity in the corporation to receive performance of the promise still remaining unexecuted cannot be alleged. The only other defense is want of consideration and that for this reason the promise was nudum pactum. Should this be alleged, the corporation replies that it has in fact performed its promise, and it being conceded its action was not illegal, i. e., against law, as distinguished from without authority of law its reply is good; for thereby it appears the other party has received for his promise all he ever expected to receive. His plea amounts merely to want of mutuality; and when it appears that want does not exist, the plea is overthrown. *Farley v. Palmer*, 20 O. S., 223.

If the second state of facts appears, i. e., that the promise of the corporation remains executory, but that of the other party has been performed, it is immaterial whether the contract falls within the first class of cases—where the corporation can be neither promisor or promisee, of the second—where it cannot be promisor, but may be promisee. In each case it appears that what remains to be done is ultra vires on the part of the corporation. The action is now by the other party against the corporation; the latter answers that its promise is void—not because it was without consideration, but because it had no power to make it. It is of no avail for the other party to reply that he has performed on his side, for that in no way meets the issue presented; the fact that he has performed does not give the corporation power to perform, for its powers depend not on the party's actions, but on its charter. Here, therefore, the plea of ultra vires must always succeed.

From what has been said it is evident that where the third state of facts appears, i. e., where the contract is executory in whole or in part on both sides, it cannot be enforced by either party, whether it falls within the first or the second class of cases; not by the other party, because in all cases the corporation had no capacity to make the promise sued on; not by the corporation in the first class of cases, because it is not authorized to receive what was promised it, and also because the promise sued on is now without consideration for want of mutuality in not being enforceable against it; and in the second class of cases for the latter reason only.

The case at bar falls within the first class of cases, and the second state of facts appears. The corporation is sued upon a promise it had no power to make; the plaintiff has done all the original agreement required of him; thus the contract is executed on his part, but executory on the part of the corporation, and the executory portion is ultra vires. The promise sued on is therefore void, not for want of consideration or mutuality, but for want of power in the promisor to make it; as we have said above it is no promise at all.

The defect in the promise being a want of power in the corporation to make it at all, the plaintiff's case is not helped by any subsequent statements of the officers of the corporation that the note would be paid; for the same want of power existed at that time. And for the same reason the plaintiff cannot call to his aid any estoppel in pais. The very essence of such an estoppel is that the person estopped has done or said something upon which the adverse party had a right to rely, and did rely, to his prejudice. Here the only assertion upon which an estoppel could be based, is the assertion that the note was good; in other words, that the corporation had power to make it. But upon this assertion the plaintiff had no right to rely, for he knew for what the note was given, and is bound to know the law. Pure assertion of law, upon facts known to both parties, never gives rise to an estoppel. *Todd v. P., Ft. W. & C. R. R. Co.*, 19 O. S., 514, 526; *Bigelow on Estoppel*, 3rd ed., 484-485; *Ashbury Co. v. Riche*, L.R. 7 H. L., 635; *Marsh v. Fulton Co.*, 10 Wall., 676. The cases in which estoppel may be applied are those where a power to make the contract in question exists on certain conditions, or for certain purposes, and the promisee is told those conditions have been performed, or those purposes were in view; such are the cases in which this doctrine of estoppel has so frequently been applied by the supreme court of the United States, in actions upon municipal bonds. But that court, in spite of its well known desire to enforce such bonds, has never overlooked the rule that there can be no estoppel where no power to make the contract has been given, or where the holder of the bonds knows the conditions limiting the power given have not been complied with. *Harshman v. Bates Co.*, 92 U. S., 569; *Wells v. Supervisors*, 102 U. S., 624; *Jarrott v. Moberly*, 103 U. S., 580.

We have examined the cases relied on by counsel for plaintiff, and can find nothing in them which shakes our confidence in the soundness of the principles above laid down.

The only ones among them in which the exact question presented here was raised, and decided adversely to our views, are *Board of Agriculture v. St. Ry.*, 47 Ind., 407, and *Oil Creek Co. v. Penn. Trans. Co.*, 83 Pa. St., 160. These two decisions, if they stood alone, would not make such a weight of authority as to require us to overthrow what we conceive to be sound principle. But they do not stand alone. There are other decisions in accord with our views, decided by courts deserving as much respect as those making the above decisions; and even the supreme court of Pennsylvania would stand with us upon this particular case, unless it be prepared to overrule another of its late decisions to which we will soon refer.

It would be impossible for us to go through the cases cited for plaintiff in detail, and point out wherein they are distinguishable from the case at bar. We must content ourselves with referring specially to a few of those most relied upon, and indicating generally the classes into which the others fall.

In *Hamilton and Rossville Hydraulic Co. v. C. H. & D. R. R. Co.*, 29 O. S., 341, the plaintiff being in possession of certain water ways without authority in its charter, allowed the defendant to close the water ways on its promise to reopen them on request: the defendant was sued for breach in refusing to reopen. The case was decided by the court upon the ground that the plaintiff being in possession of the property, the

defendant as a mere licensee could no more question the licensor's title than a tenant that of his landlord. There was nothing ultra vires in the promise of the defendant; it had perfect capacity to make the promise; from its position as licensee it was estopped from denying the capacity of the plaintiff to receive the promise; it had received the consideration for the promise; therefore the promise was enforceable.

The *Whitney Arms Co. v. Barlow*, 63 N. Y., 62, is a case where the corporation was plaintiff, it had executed the ultra vires part of the contract, and was suing upon a promise not ultra vires in the promisor to make, or it to receive. The dicta contained in that opinion that the rule which applies where the plea of want of mutuality fails because the party not bound to perform has performed, applies also where the defense is not want of mutuality, but want of capacity to contract, are not called for by the case before the court, and are not supported by the authorities named.

In *Bradley v. Ballard*, 56 Ills., 413, the plaintiff by his own contract had precluded himself from having relief in equity, and left himself only his defense at law. "*Goshen Tp. v. Shoemaker*, 12 O. S., 624." The remarks of the court as to the liabilities of corporations are not necessarily called for by the questions presented, and therefore not entitled to the consideration they might otherwise deserve.

The same is true as to *Darst v. Gale*, 83 Ills., 136. The suit was in equity, and the plaintiff was an adventurer without equity in his claim.

Without mentioning the other cases it will be sufficient to say, in some of them a power existed to make the contract, and the defect existed only in the mode of its execution; in others the suit was not upon the contract, but in disaffirmance of it; in others there was no incapacity in the promisor to make or the promisee to accept the promise given, the ultra vires act had been fully performed, and the promisor had received the consideration promised, or had nothing to do with the contract or proceeding in connection with which the ultra vires act was done; and in others the remarks supposed to be applicable to the case at bar are confessedly obiter dicta. It only remains to mention as briefly as we can, the more important of the authorities in which the exact point at issue here has been decided as we now decide it.

We have referred to a case decided by the supreme court of Pennsylvania, which coincides with our views. It is *Faulkner's Appeal* and is very fully and correctly stated in *Endlich on Building Associations*, section 302; the case is not reported in the regular series, but can be found in 14 *Weekly Notes of Cases* 48, which has been furnished us by counsel. There a building association purchased land ultra vires, and gave a bond for the purchase money; a law was then passed confirming the purchase: suit was brought on the bond; the building association was dissolved and a receiver appointed; the receiver filed a bill in equity to enjoin suit on the bond because it was given ultra vires, and to recover so much of the purchase money as had been paid. The court held the curative statute confirmed the executed part of the contract, but not the executory; so the bondholders were enjoined from prosecuting the bond, except as against the land conveyed, but were allowed to retain the payment made.

Pearce v. M. & I. R. R. Co., 21 How., 441, was, like the case at bar, an action by an endorsee upon promissory notes given by the corporation

in payment of an article purchased and received *ultra vires*, and the plaintiff was defeated on the express ground that the corporation had no authority to make the purchase.

To some of the subsequent cases in the supreme court of the United States, where public corporations have issued bonds without authority, and no recovery upon them has been allowed, though the consideration for the bonds was received, we have already referred.

Davis v. Old Colony R. R., 131 Mass., 258, was a case in all respects like the case in 47 Ind., 407, above referred to, and was decided exactly the opposite way, in a carefully considered opinion.

In *re National Permanent Building Society*, *ex parte Williamson*, L. R., 5 Ch., 309, was an application to dissolve and wind up a building association by one who had lent it money; it appearing that the building association had no authority to borrow money, the application was refused, because the applicant had no enforceable claim for the money he had lent.

Blackburn Building Society v. Cunliffe, Brooks & Co., L. R., 22 Ch. Div., 61, was an action by the official liquidators of the building society to obtain the surrender of deeds deposited with the defendants as bankers to secure certain overdrafts; the building association had no power to borrow money, and therefore the overdrafts were made without authority; but as it was conceded that part of the overdrafts went to pay legal debts of the association, the defendants were allowed their lien *pro tanto*, by way of subrogation, but were refused it as to the residue of the overdrafts.

The very question involved here has been decided by the district court of this county in *Hubbard v. Riley*, 7 Dec. R., 473, a proceeding to compel the assignee of a corporation to allow as valid claims certain notes given by the corporation in consideration for the assignment to it of shares of its own stock, the relief was refused because the notes were void for lack of authority to make the purchase.

We have laid no stress upon the fact that this land was never in fact conveyed to the corporation, but only to Sampson, trustee, because we have preferred to consider the case as if the conveyance had been directly to the corporation. We mention it now only to call attention to the case of *Franklin Co. v. Lewiston Institution for Savings*, 68 Me., 43, which upon that state of facts holds the plaintiff cannot recover.

To the suggestion that has been made that this is a private corporation, and that courts should leave the state to deal with such corporations when they act *ultra vires*, and not interfere in actions between them and other parties, we can only say that whatever may be the policy of other states, in Ohio, courts have always felt bound, where a suit is upon a contract, to determine whether there is any contract. And in reply to the suggestion that we should look at the conduct of the defendant, and make it pay because it retains the land, we can only use the words of our supreme court in *Dayton, etc. R. R. v. Coy*, 13 O. S., 84, 95, where it was said: "We do not see how we can look at the conduct of the defendant with any other view than to ascertain whether it has entered into a contract." In such case as this, it is not our province to decide as to the propriety of the conduct of the party. We have only to inquire whether it has incurred a legal obligation, and being of opinion for the reasons, which have been stated, that it has not, there must be judgment for the defendant.

In reaching this conclusion, we say nothing as to what rights the plaintiff may have against the land for which these notes were given, or as to any other claim the plaintiff may have. Our decision is based solely upon the ground that the contract sued on does not exist; as to other rights or claims, and also as to other defenses alleged, we are not now concerned.

Force and Harmon, JJ., concur.

Two other cases against the same building association, one by the same plaintiff, and one by John Lyford, were reserved on the same evidence, and present the same questions. There will be judgment in each case for the defendant.

Clemmer & Clemmer and Archer & McNeil, for plaintiff.

Healy, Brannan & Desmond, for defendant.

200 LATERAL SUPPORT—EVIDENCE—EXCAVATIONS.

[Hamilton District Court.]

†CINCINNATI AND CLIFTON INCLINED PLANE R. R. CO. V. JACOB PFAU ET AL., ASSIGNEES.

1. A book of levels from a civil engineer's office, though admissible to prove the levels as taken, is not admissible to prove an established grade of a street, which grade had not been established by ordinance.
2. The right, under Rev. Stat. 2676 and 2677, to excavate to a depth of nine feet below grade in cities and villages must be exercised with reasonable care and skill so as to avoid unnecessary injury to buildings.
3. And if due care under the circumstances requires the excavating to be done in sections, and not continuously, it should be done in that manner and this rule does not impose upon the defendant the duty of shoring up plaintiff's building.

ERROR to the Court of Common Pleas.

AVERY, J.

The question was as to the destruction of a house, caused as alleged by excavating for the inclined plane. The excavation was up the hillside from McMicken avenue to Cross street, some 300 feet above, crossing Kleiner street, which was midway between the two. The house stood fifteen feet back from the north side of Kleiner street; the lot extending to Cross street, by the side of the part excavated between Kleiner and Cross streets.

The excavation was begun at the foot of the hill; a cut being made from McMicken avenue 73 feet back on a level, and left a short time before Christmas, 1875, unfinished, with the end sloped upward to within about 50 feet of Kleiner street. In the following month, a visible movement of the soil of the lot began to be observed; by March, the house had so cracked as to need to be braced and bound together; in August, the work of excavating having been resumed in the spring and the building of the inclined plane almost completed, it had become too ruinous to live in; and at the beginning of the next year was removed.

As to the cause of this whether the excavation or something altogether disconnected with it, such as a slide from the hill above, or the

†This opinion was affirmed by the Supreme Court without report, June 29, 1886, Spear, J., dissenting.

insecurity of the foundations of the house, there was a conflict of evidence. Much interesting testimony of witnesses whose practical experience had made them familiar with the hillside and of geologists and civil engineers was offered. But the house, a very substantially built structure, had stood there for ten years, with no apparent sign of weakness except some superficial cracks that might have occurred in building; and to say nothing of questions of credibility of witnesses, the weight due this experimental fact was for the jury. We cannot say the court erred in not setting aside the verdict. Taking the concurrence of the testimony as to the value of the house before the excavation was begun, the amount, \$12,000, at which the verdict was permitted to stand after remittitur by plaintiffs, cannot be said to be excessive.

The charge to the jury was, in substance, that for the damage by excavating, between Kleiner and Cross streets, deeper than the foundation walls of the adjoining house and more than nine feet below the surface of the lot, or the curb of Kleiner street, if there was a curb, the defendant would be liable; but, where not to a greater depth than nine feet, would not be liable, unless there was negligence. Upon the other hand, that the damage by excavating to any depth, between McMicken avenue and Kleiner street, the only liability would be for negligence.

The depth of the excavation below the level of Kleiner street, at a point in line with the front of the lot, was seventeen feet, and in line with the front of the house between eight and nine feet, the lot at its front being some five feet above the street and levelled back, and the grade of the excavation rising about four feet in that distance. Compared with the surface of the lot the depth of the excavation at a point in line with the front of the house was almost eighteen feet, but in line with the rear not more than two feet; whether there was an established grade or curb of Kleimer street was not shown. The foundations of two old houses that stood between Kleiner and Cross streets, entirely within the bounds owned by defendant, were removed in the course of the excavation. There was testimony, that a retaining wall was also removed; but this, if not within the same bounds, was on the dividing line, since the testimony that shows its removal, shows that the wall put up by the defendant was in the same place.

The charge to the jury was based on the construction given by the court to the statute, providing, that for excavating on any lot in a city or village to a greater depth than nine feet below the curb of the street on which the lot abuts, or if there be no curb, below the surface of the adjoining lot and thereby causing damage to any building on that lot, the owner shall be liable; but he may dig to the full depth of the foundation walls of such building, or to the full depth of nine feet below the street, whereon the lot abuts, without incurring the prescribed liability. 66 O. L., 232; sections 2676, 2677, Rev. Stat. The construction given limited the operation and effect of these provisions to the excavation between Kleiner and Cross streets, which was the only part adjoined by the lot of the plaintiffs; but did not treat the statute as to any extent relieving from the exercise of care. The contention of the defendant, on the other hand, was that the provisions applied to the excavation between McMicken avenue and Kleiner street as well; and that the statute gave the right of going to the depth of nine feet without regard to any duty of care. This constituted the ground of most of the exceptions taken to the charge, and to the refusal or modification of

charges; there having been in all thirteen charges asked, ten of which involve substantially the same proposition.

The right of lateral support at common law, did not extend to buildings; in that respect the only liability was for withdrawing the support negligently. *Dodd v. Holme* 1 Ad. & E., 493; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dorrity v. Rapp*, 72 N. Y., 307, 310; *Gilmore v. Driscoll*, 122 Mass., 199, 208; *Transportation Co. v. Chicago*, 99 U. S., 635. The effect of the statute is to create a new liability, in case of digging deeper than the foundation walls of an adjoining building, and more than nine feet below the surface of the lot, or if the street be curbed or graded, below the curb or grade. *Burkhardt v. Hanley*, 23 O. S., 558. But it does not go further, and to that depth affords immunity for negligence. No such construction is warranted by the letter or context. The purpose evidently is, that adjoining owners may be advised what depth of foundation will protect their buildings against excavations by their neighbors but not that within that depth excavations may be made by each without any regard to the duty of care. In *McMillen v. Watt*, 27 O. S., 306, it was held that, after excavating to the statutory depth, the owner was under no obligation to furnish a support for the walls of an adjoining building. But this was where no want of ordinary care was alleged in the manner of making the excavation; the only negligence being in leaving it un-walled, and the plaintiff's foundation walls exposed. In that very case the statute was considered a matter of police regulation, which would make its proper office to be the limiting of rights, and not the exempting from duties.

There was evidence that ordinary care required the work to be done by sections, with intervals left between until walls ten or twelve feet thick were put in, whereas, it was done, although in part from the foot of the hill, and in part from the top, by a continuous course of excavation with, walls from two to four feet. Submitting this, as a question of negligence, to the jury was not putting upon the defendant the duty of propping up the house. If the verdict may have been on the ground that retaining walls were not placed there, it was because such walls were required, in the course of the excavation, by that reasonable regard for the property of another, due from the defendant even in the lawful use of its own. This was a question for the jury. They were left no room to be misled, for they were told that the defendant was under no obligation to shore up the house if the plaintiffs were given notice. They were told, besides, so far as can be understood from the general charge, that all that was meant, by the requirement of care, was the giving of notice.

There is no obligation at common law, if care is exercised in excavation, to underpin or shore up an adjoining house. *Payton v. Mayor*, 9 B. & C., 725; *Massey v. Goyder*, 4 Carr & P., 161; *Dorrity v. Rapp*, 72 N. Y., 307, 310. But the right of excavation must be exercised with reasonable skill and care, considering the nature of the soil and surroundings, so as to avoid doing unnecessary injury to any building. *Foley v. Wyeth*, 2 All., 131, 135; *Quincy v. Jones*, 76 Ills., 231, 241. Whether this would require that only small portions of the soil should be exposed at a time, and as fast as removed, that a wall should be put in, must depend on the circumstances. *Washburn on Easements*, 3rd ed., 555, 556. In *Keating v. Cincinnati*, 38 O. S., 141, the city had cut into the

foot of a hill, in excavating within its own lines for a street, and by the slipping of the soil, had damaged the house of the plaintiff higher up the slope, and separated from the part excavated by an alley. The evidence was, that the only way to have stopped the slip was by a retaining wall, to be put in by sections as the work progressed. This was not done, and was held to have warranted the jury in finding there was negligence in the excavation.

Confining the liability, arising under the statute, to the excavation between Kleiner and Cross streets, was not to the prejudice of the defendant; nor was it error. That part of defendant's property, was the only part which plaintiff's lot could be said to adjoin. The part below Kleiner street was a separate piece, abutting on McMicken avenue. The privilege of crossing Kleiner street had been obtained from the city, but this did not make the two pieces one.

The court charged that if, in excavating, the defendant tore down the retaining wall, and it was on the plaintiff's premises, defendant would be liable for the damage; and refused to charge that no evidence could be considered tending to show trespass upon the plaintiff's premises. The charge is to be read in connection with the evidence. The evidence was not objected to. It was that the excavation was on the same line, and many feet deeper, than the wall, which was taken down while they were digging. For all that appeared, this was wholly in consequence of the excavation, no part of which is shown to have been beyond the defendants' lines. The charge asked would have been misleading. If it became necessary to take down the wall to prevent it falling into the excavation, an entry for that purpose would not constitute a different cause of action. The gist of the action would still be the negligence of defendant in excavating within its own boundaries; under the old forms of actions not a count in trespass, but in case. *Smith v. Martin*, 2 Saund., 400; *Thurston v. Hancock*, 12 Mass., 220; *Shrieve v. Stokes*, 8 B. Mon., 453, 557.

The court refused to charge, that if want of ordinary care in placing or constructing the foundations of the house, or in supporting it during the progress of the work contributed to the injury, there could be no recovery. The charge did not distinguish between direct and remote causes. The court had charged that if the injury to the house occurred from its own unstable foundations, without being accelerated by acts of defendant, the defendant was not liable; also that plaintiffs could not look to the defendant, if having notice of the excavation, the injury was from their negligence in not shoring up the house. And, as to the measure of damages, or how long the house would have stood if left undisturbed, the jury were told that the stability of the foundations was to be considered. There was no error in the refusal to charge as asked. *Walters v. Pfeil*, Mood. & M., 362; *Dodd v. Holme*, 1 A. & E., 506, Taunton, J.; *Stevenson v. Wallace*, 27 Gratt., 77, 91; *R. R. v. Reaney*, 42 Md., 117, 136.

The remaining assignments of error are to the admission and exclusion of evidence. Exception was taken to inquire into the excavation between McMicken avenue and Kleiner streets, for the reason, that the petition only set out an excavation adjoining plaintiff's lot. But the amended petition added, that said excavation alongside of, and below the lot, was so negligently conducted as to cause the damage. Exception

was further taken to inquiry into the work done above Cross street. But no such inquiry was made, except in connection with the excavation below, in order to get at how that was done, and when. There was no exception to the evidence as it was offered; only a general motion to strike out at the close of plaintiffs' case.

Exception was taken to the exclusion of the deposition of Jacob Wirth. This has been deemed of sufficient importance to be set forth specifically in the petition in error. But the record only shows that a deposition was offered and excluded, without any showing what it contained, or why the witness was not produced.

Exception was taken to excluding evidence as to the disposal by Jacob Wirth of his stock in the Inclined Plane Co. His testimony at a former trial of the cause, in which he admitted owning \$2,000 of stock, had been read by the defendant, the plaintiffs consenting; and what was sought to prove was that he had since disposed of the stock. This requires no comment.

Exception was further taken to the exclusion of a book of levels from the city engineer's office, offered to prove the grade of Kleiner street. The court held it might be admitted to show the levels as taken, but not to prove an established grade, in the absence of any ordinary establishing the grade.

There was no error in this.

Judgment affirmed.

Stallo, Kittredge & Shoemaker, Paxton & Warrington, for plaintiffs in error.

Jordan, Jordan & Williams, Long, Kramer & Kramer, for defendants in error.

202 HUSBAND AND WIFE.—CONFLICT OF LAWS.

[Hamilton Common Pleas.]

EZRA HILL v. TABITHA MYERS AND JOHN MYERS.

1. What is necessary for a married woman to do to create a charge on land constituting a part of her separate estate, is to be determined by the law of the place where the land sought to be charged is situated, and not by the law of the place where the agreement was entered into.
2. Consequently, where a married woman, possessing separate estate consisting of land situated in Ohio, signed a note in Indiana, as surety for her husband, and by the law of that state the note is void: in an action brought in Ohio to charge the same in equity upon her real estate here: Held, that the question of whether the execution of the note operated as a charge on her Ohio land was to be determined by the law of Ohio.

MAXWELL, J.

The plaintiff sues the defendant upon a promissory note, of which the following is a copy:

"Grandview, Ind., Dec. 2, 1880.

For value received we promise to pay Ezra A. Hill nine hundred dollars, payable two hundred dollars in twelve months; and second payment, two hundred dollars, in two years; third payment, two hundred dollars, in three years and fourth payment, three hundred dollars, in four years, all bearing eight per cent. interest from date, and on failure of either payment, the whole amount becomes due.

Tabitha Myers.
John Myers."

On appeal this judgment was sustained by the district court. See opinion post 000. Judgment rendered by circuit court was affirmed by Supreme Court, without report, March 16, 1886, and again in Supreme Court, on later issue, 46 O. S., 183.

The facts are that the defendants, who had in early life lived in this county, had been living in Indiana for over twenty years prior to the making of this note, where the husband had carried on a mill and a farm. The husband had been unfortunate in business and all his property, except chattel property, had been sold by the sheriff. They determined to return to this county, and at the time the above note was made were on their way. The chattels referred to above were on the wharf-boat, on the Ohio river, at Grandview, Ind., and the defendants were there waiting for a steamboat to bring them up the river. A creditor to whom the husband owed \$900, followed them to the wharf-boat and threatened to attach the chattels if his claim was not paid or secured. The defendants made and gave him the note of which the foregoing is a copy. The plaintiff accepted it, and the defendants came in this state with their chattels. At that time the defendant, Tabitha Myers, was the owner of a separate estate in lands situated in this county. Nothing has been paid on the above note, so that by its term the whole amount became due before the beginning of this action.

Under this state of facts the plaintiff seeks to charge the amount due him on the separate estate of Tabitha Myers. The defendants, on the other hand, contend that as the note was made in Indiana, and no other, or different place of payment is specified therein, it is governed by the "lex loci contractus," and that under the law of Indiana, the note of a married woman, other than an obligation contracted for the benefit of her separate estate, is wholly void.

The law of Ohio as laid down in the case of *Williams v. Urmston et al.*, 35 O. S., 296, 298, is as follows: "Where a married woman having a separate estate, executes a promissory note, as security for the principal maker, a presumption arises that she intends to charge her separate estate with its payment, and a court of equity will carry such intention into effect by subjecting such estate to the payment of the debt, in the mode prescribed by the statute." It follows that if the note sued on had been made in Ohio, there would be no question but that the amount due on it could be charged on the separate estate of the wife.

On the other hand I think that under the Indiana act of 1879, and the decisions thereon, if the note is to be governed by the law of Indiana, it is void as against the wife. *Indiana Supplement to Cinc. Law Bulletin*, vol. 7, page 99.

The legal question arising is, whether the case should be governed by the law of the place where the note was made, the *lex loci contractus*, or the law of the place where the wife's separate estate is situated, the *lex rei sitae*. This question must be determined by the nature of the obligation and the relief sought.

We sometimes speak of the capacity or incapacity of a married woman to make a contract, but in the proper sense of the word she cannot make a contract, she cannot enter into any obligation which will bind her personally, either under the statute or equity. No personal action can be maintained against her, no personal judgment can be rendered against her. The inquiry always is, had she separate property, and has she created a charge on it? If she has no separate property, the inquiry is at an end. If she has not created a charge on it, the creditor has no remedy. It might be said that an action against a married woman is more in the nature of an equitable action in rem than a legal action in personam. The statutes of our own state, as well as those of many other states, have increased her power of dealing with her separate estate, and have to some extent enlarged the forms of procedure, but the statutes of our state, like the modern English law, have not changed her personal capacity in any respect. Her separate estate is under the charge and subject to the rules of equity. The decisions of our supreme court are all to the point, that she is answerable only to a court of equity. A justice of the peace has no jurisdiction. *Allison v. Porter*, 29 O. S., 137. She has no right to a trial by jury. *Avery v. Vansickle*, 35 O. S., 270.

Judge Force, of the superior court, lately decided that the time limited for bringing an action against her is fixed by section 4985, Rev. Stat., limiting the time for bringing actions for relief to ten years. *Mathers v. Hewitt*, *ante*, 616, 63. See also *Pike v. Fitzgibbon*, L. R., 17 Ch. Div., 454.

If then a married woman cannot make a contract, but can only create a charge upon her separate estate, it is immaterial what the form of the attempted contract is, or where it was made. This court will only inquire whether she has a separate estate within its jurisdiction, and whether she intended to create a charge upon that separate estate; and to determine the latter question the attempted obligation may be considered as evidence.

As it seems to me, it is the same as if she were to make a mortgage in Indiana, according to the forms used in Ohio, upon real estate situated both in Indiana and in Ohio; although it might be void for informality as a lien on the

Indiana real estate, yet it would be a valid lien on the Ohio estate. In short, the title to real property can be acquired, charged and passed only according to the *lex rei sitae*, Story, Conflict of Laws, sections 424 and 445; Wharton, sections 276, 296.

In other words, what it is necessary to do to create a charge on real estate in Ohio, is to be determined by the law of Ohio and not by the law of the place where the agreement to charge is entered into.

As Mrs. Myers could have disposed of this real estate only by a deed or other instrument valid in Ohio, so she can create a charge on it only by an agreement valid in Ohio. True, in making the note sued on, she does not dispose of her separate estate here, but she took the initial step which gives this court jurisdiction to decree a lien on that estate. See *Frierson v. Williams*, 57 Miss., 451.

I am of the opinion that in this case the law of the place where the property sought to be charged lies, should govern, and not the law of the place where the note was signed, and a decree will be entered for the plaintiff.

LIFE INSURANCE—INTEREST.

[Superior Court of Cincinnati, General Term, 1883.]

† ANNA M. BONNER v. CONTINENTAL LIFE INS. CO.

1. An insurance company is not relieved from paying interest on part of a policy of life insurance which is withheld to abide the result of litigation between the creditor and the assured.
2. To a question in an application for life insurance, where has the party resided during the last ten years, the answer, "Cincinnati," is not false on the ground that the party served as a surgeon during the war of the rebellion, Cincinnati having been his home during the period, especially where the same application states that he had been a surgeon in the United States volunteers.

HARMON, J.

Plaintiff sues upon a policy of insurance on the life of her husband, Dr. S. P. Bonner, issued by defendant in 1866, payable to her, he having died in 1874. Defense is made against plaintiff's entire claim because of misrepresentations in the application and also against her claim for interest if the policy be held valid.

The case was reserved upon bill of evidence.

The first defense does not seem to be seriously relied upon. If it be, it is sufficient to say that the alleged misrepresentations as to state of health are not proven, and that we do not agree with defendant's counsel as to the meaning of the question, "Where has the party resided (summer and winter) during the past ten years?" the answer to which "Cincinnati," is averred to have been false. It does not appear that the applicant had been away from this city, which is admitted to have been his home during the period named, except while serving as a surgeon during the war of the rebellion.

Such absence must, we think, have been well known to defendant's agent whose relations with the applicant seem to have been intimate. The next question was whether the applicant had been in the army or navy, the answer was, "Yes, Surgeon U. S. Volunteers," and the company's officers could hardly have supposed that our peaceful, or at least bloodless city, had been the scene of his entire service.

But apart from these facts, we think, for reasons, too obvious to mention, that absence of this sort was not residence within any fair meaning of the question.

†The case of *Insurance Co. v. Bonner*, 36 O. S., 51, is with another company, and does not involve the points in this decision.

The defense as to interest rests upon the following facts: In 1874, defendant's agent brought suit against it for services. Defendant set up a counter-claim upon his bond for \$3,500, which it charged he had not paid over, and made his sureties, Dr. Bonner and Col. Harris, parties to the action. Upon Dr. Bonner's death, Col. Harris notified the company not to pay over the money upon the policy, claiming that he had a right to have one-half of any sum adjudged against the sureties paid therefrom, the agent and Dr. B's estate being, he averred, insolvent, and the annual premium on the policy in question exceeding the amount permitted by law as against his creditors. He also, by cross-petition making plaintiff herein a party, sought to restrain the company from paying over the proceeds of the policy, but no such injunction was ever issued.

Afterward, in April, 1875, the policy having by its terms become due and payable, an agreement in writing was made between plaintiff and Col. Harris whereby he waived any right he claimed as to \$3,000 of the proceeds of the policy and consented to that sum being paid over to her, the remaining \$2,000 to "remain in the hands of the company to abide the event of said suit."

The company was not a party to this agreement, but in May, 1875, paid her \$3,000 on account of the policy and took from her a receipt therefor in which it was stipulated that "the balance due on said policy is to remain in the possession of said company subject to the final decree in said case as per written agreement made and signed by said Anna M. Bonner and L. A. Harris."

That action having been decided in favor of the agent in February, 1881, this action was brought for the amount so retained by the company with interest from the maturity of the policy in April, 1875.

It is now contended that the company is chargeable with interest only since February, 1881, because the money was not payable until then by virtue of said notice, agreement and stipulation.

The argument is first that the agreement of the parties to which the company assented by paying the money, placed it in the same situation as though the injunction applied for had been granted, in which case it would not have been liable for interest. Conceding the premises, we do not agree to the conclusion. By our statute interest in cases like this is recoverable as part of the debt. *Darling v. Wooster*, 9 O. S., 517. By that of Mass., it is recoverable as damages. *Norris v. Life Ins. Co.*, 131 Mass., 294, upon which counsel relies, is therefore not applicable here. On the contrary *Candee v. Webster*, 9 O. S., 452, seems to us conclusive. The analogy between garnishment and injunction in this regard is perfect. Every reason given in the opinion of the court in that case why garnishment should not be held to relieve a debtor from the payment of interest is equally applicable to the case of an injunction.

Again it is contended that viewed merely as an agreement, the effect of what took place was to discharge defendant from liability for interest. Such intention, however, is certainly nowhere expressed, although interest had already begun to run. It was merely agreed that the balance due on the policy should remain in the company's hands. The use of this word would not naturally indicate any change in the company's relations toward plaintiff, but rather the mere continuance of the relation already existing—that of an insured liable for interest until payment, if liable at all. The

company assumed no new relation or liability. It promised nothing. It was not even a party to the agreement. Its position therefore is not what it would have been if it had simply given a note payable without interest at the end of the litigation as suggested by counsel. In that case it could have been sued upon the note. Now it can be sued only upon the policy and is free to set up as it now does any defense it ever had. The fact of part payment is mere evidence.

But even conceding that the intention of the parties was to agree to relieve the company from its obligation to pay interest, we think such agreement not enforceable, for want of consideration. The past payment was no consideration upon a well settled principle. There was no new promise, no waiver of defenses known, or possible, no change of position. The company did not even bind itself to keep the money. It might at any time have paid it into court and stopped the running of interest. And there is nothing in the record tending to show that it made a special deposit of the money or in any way set it apart or acted toward it as a mere stakeholder. On the contrary for aught that appears, it has from the first cherished the intention of defending against the policy upon the grounds now set up. It cannot at the same time contend, that it owes nobody and that it has all along been holding the money idle until it could learn to whom it owed it.

In short, we do not think plaintiff intended to waive or did waive any part of her original claim against defendant, which was \$5,000 and interest thereon from April 19, 1875, and for which with a credit of \$3,000 of May 11, 1875, she may have judgment.

Force and Worthington, JJ., concur.

Mannix & Cosgrave, for plaintiffs.

Sayler & Sayler, for defendant.

220 FORECLOSURE OF MORTGAGE—LIMITATIONS.

[Hamilton District Court, 1883.]

GILBERT DATER, ADMR., v. CHARLOTTE BRUNER, ADMX.

The right to foreclose a mortgage is not barred until after the lapse of twenty-one years after adverse possession by the mortgagor, which presumptively begins with the breach of condition.

ERROR to the Court of Common Pleas.

AVERY, J.

The judgment was upon demurrer to a petition for foreclosure of a real estate mortgage. The mortgage was made July 18, 1860, to secure a note at one year from that date. The petition was filed December 10, 1881. The action was held to be barred.

In this state, it is to be regarded as settled that even a positive statutory bar precluding recovery upon the note, does not prevent enforcement of the mortgage. *Fisher v. Mossman*, 11 O. S., 42; *Gary v. May*, 16 O., 66; *Baily v. Smith*, 14 O. S., 396, 411, *Ranney, J.* But treating it, as an independent cause of action, the point made is, that foreclosure is barred, either by fifteen years, the statutory limitation of actions upon a specialty, or by ten years, the limitation of actions for relief not otherwise provided for, or by twenty-one years from the making of the mortgage.

An action upon a specialty, within the meaning of the statute, is an action at law upon a sealed obligation. The same limitation was prescribed by the statute of 1831; the language being, "actions upon the case covenant and debt founded upon a specialty or any agreement, contract or promise in writing." In the limitations of the Code of 1853, which abolished common law forms, the description, "upon the case covenant and debt," is dropped, but this does not change the nature of the action. The limitation remains the same, touching legal remedies only, and not controlling actions by the holder of the legal estate, to cut off the equity of redemption. Decisions of a different import, as by the courts of Oregon and Kansas, rest on statutes excluding possession of the mortgagee until foreclosure. *Anderson v. Baxter*, 4 Or., 107; *Eubanks v. Leveridge*, 4 Sawy., 274; *Chick v. Willetts*, 2 Kan., 385. The rule, with the reason, is stated in *R. R. v. Trimble*, 51 Md., 99, 112.

The statutory limitation of actions for relief is held to refer to equitable relief. *Neilson v. Fry*, 16 O. S., 553, 558, Welch, J. But an action upon a note is only barred in fifteen years, and it is unreasonable to suppose that recourse in equity to the mortgage could have been intended to be precluded by a shorter time. The right to redeem would be affected by similar considerations and surely the statute is not so to be construed that a mortgagor out of possession would be barred of his equity of redemption in ten years, but for fifteen years would be left subject to an action for the debt.

The right to foreclose and the right to redeem are reciprocal and commensurable. *Caufman v. Sayre*, 2 B. Mon., 206, Robertson, C. J. They are to be regarded as mutual, and the same limitation that would apply to the one, will apply to the other. 2 *Hilliard on Mortgages*, section 2; *Crawford v. Taylor*, 42 Ia., 260; *Locke v. Caldwell*, 91 Ills., 417. In *Robinson v. Fife*, 3 O. S., 551, 560, Kennon, J., it is said, that although strictly speaking there is no statute of limitations applicable to the right to redeem mortgaged premises in the possession of the mortgagee, yet courts of equity, on the analogy of the statute, would hold such rights barred, after the lapse of twenty-one years, where possession is held adversely. The same analogy extends to the right to foreclose. *Hughes v. Edwards*, 9 Wheat., 489, 497; 4 Kent's Com., 12th ed., 190; *Story Equity*, section 1028 a, section 1028 b, section 1590.

From what time the limitation should run, must depend on the beginning of adverse possession. A mortgage, at law, as a conveyance upon condition, vested the title and right of possession, defeasible by performance of the condition, in the mortgagee. The rule was, that, on the mortgage being executed, he might, at once, without giving notice, bring ejectment against the mortgagor. The cases are collected in the notes to *Keech v. Hall*, 1, *Smith Lead Case*. In some of the states, notably in New York, California, Oregon, Nebraska, and Kansas, this rule has been changed by statute. In this state, it has been modified by judicial construction. The mortgagee is not held entitled to possession, before condition broken; on the contrary, it has been the frequent language of the supreme court, that, until then, the title, even against him, remains in the mortgagor. *Ely v. McGuire*, 2 O., 223; *Baird v. Kirtland*, 8 O., 21, 23; *Allison v. McCune*, 15 O., 726, 732, *Birchard*, J. It is only, after condition broken, that ejectment may be brought by the mortgagee.

Rands v. Kendall, 15 O., 671, 677, 687; Frische v. Kramer, 16 O., 126, 138; Nolan v. Urmston, 18 O., 273, 277; Allen v. Everly, 24 O. S., 97. The New York cases, prior to the existing statute, were the same. "Ejectment could be maintained after forfeiture by non-payment, and it was then said that, after forfeiture, the legal title was in the mortgagee, for the reason that his title would prevail at law over that of the mortgagor." Grover, J.; Hubbell v. Sibley, 50 N. Y., 472. "Then, and not till then, is he considered as having an interest in the land; then he might claim possession by an action of ejectment." Savage, C. J.: Phyfe v. Riley, 15 Wend., 254. In Swartz v. Leist, 13 O. S., 419, where one of the notes had been assigned before due, and satisfaction was afterward entered by the mortgagee on the margin of the record of the mortgage, it was said, the legal title to the conditional estate granted by the mortgage remained in the mortgagee, as fully after the transfer of the note as before. But the distinction, whether before or after the breach of condition, was not in question; the decision must have been the same, in either event.

Ejectment lying only from breach of condition, the limitation by analogy to the statute would begin, against foreclosure, only from then. Presumptively, in the absence of some recognition of the mortgage, or payment of interest, or the like, that would be taken as the time from which the mortgagor begins to hold adversely. Bacon v. McIntire, 8 Metc, 90, Wilde, J.; Nevitt v. Bacon, 32 Miss., 212; Wood on Limitations, section 225, section 235. It could not, in any event, be from the making of the mortgage; since, as has been well said, whatever be the true relation of the parties to the property, or whichever may be in possession, he holds possession for the other until condition broken, and neither can set up an adverse claim against the other before that event. Wood on Limitations, section 221. The court of common pleas erred, therefore, in sustaining the demurrer to the petition. The case of Longworth v. Taylor, 2 C. S. C. R., 39, cited by counsel in support of the ruling, is on the contrary, when read, against it.

The judgment is reversed.

Reemelin & Reemelin, for plaintiff in error.

W. G. Mayer, for defendant in error.

DIVORCE AND ALIMONY.

[Belmont District Court, April Term, 1883.]

Ball, Pease, Frazier and Hance, JJ.

*PAULINE V. WADJLE v. ARCHIBALD WOODS ET AL.

An action for alimony alone can be maintained in the courts of this state even though plaintiff, by an ex parte proceeding in another state, has already obtained a divorce a vinculo from the defendant, the matter of alimony having been dismissed without prejudice, by reason of defendant's non-residence, from said divorce proceeding.

BY THE COURT:

The plaintiff, on February 19, 1881, filed in the court of common pleas of Belmont county, Ohio, her petition in which she set forth, that she had been a resident of the state of Ohio for the year last past and is now a bona fide resident of Belmont county. That on August 22, 1872, in Ohio county, West Va., she was married to the defendant, Archibald Woods. That she lived with him until February 10, 1874, when she avers defendant wilfully abandoned her, and has

*This judgment was affirmed by the Supreme Court. See opinion, 44 O. S., 449.

since wholly refused to provide for her support. That during all the time said Archibald Woods continued to live with her, from the time of their marriage to

The plaintiff further states that on March 3, 1877, she being then a resident the time when he abandoned her, he was guilty of habitual drunkenness, etc. of Shelby county, Tennessee, the chancery court of said county granted her a divorce, a vinculo, from the said defendant, Archibald Woods, and restored her to her maiden name of Pauline V. Waddle, and that since that time she has ceased to be his wife. A certified copy of the record of her proceeding for divorce in Tennessee is made a part of her petition.

It appears from the record of her proceeding in the chancery court of Shelby county, Tennessee, that she filed her bill of complaint against defendant, Archibald Woods, on August 14, 1875. The bill avers that complainant is a citizen of Shelby county, Tennessee, and that the defendant, Archibald Woods, is a citizen of West Virginia, charges him with having failed to perform the duties incumbent on him as a husband; that he has failed to provide for her maintenance, and charges him with drunkenness and abandonment and prays for a divorce, a vinculo, and for alimony, and for publication.

The only service in the proceeding in Tennessee was constructive or by publication, and no appearance of, or for defendant was had or entered.

That at the time of the final decree for divorce, and as a part of the entry was the following: "But this cause is retained as to the matter of alimony but for no other purpose." This entry bears date March 23, 1877, and on July 1, 1880, the following entry was made:

"Pauline V. Woods v. Archibald Woods, decree final, as to alimony."

Now on this day this cause coming on for further adjudication touching alimony, and it appearing that at the time a divorce, a vinculo, was by this court heretofore granted to the plaintiff herein this cause was retained as to the matter of alimony and no other purpose.

"And it appearing to the court that the defendant is now a non-resident of this state, and a resident of another state having property therein, the court doth on motion of said plaintiff now here dismiss as to the said matter of alimony without prejudice to the plaintiff touching the same, so that said plaintiff may be enabled to proceed in said foreign jurisdiction for recovery thereof, or do any other act necessary therein."

The plaintiff further avers that by the will of his uncle, G. Worthington Woods, which was admitted to probate in Belmont county, Ohio, in August, 1876, the defendant, Archibald Woods, was made the legatee of one-fourth interest of a tract of land, situate in Belmont county, Ohio, and chooses in action in the hands of the other defendants as executors of said will, etc.

And prays for alimony out of such real and personal estate.

The defendant, Archibald Woods, demurred to the petition—assigning as ground therefor that the petition does not state a cause of action or facts entitling plaintiff to the relief prayed for.

A decree pro forma having been entered against the plaintiff in the common pleas, upon the demurrer, she appealed to the district court, where the cause was submitted to the court upon demurrer, and the court overruled said demurrer. Judges Ball, Pearce and Frazier concurring, and Judge Hance dissenting. The case was subsequently submitted on testimony, and alimony allowed in the sum of \$1,000, and exceptions taken.

Cochran & Cochran and L. Danford, attorneys for plaintiff.

Cowen & Son and R. E. Chambers, attorneys for defendant.

†The following is a review of the decision of the Supreme Court, in affirming the above judgment, 449, furnished by Jno. F. Kelly, Esq., of Bellaire, O., and published 17, B. 2.

In this case this court decided that a wife domiciled with her husband in another state, can abandon that domicile, procure an *ex parte* divorce, in a foreign jurisdiction, and then come to Ohio and sue for and recover alimony alone.

Speaking judicially, the court decided that the statute, secs. 5690 and 5702, allows alimony after a divorce *a vinculo*. In other words, alimony is grantable in an independent proceeding after an *ex parte* divorce *a vinculo*, obtained by the wife in a foreign jurisdiction, because the statute, secs. 5690, 5702, authorizes it.

I propose to show that this decision is not sustained by the statute, by authority, or by any kind of judicial reasoning.

After stating what was not claimed; that sec. 5702 allows a wife to petition for alimony alone; and expressly rejecting the English doctrine, the court say: "As to *where* and by *whom* a petition for *alimony alone* may be filed, sec. 5690, of Rev. Stat., provides as follows:" * * * "The language of the statute is, 'the court shall hear and determine the same, whether the marriage took place, or the cause of divorce' (or as here alimony) 'accrued within or without the state.'" * * * "Thus, the language of the statute answers nearly all the questions presented in this case." "But the words of the statute, sec. 5702, are, 'the wife may file her petition for alimony alone;' may the word 'wife' as used in this statute include a woman divorced, as was this defendant in error?" Judge White, in *Cox v. Cox*, on page 512, "shows that the word 'wife' designates the person divorced, after the divorce is granted. He further considers the questions at length, and the court there held, 'that the decree of divorce was no defense to her petition for alimony.' The principles there stated and held, sustain this judgment."

This is the substance of that opinion. It can thus be seen that the court based its decision on secs. 5690 and 5702 of the statute, and the case of *Cox v. Cox*. Sylogistically speaking, this case affirms that the statute gives alimony in an independent proceeding, after an *ex parte* divorce *a vinculo* obtained by the wife in a foreign jurisdiction; the defendant in this case is such a person; therefore she is entitled to alimony. If, therefore, the major premise is not *true*, the decision is worthless.

The Ohio statute provides for three kinds of alimony: Alimony *pendente lite* in sec. 5701; separate maintenance in sec. 5702; and permanent alimony in secs. 5699, 5700. Section 5689 gives the causes for divorce; secs. 5690 and 5691 provide for the residence, or, properly, the *venue*; secs. 5692-5698 and 5704-5706 give the procedure; secs. 5699-5700 specify the character of the decree in divorce *a vinculo*—permanent alimony. Section 5701 provides for alimony *pendente lite*; and secs. 5702-5703 provides for separate maintenance.

Section 5690 provides for the *venue* and does not confer power to grant anything. But the Supreme Court says it does confer that power. This section reads: "Except in an action for alimony alone, the plaintiff shall have been a resident" one year; "all actions (for divorce or for alimony) shall be brought in the county" of the *bona fide* residence, "or in the county where the cause of action arose; and the court shall hear and determine the same, whether the marriage took place, or the cause of divorce accrued, within or without the state." Meaning that for alimony alone—that is, separate maintenance—the plaintiff need not be a resident for one year. For divorce, the plaintiff must be a resident for one year. In both cases the action must be brought in the county of the *domicile*, or in the county of the *delictum*. When the action is thus brought, the court shall take jurisdiction, no matter where the marriage or the *delictum* took place. If the action is for alimony alone—separate maintenance—it must be brought in the county of the *domicile* or of the *delictum*, and either is sufficient to give jurisdiction, in which case the court shall hear and determine whether alimony shall be granted irrespective of where the *marriage* or *delictum* took place. In other words, all that is necessary in an action for separate maintenance is that it be brought in the county of the *domicile* or of the *delictum*; then the court must take jurisdiction. If brought in the county of the *domicile*, it does not matter where the *marriage* or the *delictum* took place. If brought in the county of the *delictum*, it does not matter where the marriage took place. Hence, this section governs the *venue*, and refers to nothing else. This being the truth, and the correct construction, how can the Supreme Court say that this section "answers nearly all the questions presented in this case," when the question presented was, "can alimony be granted after an *ex parte* divorce *a vinculo* obtained by the woman in a foreign jurisdiction." This section only answers the question of *venue*, and how then can a court hold that it governs alimony after a divorce *a vinculo*?

The court does not fare any better in its construction and application of sec. 5702. That section provides "when the wife files her petition for divorce or alimony, the husband may file a cross-petition for divorce, upon either cause mentioned in sec. 5689; the wife may file her petition for alimony alone; or, if a petition for divorce has been filed by the husband, she may file her cross-petition for alimony, with or without a prayer for the dissolution of the marriage contract; and such petition, or cross-petition for alimony, may be for the following causes:" * * * The proper wording of this section is this: "The wife may file her petition for alimony alone. If the wife files her petition for divorce or alimony (alone) the husband may file a cross-petition for divorce upon either cause mentioned in sec. 5689. If a petition for divorce has been filed by the husband, she may file her cross-petition for alimony with or without a prayer for the dissolution of the marriage contract. The petition of cross-petition for alimony (alone) may be for the

following causes." The construction is, the wife can petition for alimony alone. If she does, the husband can cross-petition for divorce. If the husband petition for divorce, the wife can cross-petition for alimony, with or without a prayer for divorce. If the court (sec. 5703) find the charges true, in the petition for alimony alone, it shall dispose of the children, give judgment for alimony, the wife shall have her own lands, and have the "right and power to acquire, hold, manage and dispose of property, money, and choses in action, and bring and maintain suits in her own behalf, *free from the control or interference of her husband.*" * * *

Compare these two sections with the equity doctrine of separate maintenance, and it will be found that it is this equity doctrine reduced to the form of a statute. More than this, trace the history of this legislation, and it will be found that this statute was framed upon and after that equity doctrine.

Separate maintenance means a support for the wife without a dissolution of the marriage. If the marriage is dissolved upon the cross-petition of the husband, or of the wife, then the court will not decree as provided in sec. 5703, but as provided in secs. 5699, 5700, because then the action becomes an action for divorce. If the marriage is not dissolved, the decree will be as provided in sec. 5703.

But the court say, that in sec. 5702 the word "wife" includes "a woman divorced," and cites Judge White's opinion in *Cox v. Cox*, 512, to support this. That case did not have sec. 5702 under discussion. The question in that case was, should the district court reopen for trial all the issues of fact upon which the alimony was granted in the court below, instead of receiving the judgment of the court below as proof of those facts, and as an estoppel. Because the district court did not reopen the case, it was reversed. White, J., distinctly said, on page 512, that the question was whether an *ex parte* decree can defeat "the alimony which the statute (upon the facts as they exist in regard to the husband's desertion) intended to provide;" and "in arriving at the conclusion" that an *ex parte* decree shall not defeat the statute, "we make no distinction" between a foreign and a domestic decree. In a case where the lower court decreed divorce and alimony, and there is an appeal as to the alimony, "it is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed," because "on appeal, alimony may be decreed by the district court, notwithstanding the divorce pronounced by the court of common pleas," for the reason that an appeal as to alimony is expressly allowed by the statute (sec. 5706—54 v. 131, sec. 17). "It is true," in the allowance of alimony upon a proceeding for divorce and alimony, "the statute, (sec. 5699—51 v. 317, sec. 7) speaks of the allowance as being made to the wife," but the term "wife," in such cases, can designate the person, not the relation; "or the petition may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony" in cases where she obtained a decree for divorce and alimony in the court below, and there is an appeal as to alimony. That is the meaning of that opinion on page 512, and, in short, it means that the word wife refers to the person, and not the relation in appeals as to alimony.

But the question involved on page 512 is stated by the court to be "whether an *ex parte* divorce *a vinculo* will defeat alimony," and the court held it would not, because such a result would work a fraud upon the wife, and because an *ex parte* decree cannot have that effect. And because the cases of *Richardson v. Whitson*, *Crane v. Meginnis* and *Shotwell v. Shotwell*, are authority for the doctrine that alimony can be granted after a divorce *a vinculo*. This case is not supported by any of these authorities, nor by the reasons advanced by the court.

Before showing the absurdity of this case, let me recapitulate the objections to the opinion in *Woods v. Waddle*. First, it cannot be supported by sec. 5690, because that exclusively relates to *venue*—residence—and not to alimony. Second, it cannot derive support from sec. 5702, because that exclusively relates to separate maintenance. Third, it cannot derive support from *Cox v. Cox*, because that is not a case in point, does not decide the principle involved, and as authority is worthless.

The proper ground upon which *Cox v. Cox* can rest is that announced in *Hoffman v. Hoffman*, 46 N. Y., 30; *Shannon v. Shannon*, 4 Allen, 134; *Smith v. Smith*, 13 Gray, 209; *Leith v. Leith*, 39 N. H., 20; *Kerr v. Kerr*, 41 N. Y., 272; *Commonwealth v. Blood*, 97 Mass., 328; *Barden v. Fitch*, 15 Johns., 140; *Prosser v. Warner*, 47 Vt., 667. In *Hoffman v. Hoffman*, the facts were the same as in *Cox v. Cox*. The husband and wife were domiciled in New York. The husband went to Indiana and procured an *ex parte* divorce, the wife remaining domiciled in New York. To a suit in New York by the wife for divorce and alimony, the husband pleaded the Indiana divorce, and the court said: "For the reason that the Indiana court had no jurisdiction, as the plaintiff was in fact a resident of New York, though he claimed residence in Indiana, and went to Indiana to obtain this divorce, and the wife was all the time a resident of this state, was never served with process, or

appeared, the Indiana decree of divorce cannot be enforced here and must be held void." Though the court did not exhibit the necessary learning to place the case of *Cox v. Cox* on the proper and only ground to which it could be authority and be supported by authority, namely that an *ex parte* divorce outside of the domicile and place of *delictum* is not valid out of the jurisdiction where granted—the rule advanced by Redfield, C. J., in 3 Am. Law Reg. N. S., 193, yet it had some chaotic idea about it when the following language was used on page 512: "To give to a decree thus obtained the effect claimed for it, would be to work a fraud upon the pecuniary rights of the wife. Such a result in our opinion is rendered necessary by no principle of comity or public policy—the only grounds upon which *ex parte* decrees of divorce are authorized and supported." In truth, reason, and on precedent, the case of *Cox v. Cox* can rest upon no principle but the rule above stated as advanced by Redfield. The court stated the question to be, "can the *ex parte* decree be made available to defeat the right to alimony," and it held that it could not; and why? not upon the ground as advanced by the court that alimony is grantable after a divorce *a vinculo*, but upon the ground that that decree had no force or validity outside of the jurisdiction which granted it, because a divorce, to be jurisdictional, must be granted by the forum of the *domicile* or of the *delictum*. Every state has jurisdiction of the status of its citizens, and to decide when a citizen shall be held to be married or single; but its mandates have no force or validity outside of its territory unless its adjudication is *inter partes*. This is the opinion of jurists for centuries, and the principle is embodied in the constitutions of every state, in the provision protecting a man's person and property. If the adjudication is *inter partes*, it is valid everywhere. If *ex parte*, it is valid only in the jurisdiction where made. But the case of *Woods v. Waddle*, not only misconstrues the statute, but is adverse to the opinion of the best jurists repeatedly enunciated for centuries, at home and abroad, in this that the court grants alimony to a woman who abandons her *domicile*, and the place of the *delictum*, and procures an *ex parte* divorce in a foreign jurisdiction. By the well established rule that an *ex parte* divorce had no force outside of Tennessee, *Cox v. Cox* and *Mansfield v. McIntyre*, could not recognize such *ex parte* decrees, nor would the cases above cited.

In the case of *Prosser v. Warner*, 47 Vt, 667, the facts were the same as in *Woods v. Waddle*. In that case the husband and wife were domiciled in Vermont. The wife left the husband and his domicile, and went to New York and procured an *ex parte* divorce. She then returned to Vermont, and commenced proceedings in the Vermont court for alimony, and the court held that the *ex parte* decree had no force in Vermont. And why? In Vermont the husband was still a married man. The *ex parte* decree did not change the status of the husband. It had no jurisdiction over this status. It changed the status of the wife within the jurisdiction of New York. From public policy the Vermont court would recognize her as a divorced woman in proceedings affecting her person or her personal liberty, but until the Vermont law says that the husband has no wife, he will continue to remain in that status, hence the New York decree obtained *ex parte* away from the *domicile* and *place of delictum* has no force in Vermont and could not be used as a basis for an action for alimony. This case, and the decisions in *Shannon v. Shannon*; *Smith v. Smith*; *Leith v. Leith*; *Kerr v. Kerr*; *Barden v. Fitch*; *Hoffman v. Hoffman*, is founded upon the principle announced by Judge Redfield as above stated.

The court, in *Woods v. Waddle*, state "the old English doctrine that alimony has no independent existence is not the law of Ohio." In the first place, there is no such "old English doctrine." Prior to 1858 the English courts only acted upon separate maintenance, in cases of separations—that is—divorce *a mensa et thoro*. That is the doctrine in most all the states in this country, and should be the doctrine in Ohio, because the statute cannot truthfully be construed on any other doctrine.

In the states of Alabama, California, Kentucky, Maryland, North Carolina, Pennsylvania, South Carolina, Tennessee and Virginia the courts tend to the view that alimony has an independent existence; and in all other states the courts hold that it has not.

As a question of principle, which is the true doctrine? The law and public policy demand that husband and wife live in cohabitation, and while so living the husband is obliged to support his wife. They should not live apart, unless by disagreements public policy permits it, or there is a commission of matrimonial offense. If either of these occur, she can pledge his credit, or obtain a separate support upon a judicial separation. It is a question of separation, not separate support, and before a court can grant the latter it must decree the former. The primary question is, shall they continue to cohabit, or shall they live apart? If the finding is that they shall live apart, then the question is separate support; hence the latter

question is incident to and follows the former. Therefore, the true doctrine is that alimony is incident to divorce.

If the cases of *Cox v. Cox* and *Woods v. Waddle* can be interpreted as authority for the doctrine that alimony is not incident to divorce, and can be granted in an independent proceeding after a divorce *a vinculo*, then they are not supported by the statute, nor by the adjudications.

In *Richardson v. Wilson*, cited in *Cox v. Cox*, the court granted alimony after a legislative divorce by virtue of the statute of 1799, ch. 19, sec. 10, substantially incorporated in secs. 2468 and 2469 of the present Tennessee code, which expressly allows it. This is proved by the subsequent decisions. *McBee v. McBee*, 1 Heisk., 558; *Rutledge v. Rutledge*, 5 Sneed, 554; *Nicely v. Nicely*, 3 Head., 184; *Swan v. Harrison*, 5 Cold., 534.

In the case of *Crane v. Meginnis* the court assumed jurisdiction on the ground that the courts of chancery had inherent original jurisdiction to grant alimony alone, which jurisdiction was assumed in 1707 in *McNamara's Case*, 2 Bland, 566; in 1738, in *Synthecumb's Case*; in 1746, in *Scott's Case*; in 1750, in *Govine's Case*, all reported in 2 Bland, 544. The case of *Wallingsford v. Wallingsford*, Har. & J., 485, and *Jamison v. Jamison*, 4 Md. Ch., 289, review the authorities and prove this.

The case of *Shotwell v. Shotwell*, 1 Sm. & M., Ch., 51, cited in *Cox v. Cox*, was overruled in *Lawson v. Shotwell*, 27 Miss., 630, which overruling was approved in *Bankston v. Bankston*, 27 Miss., 629. Hence, *Cox v. Cox* cannot derive any support from the cases cited, because the Maryland case is founded on equity jurisdiction. The Tennessee case on express statute, and the Mississippi case was overruled. In Ohio there is no inherent equity jurisdiction, and no statute expressly allowing alimony in an independent proceeding after divorce.

In North Carolina the chancery courts have granted separate maintenance, and intimate that alimony alone after divorce would be allowed, on the ground of equity jurisdiction. *Spiller v. Spiller*, 1 Hayw., 582; *Knight v. Knight*, 2 *Id.*, 101; *Schonwald, Phil. Eq.*, 215; *Hodges v. Hodges*, 82 N. C., 122.

The same inherent equity jurisdiction is claimed in Virginia; *Purcell v. Purcell*, 4 Hen. & Munf., 507; *Almond v. Almond*, 4 Rand., 662; but as this court approved and followed *Duncan v. Duncan*, 19 Ves., 394; and rejected *Head v. Head*, 3 Atk., 285; and *Ball v. Montgomery*, 2 Ves. Jr., 195, the weight of the English cases are against the Virginia court. *Story Eq. Jur.*, sec. 1422; 24 Am. Law Reg., N. S., 6.

The California case, *Galland v. Galland*, 38 Cal., 265, was by a divided court, and without any reasoning of its own adopts and follows the reasoning of *Mills, J.*, in *Butler v. Butler*, 4 Litt., 202, but cites the Virginia, South Carolina and Alabama cases and the rejected English cases. It is difficult to see why California should follow the cases cited by the majority of the court, since in that state the courts are statutory and cases assume jurisdiction upon inherent original jurisdiction of chancery.

Kentucky courts follow the same doctrine on the ground of inherent equity jurisdiction. *Lockridge v. Lockridge*, 3 Dana, 28; *Boggess v. Boggess*, 4 *Id.*, 307; *Woodridge v. Lucas*, 7 B. Mon., 49; *Butler v. Butler*, 4 Littell, 205; *Rogers v. Rogers*, 15 B. Mon., 364; *Hulett v. Hulett*, 80 Ky., 356. The leading case is *Butler v. Butler*, but it does not seem that the court understood the doctrine, inasmuch as the grounds upon which the decision is based, and the reason for it, are certainly not logical or satisfactory, and not in accord with the current of authority.

This equity jurisdiction is assumed in Pennsylvania; *McKarracher v. McKarracher*, 3 Yeates, 56; and in South Carolina, *Jelineau v. Jelineau*, 2 Dess., 45; *Prather v. Prather*, 4 *Id.*, 33; *Threewits v. Threewits*, *Id.*, 560; *Prince v. Prince*, 1 Rich. Eq., 282.

But look at the authorities, and the reasoning, and good judicial thought on the other side of this proposition. In Arkansas, the court in *Bowman v. Worthington*, 24 Ark., 529, after reviewing all the cases, hold that alimony is incident to divorce, and cannot be granted in an independent proceeding after a divorce *a vinculo*, whether *ex parte* or not.

The Georgia courts, after reviewing all the cases, follow the same principle; *McGee v. McGee*, 10 Ga., 477; *Goss v. Goss*, 29 Ga., 109. In Indiana the same doctrine is followed: *Fischli v. Fischli*, 1 Blackf., 360; *Muckenburg v. Holler*, 29 Ind., 139; *Moon v. Baum*, 58 Ind., 194; *Middleworth v. McDowell*, 49 Ind., 386; and in Illinois, *Chestnut v. Chestnut*, 77 Ill., 346; and in Iowa, *Blythe v. Blythe*, 25 Iowa, 266; *Harshberger v. Harshberger*, 26 Iowa, 503; although *Graves v. Graves*, 36 Iowa, 310, seem to impeach this ruling. The same doctrine prevails in Maine, *Jones v. Jones*, 18 Me., 311; *Henderson v. Henderson*, 64 Me., 419; and in Massachusetts, *Shannon v. Shannon*, 2 Gray., 287; *Baldwin v. Baldwin*, 6 Gray., 342; *Coffin v. Dunham*, 8 Cush., 405; and in Michigan, *Peltier v. Peltier*, Har. Ch., 19; *Perkins v. Perkins*, 16

Mich., 167; Wright v. Wright, 24 Id., 180; and in Missouri, Doyle v. Doyle, 26 Mo., 545; Simpson v. Simpson, 31 Mo., 24; and in New Hampshire, Parsons v. Parsons, 9 N. H., 317; Sheafe v. Sheafe, 24 Id., 569; and in New Jersey, Kerrigan v. Kerrigan, 2 McCart., 146; Nichols v. Nichols, 10 C. E. Green., 60; Yule v. Yule, 2 Stock., 138; Rockwell v. Morgan, 2 Beas., 119; Anshutz v. Anshutz, 1 C. E. Green., 162; and in New York, Atwater v. Atwater, 53 Barb., 621; Codd v. Codd, 2 Johns. Ch., 141; Lewis v. Lewis, 3 Id., 519; Mix v. Mix, 1 Id., 108; Perry v. Perry, 2 Paige, 501. and, in Vermont Harrington v. Harrington, 10 Vt., 505; Prosser v. Warner, 47 Vt., 667. And is now the rule in England, Winstone v. Winstone, 3 Swabey & Frisam, 245.

Instead of the doctrine that alimony is incident to divorce, being the "Old English doctrine" as the Ohio court in Wood v. Waddle say, it is the American doctrine, the first enunciation of which being by the Maryland Courts of Chancery in 1707 in McNamara's Case, 2 Bland Ch., 566. The English cases, Oxenden v. Oxenden, 2 Vern., 493; Nicholls v. Danvers, 2 Vern., 671; Williams v. Callow, 2 Vern., 752; Larbook v. Tyler, 1 Ch. R., 41; Watkyns v. Watkyns, 2 Atk., 96; Duncan v. Duncan, 19 Ves., 394, are cases of separate maintenance, and were subsequently shaken and doubted in Ball v. Montgomery, 2 Ves., 195; Head v. Head, 3 Atk., 550; Segard v. Johnson, 3 Ves., 195.

The case of Woods v. Waddle cannot stand on the statute where the court tries to make it stand, because any one who will read and analyze the statute, will see that it cannot apply to this case; nor for the reasons stated, can it stand on the decisions. But it has this in its favor. It is against the opinion of that learned jurist, Judge Redfield, against the opinion of the best jurists, and against all authority and all reason. It establishes the doctrine that an *ex parte* divorce is valid in Ohio; when Cox v. Cox, and Mansfield v. McIntyre and all other decisions hold that such a divorce is not valid in Ohio.

223 TELEGRAPH COMPANY—INJUNCTION CONTRACTS.

[Hamilton Common Pleas, 1883.]

F. A. BRADLEY v. W. U. TELEGRAPH CO.

1. The business of collecting and selling "commercial news," is not part of the public duty of a telegraph company, as a carrier of messages for hire, and the court will not enjoin it from discontinuing to furnish such "commercial news" to one of its customers, or from removing from his office the ticker through which the quotations are furnished.
2. Contracts for the sale and delivery of a commodity at a future day if made in good faith with the intention to deliver and receive the commodity are valid, but if made without any intention to deliver and receive the commodity, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, are against public policy and invalid.

MAXWELL, J.

This case comes up on a motion by the defendant to dissolve a temporary restraining order heretofore made in favor of the plaintiff by one of the judges of this court, and also on the motion of the plaintiff to make the temporary order perpetual.

The plaintiff alleges, that he is in the business of dealing in provisions, grain and stocks, in this city, both on his own account, and as a broker, and that to facilitate the carrying on of his business, he made a contract with the defendant, in which the defendant agreed, in consideration of a certain sum to be paid by the week, to furnish and deliver to him, through and by means of an instrument called a "ticker," placed in his office, quotations of the prices of grain, provisions, etc., in other cities, and it was agreed that the contract should not be terminated within any calendar month, nor without one month's notice. He further alleges, that the defendant in violation of its agreement, without the required notice and without any cause, threatens to, and is about to, discontinue furnishing the quotations above referred to, and remove the ticker from his

office, and that such action on its part, will destroy his business, and cause him irreparable injury, and he asks that they may be restrained from so doing. The petition and amended petition are somewhat lengthy, but the foregoing is the substance of them.

There is no averment in the petition, nor does it appear in testimony, that the contract was made for any definite length of time, and it will be observed, that under the contract, the plaintiff was to pay for the quotations, by the week, but it is alleged in the petition, and claimed in the argument, that the defendant is a quasi common carrier, and, as such, is in duty bound to furnish these quotations so long as the plaintiff continues to pay for them. The plaintiff relies on this, and on the parts of the contract, providing for one month's notice, and that the contract shall not be terminated, except at the end of a calendar month, to maintain this action and to sustain his claim for the form of relief sought.

The defendant admits that it was about to take the action complained of, and justifies itself in so doing, alleging that the plaintiff is and has been carrying on a business contrary to public policy, a business, commonly called a "bucket-shop" business, and that it had been notified by the board of trade of Chicago, to discontinue furnishing quotations to those carrying on the business, which it is alleged the plaintiff is engaged in. There are some minor defenses going to the form of the action, but the foregoing defense furnishes the main battle ground.

It appears from the testimony without dispute, that the quotations heretofore furnished the plaintiff by the defendant, were not messages sent over the wires of the defendant by some one in the employ of, or in any way interested with the plaintiff, in Chicago, but that the defendant itself collected these quotations on the board of trade of Chicago, and furnished them under the general head of "Commercial News," to the plaintiff and others for a stipulated price. This business of collecting and furnishing "commercial news" is entirely separate and distinct from the business of the defendant as a common carrier of messages for hire from one person to another, over its wires, and I cannot see that it differs in its nature from the business of any of our merchants who purchase goods and merchandise, in the east and elsewhere, and bring them here to dispose of to their customers. The fact that one is tangible in its nature, and the other intangible, does not, I think, make any difference in principle. I use the words "common carrier," not as applicable generally to telegraph companies, but only to their duty to receive and transmit messages for the public. The law of bailment is the foundation of the law governing common carriers, and the ordinary definition of bailment is, a delivery of something of a personal nature by one to another upon a contract, express or implied, that that other will dispose of the thing according to the instructions given him. 2 Black Com., 451; Story Bailment, section 2; 2 Kent's Com., 559. But in this case, the quotations collected by the defendant are its own property until delivered into the possession of the plaintiff and are not in any sense the subject of a bailment. I am not aware of any adjudicated case on the subject, but it seems to me clear on principle, that in collecting and furnishing the quotation which are the subject of this controversy, the defendant was engaging in a business entirely distinct from its public duties. If I am correct in my conclusion, then as to the business which is the subject of this controversy, the defend-

ant occupied the same relation to the plaintiff that any private individual would, and as the alleged contract had no definite time to run, the defendant might rightfully discontinue furnishing the quotation at any time, subject of course to the provision as to notice, and as to that, I think the plaintiff's remedy would be adequate at law in an action for the breach of the contract, and the court would refuse the aid of its extraordinary powers. I think this would apply to the removal of the ticker as well.

In the second place it appears from the testimony, that the plaintiff has been transacting by far the greater part of his business, if not all, by settling the differences, as it is called, on his contracts, and not by receiving or delivering the merchandise bought and sold. He also has been in the habit of taking the deals to himself, as it is called, instead of telegraphing them to Chicago, as some other brokers do, and this last seems to constitute the difference between what are called the regular brokers, and what are called the "bucket shops." I do not use the term "bucket shop" as an opprobrious term, but simply as a descriptive one, as the plaintiff has done in two of his letters which are in testimony, and in which he is speaking of his business. The adjudicated cases so far as I have examined them, are to this effect. If at the time the contract is made, the parties intend in good faith, the one to deliver and the other to receive the thing which is the subject of the agreement, the contract is a valid one, even though they should afterwards change their minds and settle by paying and receiving the differences, but if at the time the contract is entered into, it is the intention of the parties to close the contract out by settling the differences, the contract is not valid but is against public policy.

See *Kirkpatrick v. Bonsall*, 72 Pa. St., 155; *Rumsey v. Berry*, 65 Me., 570; *Barnard v. Backhaus*, 52 Wis., 593; *Bereridge v. Hewitt*, 8 Brad., 667; *In re Green*, 7 Bissel, C. C., 337; *Gregory v. Wendell*, 39 Mich., 337; *Grizewood v. Blaue*, 73 E. C. L., 525; *Thacker v. Hardy*, L. R. S. 4 Q. B., 685.

In this case the testimony, I think is clear, that the intention of the plaintiff, and by far the greater number of parties who dealt with him, was to close out their contracts by settling the differences, and not to deliver or receive the merchandise. True, the contracts were in proper form, but the court will look at the circumstances surrounding the contract to see what the intention of the parties is in a case like this. It is admitted that the plaintiff did not act strictly as a broker, that is, that he took the deals to himself. But he does not appear to have been a man of large means, he does not appear to have had any grain or provisions on hand at any time, he does not appear to have made any arrangements in any case for delivering or receiving the merchandise. According to the testimony, many of the persons who dealt with him, could not have made any possible use of the merchandise if it had been delivered to them. It is in testimony that many of the deals were closed out the same day they were made, some within an hour. In short, I must conclude from all the testimony, that the business transactions of the plaintiff were nothing more or less than wagers on the price of the commodities he dealt in.

Counsel contend, however, that if the contract between the plaintiff and the defendant was lawful, and the information furnished under it was not immoral, it is no business of the defendants, what use the plaintiff makes of the information. I do not think this is the law. I think

the law on this point is clearly stated in Benjamin on Sales, section 506, as follows: "The sale of a thing, in itself an innocent and proper article of commerce, is void when the vender sells it knowing that it is intended to be used for an immoral or illegal purpose." See also Cannon v. Boyce, 3 B. & A., 179; McKinnell v. Robinson, 3 M. & W., 435; Pearce v. Brooks, L. R., 1 Ex., 213; Green v. Collins, 3 Cliff C. C., 494; Hill v. Spear, 50 N. H., 253; White v. Buss, 3 Cush., 448; Weber v. Donnelly, 33 Mich., 469. The obvious inference would be that it would be the plain duty of the defendant to withhold the commercial news, which it had been selling to the plaintiff, as soon as it found out that he was making the improper use of it to which I have preferred, without reference to that part of the contract requiring notice to be given.

The motion to dissolve the temporary restraining order will be granted and the bill dismissed.

Campbell, Bates & Von Martels, and Sage & Hinkle, for plaintiff.
Ramsey & Matthews, for defendant.

JURY.

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[Lorain District Court.]

Cadwell, McKinnie and Jones, JJ.

FRANK HOFFNER ET AL. v. VILLAGE OF OBERLIN.

A person on trial under a municipal ordinance for an offense, substantially made a misdemeanor by the statute, is entitled to a jury trial.

JONES, J.

This is a petition in error to reverse the judgment of the court of common pleas because it affirmed the judgment of the mayor of Oberlin convicting the plaintiffs in error of the offense of gambling.

An ordinance of the village of Oberlin provided in section 4 as follows: "That if any person shall play at any game whatever for any money or any valuable thing, such person shall, on conviction thereof, be fined in any sum not less than ten dollars nor more than fifty dollars."

This is substantially like section 6938, Rev. Stat. of Ohio, so far as the definition of the offense is concerned. This section provides that "whoever plays at any game whatever for any sum of money, or property of any value * * * shall be fined not more than one hundred dollars or imprisoned not more than six months, nor less than ten days or both."

The defendants, Frank Hoffner and George Derby, were arrested under the ordinance of said village, charged with the offense of "playing a certain game called pool, for a large sum of money, to-wit: five dollars, by means of a certain gaming device, to-wit: balls and sticks commonly called cues."

Before commencement of the trial the defendants demanded a trial by jury, but the same was refused for the reason that the ordinance did not provide for it, and trial thereupon proceeded, and conviction was had before the mayor without a jury, and the important question in the case arises on the demand, refusal and conviction before the mayor on refusal of a jury.

The constitution of the state of Ohio not only provides in art. 1, sec. 5, of the Bill of Rights that "the right of trial by jury shall be inviolate," but it also provides in section 10 of the same article substantially that no per-

son shall be held to answer to any criminal charge without indictment or presentment by the grand jury, "except in cases of impeachment, etc., * * * and in cases of petit larceny and other inferior offenses."

The same article then goes on to provide, "That in any trial in any court, the party accused will be allowed to appear and to defend in person and with counsel * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Taking these provisions together, do they not clearly imply that while there need not be an indictment in prosecutions for "petit larceny and the inferior offenses," that there can be no trial for such or a similar grade of offenses without there being a right of trial by jury in whatsoever court the citizen may be tried?

These provisions of our present constitution are different from the provisions of most of the constitutions of other states, and are much more comprehensive than our former constitution of 1802, which provided that the right of trial by jury should be inviolate, but limited the right to cases where the prosecution was by indictment by grand jury. The provisions of our present constitution above cited have certainly enlarged and extended the right of trial by jury as it existed at common law, as it was in our first constitution, and as it now exists in many other states of the Union.

In the case of *Work v. State*, 2 O. S., 297, 302, which arose after the adoption of our present constitution, and was a prosecution merely for assault and battery, it was said by Judge Ranney, that able exponent of original and fundamental principles, in describing the effect of sections 5 and 10 of this constitution: "By the first of these sections the right of trial by jury is recognized to exist, and its continuance unimpeached is provided for. By the last, this right is declared to belong to every person accused of any crime or offense," and in the same case he says "that it is beyond the power of the general assembly to impair the right or materially change its character."

We think there can be no reasonable doubt that these provisions guarantee the right of trial by jury to any person accused of crimes or offenses like or similar in grade to petit larceny, or other inferior offenses, in any court in or of the state; and while we are far from intending to assert or maintain that every violator of a merely municipal ordinance may claim a trial by jury on matters involving municipal regulations merely, like sidewalk ordinances, obstructions of streets, permitting animals to run at large, etc., still we are impelled to the conviction that when a municipal ordinance provides for the punishment of petit larceny, assault and battery, gambling, and similar offenses which are also offenses under the state law, that the defendant cannot by this change of tribunal, be deprived of this right, for we cannot assent to the idea that these constitutional provisions can be substantially annulled or evaded by the legislature delegating to an intervening agency, such as a municipal corporation, the power to fine and imprison a citizen for such offenses without giving him a right to a trial by jury. These municipal corporations are not independent of, but are created and governed by, and subservient to the constitution of the state, and the laws enacted in pursuance thereof; and it seems perfectly clear, that if the legislature of the state (which is itself absolutely powerless under the constitution, to try and punish a citizen for offenses of the grade mentioned without giving him a right of

trial by jury) can delegate power to villages and other municipalities to pass ordinances against substantially the same offenses, and punish the offender in substantially the same way as under the state law, and utterly deprive him of the right of trial by jury, that there is thereby a complete evasion and indeed abrogation of the constitutional provision in regard thereto, within the limits of all these municipalities. For if the rule we have laid down here is not the correct one, and if it be true that in no prosecution before a mayor's court under such an ordinance, can the defendants demand a trial by jury as a constitutional right, it would be entirely practicable in all the cities and villages of the state by beginning all prosecutions of the offenses of the grade I have named, under ordinances of such corporations to completely deprive any defendant therein of his right to trial by jury in all such cases; and it must be remembered that the constitution does not limit the right of trial by jury, in state courts, to cases when the defendant may be imprisoned, and though the statutes of the state now assume to limit the jurisdiction of mayors' courts without juries to cases where imprisonment is not a part of the punishment; yet these same statutes may tomorrow undertake to grant the power to imprison as well as fine without the defendant having the right to trial by jury. And if this boasted constitutional privilege depends not on the question whether he is on trial for one particular offense or another, but merely whether he is on trial in one court room or in another, it may well be asked what becomes of its value in protecting the character, property or liberty of the citizens.

The dividing line between cases where a jury can be lawfully demanded, and where no such right can be enforced, has never been clearly drawn or decided by the Supreme Court of our state under the present constitution. Though we are advised that a case, or cases, have long been pending therein without any decision being arrived at, yet we think the considerations we have adverted to clearly mark this line, and we therefore hold that every person who is arrested and put on trial before a mayor's court or any other court under a municipal ordinance for any offense that is also substantially made a misdemeanor by the statutes of the state, is entitled to a jury trial, under the provisions of the constitution hereinbefore quoted.

Various cases have been cited by counsel on either side, but nearly all of them are either inapplicable or entitled to but little consideration by reason of the differences from ours of the constitutional provisions of the states in which they were decided; for instance decisions have been cited, 42 Pa., '89 and other cases, apparently flatly opposed to the view we have taken of this question. But these cases were decided under a constitution which was established originally in 1776, and merely provided that "trial by jury shall be as heretofore and shall remain inviolate." This provision was substantially re-enacted in the constitutions of 1790 and 1838, and the decisions were clearly put upon the ground that trial by jury had not, theretofore, in Pennsylvania been allowed in petty criminal cases or misdemeanors, but only in criminal cases which involved a liability to imprisonment in the penitentiary; and, of course, the case of *Work v. State*, in 2 O.S., 302, *supra*, is entirely at variance in this point with the doctrine of this and similar cases, and has never been the law of Ohio since our present constitution was adopted.

For the refusal therefore of the mayor to grant the defendant a trial by jury on his demand, and for proceeding to try him without a jury, the decision and judgment of the mayor's court, as well as the judgment of

the court of common pleas affirming the same, must be reversed with costs.

Cadwell, J., dissented.

E. J. Blandin, for plaintiff in error.

I. A. Webster, for defendant in error.

COURTS—STATUTES.

[Hamilton District Court.]

WM. AMLINGMEIER v. AMLINGMEIER.

The superior court has no power to hear and determine proceedings supplemental to execution. Such proceedings are confided to the judges of the common pleas or probate court. Sections 498 and 5472, Revised Statutes, construed.

Error to the Superior Court of Cincinnati.

MOORE, J.

At the December term, 1882, of the superior court of Cincinnati, the defendant in error recovered a judgment against the plaintiff in error in the sum of \$2,868.00

On March 10, 1883, the defendant in error, the judgment creditor, filed his affidavit in said court alleging that an execution had issued against the property of said plaintiff in error and returned unsatisfied and that certain persons named had property, moneys and effects, belonging to said judgment debtor, which ought to be applied to the payment of the said judgment and at the same time the judgment creditor moved the court for an order to be directed to the judgment debtor and the several persons named to appear at a time and place to be specified and answer concerning any property they or any of them might have belonging to the said judgment debtor. Whereupon the court appointed a referee to take the testimony of the parties named, who with the exception of the said judgment debtor appeared and were examined. Thereupon the said judgment creditor caused a second execution to issue against the property of the judgment debtor, and from the testimony reported by the referee the court found that the said judgment debtor had in his possession the sum of \$3,600, which he unlawfully and unjustly refused to apply to the payment of said judgment or satisfaction of the second execution and ordered that the said judgment debtor forthwith apply so much of said \$3,600 as may be necessary to the payment of said judgment, and in default of such payment upon demand and service of a duly certified copy of said order on him by the sheriff, that said sheriff take the body of said Wm. Amlingmeier and produce him before the court for further order. The said Amlingmeier refused to comply with the order and was arrested and brought before the court to answer in proceedings in contempt. The court having found, that the said judgment debtor had disobeyed its orders, directed that he pay a fine of one hundred dollars and costs of the proceedings and that he be committed to the jail of the county and be there detained in custody by the sheriff until the said order of court be complied with, to all of which and the refusal of the court on motion of the defendant

in error to set aside the execution and discharge the plaintiff in error from custody, the defendant in error excepted.

The record presents the question whether the superior court had the power to hear and determine the proceedings, supplemental to execution and as stated. This power is sometimes confided to the court whence the execution issued, sometimes to the judge of such court and sometimes to a county or probate judge. The statutory provisions in force in each state must govern. In Ohio under the title, "Proceedings in aid of execution," subdivision 3, entitled "examination of debtor," section 5472, Revised Statutes, the examination of the debtor after return of an execution unsatisfied is provided for. This section contemplates a writ to the county where the judgment debtor resides or where the judgment was rendered if the judgment debtor does not reside in the state, also an order from a probate judge or a judge of the court of common pleas of the county to which the execution is issued requiring such debtor to appear and answer concerning his property before such judge or a referee appointed by such judge, etc.

Section 5475, Revised Statutes, provides for the examination of a debtor or debtors of the judgment debtor after the return of an execution against the property of the judgment debtor, upon proof in writing by affidavit or otherwise to the satisfaction of the court. Such person or persons may be directed to appear and answer concerning any property belonging to the judgment debtor in their possession or under his or their control.

Section 5481, Revised Statutes, gives the judge or referee power to punish as for contempt disobedience of his orders in the proceedings mentioned.

The statute in question is special in its nature and supplemental to the action in which the judgment was rendered, and distinctly provides that the examination of a judgment debtor shall be conducted before a probate judge, or a judge of the court of common pleas of the county to which an execution is issued.

In the case at bar, instead of *causi*, the judgment debtor to be brought before the probate court or a judge of the common pleas court, the jurisdiction of the superior court, where the judgment was rendered, was invoked.

Section 498, Revised Statutes, defining what laws conferring jurisdiction on courts of common pleas, and district courts are applicable to the powers of the superior court does not confer jurisdiction on that court to entertain proceedings in aid of execution. Such proceedings are specially confided to a judge of the court of common pleas or a probate court, and not to a court. The New York Code of procedure, similar to the Ohio statutes in this respect, has been construed. *Cushman v. Johnson*, 13 How., Pr., 495; *Miller v. Rosseman*, 15 How. Pr., 10. Also see cases discussed in 1 W. L. M., 143.

Judgment reversed and mandate to the court below directing the discharge of the judgment debtor from custody of sheriff.

Hagans & Broadwell, for plaintiff in error.

Burnet & Burnet, for defendant in error.

SCHOOLS.

[Hamilton District Court.]

ROBERT CORRE v. STATE OF OHIO.

1. The presence of a newspaper reporter on the floor of the board of education, a gallery being provided for the rest of the public, is a privilege and not a right and the board have power to expel him.
2. That he is allowed on the floor by a rule of the board and by another rule no amendment or change of the rules can be had without laying the amendment over for a meeting, and that therefore the expulsion was illegal, is an objection which may be taken by a member but no third person can avail himself of it.

Error to the Court of Common Pleas.

On July 26, 1881, the prosecuting attorney of the police court of Cincinnati, filed an information against Robert Corre and J. W. Underhill, charging them with assault and battery upon W. J. Shaw; August 1, the cause was tried, defendants pleading not guilty; J. W. Underhill was dismissed, and Robert Corre found guilty, being sentenced to pay the costs.

Motions for new trial and arrest of judgment were made, which were overruled, and a bill of exceptions duly taken.

The evidence shows that Shaw was a reporter of the Cincinnati Daily Gazette; that on the evening of July 25, 1881, being at the reporters' desk in front of the chair on the floor of the council chamber, at a meeting of the board of education of the school district of Cincinnati, J. W. Underhill, president of the board being in the chair, and Robert Corre, sergeant-at-arms, a resolution was offered by a member that he be admitted to the privileges of the floor upon apology. This not passing, he was directed by the president to withdraw; and refusing, the sergeant-at-arms was called on by the president to remove him, which was done by leading him to the door that entered upon the floor. There was a gallery for the accommodation of the public. This was the grievance complained of.

At a meeting of the board, June 27, the following resolution had been adopted and was still in force:

"Resolved: That Mr. Betty and Mr. Shaw, the newspaper reporters, who acted as eavesdroppers at this executive session, and who afterwards insulted this board by appearing in their midst with shouting and jeering remarks and ungentlemanly acts, be hereafter excluded from future meetings of this board."

The meeting of the board was a public one, and public matters were under discussion.

A petition in error was filed in the court of common pleas, which affirmed the judgment of the police court, pro forma. A petition in error was then filed in the supreme court to reverse the judgment of the court of common pleas, but that court remanded the cause to the district court for hearing.

AVERY, J.

The plaintiff in error was appointed sergeant-at-arms at a meeting of the board of education of this city, held in the council chamber July 25, 1881, and by order of the president removed from the floor of the chamber

a newspaper reporter. For this he was prosecuted in the police court on the charge of assault and battery, and was found guilty, and fined.

The assault and battery was as little as it could be, being only the placing the hand lightly on the shoulder of the reporter and leading him to the door, and the fine was as little as it could be, being only the costs; but from some real or supposed importance of principle involved, the case was taken to the court of common pleas, and the judgment being there affirmed, a motion was made for leave to file a petition in error in the supreme court. That court has remanded the case here.

Elaborate arguments have been presented by counsel. But the question does not require discussion, either of the right of the public to be present at the meetings of the board of education, or the right of the president to preserve order.

The reporter, when he was removed, was creating no disorder. What he had done, was at a former meeting, when being excluded from an executive session of the board, and in some way overhearing the proceedings, he had, upon being re-admitted, jeered at the board. But, upon the other hand, his removal was only from the floor of the chamber; the gallery, the place allotted to the public, still remained open to him. The matter stood thus. At a former meeting, for his conduct on that occasion, a resolution had been passed that he should be excluded from the meetings of the board. At the present meeting, a resolution was offered that he should be admitted to the privileges of the floor; but this not passing, and he refusing to move from the place he occupied on the floor, he was, under the order of the president, led to the door. This seems to dispose of the question. His presence upon the floor was not a right but a privilege. It was not what was held in common with the public, but was a special concession from the board. That under the rules of the board, reporters were privileged to the floor of the chamber, did not take away the power of the board to revoke the rules. It is argued, that by the rules, the privilege could only be withdrawn by suspension of the rules, or by an amendment, that should have been laid over until the next meeting. The rules relied on are not made part of the record, and the only evidence of their existence is in the brief of counsel; but assuming there were such rules, the objection is upon a point of order, which if not taken by a member of the board, could certainly be of no avail to any one else.

Judgment reversed.

D. Thew Wright and E. Cort Williams, for plaintiff in error.

Bateman & Harper and John A. Caldwell, for defendant in error.

MUNICIPAL CORPORATIONS—JUDGMENT—INTEREST. 243

[Hamilton Common Pleas Court.]

CINCINNATI (CITY) v. F. B. WILLIAMS ET AL.

In an action to assess damages resulting to property owners from a proposed improvement, under sections 2317, 2318, 2319, Revised Statutes, the judgment will bear interest from the time work is begun.

MAXWELL, J.

In this case the city filed a petition to assess the damages resulting to the abutting property owners from the proposed improvement of Madi-

sonville pike, under sections 2317, 18, 19, Rev. Stat. On February 18, 1881, an ordinance was passed by the common council, for the improvement of Madisonville pike. Claims for damages were filed by the defendants herein. A jury was summoned, trial had, and on April 21, 1882, a verdict was rendered assessing damages in favor of the plaintiffs. May 3, 1882, a judgment was entered on the verdict. The work was let July 29, 1882, and the work was begun August 1, 1882. The question is whether the judgment bears interest from the date it was entered, or, if not, from what time it does bear interest, if at all.

The proceeding in this case, although it is an inquiry made beforehand to enable the city to determine whether it will go on with the proposed improvement, is analogous to condemnation proceedings. The damages assessed, though not for land taken, are intended to compensate the owner for certain rights and enjoyments inherent in the land.

In condemnation cases the title does not pass till full compensation is made, section 5, article 13, Bill of Rights; section 2250, Rev. Stat., *Giesy v. C. W. R. & Z. R. R. Co.*, 4 O. S., 308, or as the court say, in the case just cited, page 330; a man is fully compensated for his property when he is paid its full value, and not before.

Following this principle the court in the case of *A. & G. W. R. W. Co. v. Koblenz*, 21 O. S., 334, held that the property owner was entitled to interest from and after the time the property was taken, although the money had been paid into court, and was lying there, pending a writ of error taken by the railway company. See also *City v. English*, 6 Dec. R., 972. I think it may safely be assumed as a principle of law in condemnation cases, that if the property owner should waive the payment of the sum assessed as compensation, for a time, and allow the corporation to take the property and proceed with its improvement, he would be entitled to interest from the time the property was taken possession of, for that would give him full compensation, no more, no less.

Applying the analogy to the question under consideration, I think interest should be allowed on the judgments from the time the city entered upon the property to make the improvements, that is, August 1, 1882.

Kumler, Ampt & Warrington, for plaintiff.

Coppock & Coppock, for defendant.

FORMER COMMON PLEAS DECISION.

In this connection we give a statement of this case, before the common pleas, on the trial referred to above, and the charge of the court to the jury, published originally, 10 Am. Law Rec., 705.

[Hamilton Common Pleas Court.]

CINCINNATI (CITY) v. WILLIAMS ET AL.

1. In improving its streets, a city is not liable to an abutting lot owner, on account of a grade or fill, unless the city has formerly fixed a grade, and the owner has improved his property in conformity thereto.
2. Damages are limited to the injury to the improvements, whether they are houses, fences or hedges. If these are wholly destroyed, their value determines the amount of damages. If they are only injured, the difference in value is the measure. If approaches to the house can be made, then the expense of the approaches, plus the difference in value, is the measure. But the sightliness of the place is not property, nor is the obstruction to view. Injury to the drainage of the buildings, but not of the lot, may be allowed for.
3. General benefits, which the rest of the neighborhood also got, by reason of the improvement of the whole vicinity, are not to be off-set. But local increase of value, as by change of slopes, may be deducted.
4. Country owners have the same rights in the grades of adjacent turnpikes, which have been permanently adopted, by improvement and long usage, as city owners have in the streets they abut; hence, when, by annexation, the turnpike becomes within the city, proprietors have the same claim for change of grade, as if its level had been fixed by a written resolution.

On March 4, 1882, the city of Cincinnati filed its petition, setting forth the proceedings of the Board of Public Works and of the common council, which are required by the laws of Ohio for the improvement of a street, and showing the necessary preliminary steps for the improvement of Madisonville turnpike, from McMillan street to Woodburn avenue, and further showing that the defendants had filed their claims for damages with the city clerk, as required by law, and stating that the ordinance for said improvement provided that the claims for damages should be made, and praying the court to call a jury for the assessment of the damages claimed.

It appeared that the plans and specifications for the improvement contemplated a cut in front of the premises of F. B. Williams, varying in depth from grade to between eleven and twelve feet; and a fill varying in height from two to seven feet in front of the premises of Mrs. E. T. Swift. It further appeared that the premises of each of the defendants had been improved with dwelling-houses and appurtenances in the year 1859, with reference to the grade and level of the Madisonville turnpike, a public road owned by a private corporation. That the premises of the defendants were not at the time within the corporate limits, but first became part of the corporation of Woodburn, which corporation subsequently became part of the corporation of Cincinnati. It also appeared that the city of Cincinnati had acquired the rights of the turnpike company in said road, so far as the corporation of Cincinnati extended.

The case was submitted to the jury under the following charge of the court:

AVERY, J.

GENTLEMEN OF THE JURY: You are sworn to inquire into and assess damages to private property from the improvement, by the city, of the Madisonville road, from McMillan street to Woodburn avenue. The damages claimed are for a fill in front of the premises of E. T. Swift

and for a cut in front of the premises of F. B. Williams. The inquiry is made in advance of doing the work, but is to be determined upon the same principles as it would be if the work were done.

At the outset, you are to attend to the question of the right of an abutting lot owner to recover for a cut or fill, in front of his premises, made by the city in grading its streets. There can be no right to recover at all, except where a former grade having been already made, the property owner has conformed thereto in making his improvements, and is injured in respect to his improvements by the change.

A moment's reflection will enable you to see the reason of this. The city is owner of its streets for public usages of passage, just as much as the proprietor of the abutting lot is owner of his land. In improving the street for the convenience of passage, the city is upon its own property, and, as a general rule, the abutting lot owner cannot complain of a cut or fill, any more than one neighboring owner can complain of another for cutting or filling upon his own land. The exception is where the city has fixed a grade and the owner has improved his property in conformity, for there, being induced by acts of the city, which may be regarded as conclusive in respect to what would be required for the public use of the street, the owner, having made his improvements, will be entitled to recover for a change by the city to the injury of such improvements. In other words, the general rule is that the city is not liable. The exception is where there has been a former grade, and the property has been improved to that grade. In that event there will be a liability to the extent that the improvements were injured by the change.

The inquiry must begin, therefore, with the question, whether before 1874, when the grade was adopted to which the proposed improvement is to be made, the existing grade of Madisonville road was established.

Prior to 1873, that territory was not within the limits of the city. The road was under control of a turnpike company, but country owners have the same private rights in adjacent highways as city owners have in adjacent streets, and while it may not appear by any written resolution or order, that the grade of the road to the levels existing was fixed, yet if, by use by the public authorities having charge of the road, it was made to appear that such levels had been permanently adopted, it would be an established grade within the instruction given you, and an adjacent proprietor, improving according to that grade, would be entitled to recover against the city for injury to his improvements by the change. In other words, the establishment of a grade does not necessarily require the passage of an ordinance or other legislative action, but it may be shown by the nature of the improvement on the surface of the highway, under the direction or sanction of the proper authorities.

Leaving the question to be determined by you, whether, within these principles, the grade of Madisonville road had been fixed prior to the annexation of that territory to the city, and whether the parties had conformed their improvements to that grade, the question will be next, if you find for them on that issue, as to the amount of damages which they are entitled to recover for the change now proposed by the city. Unless you find there was a grade to which they conformed in making their improvements, the inquiry, of course, is at an end.

Leaving, as has been said, that question to you, let us take up for a moment the question of amount, a question which, to repeat, will be considered by you only after you have determined the first question.

Damages being given only in respect to improvements made in conformity to a grade established by public authority, you will exclude from consideration any improvements made after the ordinance of 1874, which changed the grade. The ground upon which damages are given at all, is that the property owner has been led by the action of the public authorities to take an existing grade as established, and so, without expecting change, been induced to make his improvements; but where a change is advertised by the passage of an ordinance, subsequent improvements made by him are at his risk, in case, when the grade comes to be made, he is injured.

Confining, then, your attention to improvements made prior to the ordinance of May, 1874, it may be necessary to say, in the beginning, that damages are to make good the loss sustained by an injury. But they can only be given in money, and will be measured, therefore, only by differences of value in money. Money is the legal standard of values.

Observing, then, that the right of an abutting owner to recover for change of grade is limited to injury to his improvements, there may be two classes of damage: First, where the nature of the work is such that necessarily part of his improvements will be destroyed. The determination of that class of damages is easy. For illustration, if this improvement is such that the hedge, which is on the line, and the gate and posts will be carried away, it will be easy to determine the loss. I mention these merely to illustrate.

The other class is more difficult, but still the damages, if any, are to be ascertained. This, as has been said, upon the assumption that the first question left to you is determined in favor of the parties. The other class of damage to property by change of grade, consists not in carrying away the improvements, but in affecting their use. A house upon a man's property to which he could get no access from the street, might be valueless. To the extent, therefore, that the use of his buildings and improvements are affected by impairing the access between his property and the street, if he has a right to recover for change in the street, he is entitled to damages.

How the extent to which improvements are affected by a change of this sort may be ascertained, is a question upon which there is no certain rule, but it must be left to your judgment, taking into consideration estimates and opinions of witnesses, but being in the end your own judgment. Opinions of witnesses in the way of estimates of damages are testimony, but only testimony, and it is the province of the jury to judge of the weight of testimony.

Because there is no certain rule by which matters of this sort may be determined, the evidence was permitted to take a wide range. You had testimony as to value of the entire property, and as to differences in value that would be occasioned by the contemplated change. You had testimony as to the value of the trees and ornamental shrubbery, and of the driveway. Estimates were also furnished as to the cost of what might be called a retaining wall, and of a slope. That was all compe-

tent, but is to be applied by you under instructions that the right to recover is limited to injury to improvements, and only as bearing upon that question, could testimony touching damages be received.

Now, it may be natural to inquire how it can bear upon injury to improvements to hear what it will cost to take away a tree, or to dig down a slope, or to put up a wall. It is only this way, as may be explained, for the sake of example, by taking a case where the improvement a man has upon his property consists of a house, and there is change of grade, for which he is entitled to recover, by digging down in front of his house. The house left upon the top of the bank, inaccessible, would be valueless, except, perhaps, for the material of which it was composed, and which, after the house was torn down, might be carried away. But the damages might not consist of the entire value of the house, because it might be possible so to arrange the approaches over the ground that the house would be accessible and could be used. In that even it would be as valuable as before, except for the depreciation caused by the greater difficulty of access, and the damage would be measured by the difference between the value of the house when the approaches were made to it, and the value as it stood before, adding to that the cost of making the approaches.

Now the same general principle may be applied here. The recovery can only be had to the extent of the damage to the improvements; that is to say, to the extent that the improvements which were conformed to the grade as it was, will be depreciated by the change. If the approaches to the improvements, consisting of the residence and buildings, may be so arranged as to make them accessible as before, the difference would be in the cost of so making them accessible, together with what was necessarily lost in effecting that object; as, for instance, if trees or ornamental shrubbery, or fences, or driveway were required to be removed. This, though, gentlemen, you should observe, is only a mode of determining the true question. The true question is differences in value, caused by the change of grade, to the improvements made upon the property.

One consideration, however, must certainly be excluded in computing the amount. The sightliness of a man's place, that is to say, the appearance it presents from the street in its front, is of value, certainly, but is not a right of property in the street. To come upon the place and deface its appearance would certainly be injury to a right of property, but to take away the street from the front, by lowering its grade, and so rendering a view of the premises impossible, would not be a property injury to the owner, any more than if his neighbor should obstruct the view. It is the same with respect to the view that the situation of property affords. The right of view of an owner is certainly valuable; it is one of the peculiar pleasures of property, but it is not property itself. There can be no property in a view. The property of the owner in a view extends only to the limits of his own. Beyond that, each owner has equal right. Any other doctrine would render every improvement or enjoyment, except by one man, of his property impossible.

In making up your determination touching this question of damages, you are not to take into account as an offset against what might be otherwise recovered, general benefits that might accrue from improvements in the vicinity, or from the fact that this street, by the very change contemplated, may be made more convenient for public passage.

Benefits of that sort belong to the public, and the parties who are complaining are, as constituent parts of the public, entitled to their equal share. The question is private property, and no private property can be taken, with an offset against the owners of the public benefits to which as citizens they are entitled.

No question can arise, then, as to comparison of benefits, except if, in taking into consideration the damages sustained to the improvements, you go into the cost of making the improvements as accessible as before, it would be proper to take into consideration whether, when the access is so made, there has been a value added, for if a value is added by the change of the slopes of the property, it should be taken into account. In other words, the amount properly to be awarded would be determined by comparing the expense with any increase of value from the expenditures.

One other consideration to which counsel have directed my attention and upon which, therefore, it becomes necessary to charge: The question of drainage. The right of a property owner to recover in respect to his improvements, where he has conformed them to an existing grade, extends to an injury to his drainage as well as an injury in any other respect. In other words, I decline to exclude from your consideration the question as to the effect upon the value of the building of Mrs. Swift, caused by the change of the grade in front of her property, in respect to drainage. It is not drainage of the lot, however, but drainage of the improvement; that is to say, of the building, since your inquiry, as I have attempted to explain throughout, is confined to the buildings.

The following argument by F. M. Coppock, Esq., was published with the foregoing charge to the jury:

I.

THE RIGHT OF RECOVERY.

It has been laid down as a well-settled principle of law that a municipal corporation is not liable in an action for consequential injuries to private property where the act complained of was done under the authority of a valid act of the legislature, and was done with reasonable care and skill. *Dillon, Mun. Corps.*, sec. 989. (3d ed.) Hence, "the courts, by numerous decisions in most of the states, have settled the doctrine that municipal corporations, acting under the authority conferred by the legislature to make, repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability. There is no such liability, even though in grading and leveling the street a portion of the adjoining lot, in consequence of the removal of its natural support, falls into the highway. And the same principle applies, and the same freedom from implied liability exists, if the street be embanked or raised, so as to cut off or render difficult the access to the adjacent property. And this is so, although the grade of the street has been before established, and the adjoining property owner had erected buildings or made improvements with reference to such grade." *Dillon, Mun. Corp.*, sec. 990.

This is, no doubt, the general law. The reasoning by which it is arrived at and deduced from principle is, however, different in almost every case in which it has been discussed. In fact, there is such diversity of opinion as to the real ground upon which the rule of non-liability rests, that it may be said the cases agree only upon one point—that the municipal corporation is not liable.

The courts of the state of Ohio, in full view of the adjudications upon this question in other states, have come to a conclusion directly opposite to that of the current authorities, and, while admitting that it is contrary to the general rule,

hold that there is a common law liability of a municipal corporation for injuries resulting to the abutting property owner, if he has improved his property with reference to the grade of a street, or road, or if an unreasonable grade is established to his injury, although the injury occurs in the exercise of lawful authority. The course of decision in Ohio is interesting, if for no other reason, because it stands alone.

The question first arose upon demurrer to a petition charging an illegal and malicious digging of the street and pavement to the injury of the plaintiff. Demurrer overruled—corporation liable for an illegal and malicious digging. *Goodloe v. Cincinnati*, 4 O., 500.

The same ruling was made upon demurrer to a petition which charged an illegal digging, but not alleging that it was malicious. *Smith v. Cincinnati*, 4 O., 514.

Where officers acting in good faith under an order regularly made by town trustees for grading a street, dug up and removed earth in front of a person's house and lot, without doing any unnecessary damage, or any act except in good faith under the order, such officers were held not liable for injury sustained by the individual by such digging. *Scovil v. Geddings*, 7 O., pt. 2, 562.

These decisions of our supreme court contain nothing of importance in regard to the peculiar doctrine held in Ohio, inasmuch as they are entirely in accord with the general current of authority, that an illegal or malicious digging up or grading of the street to the injury of the abutting owner is actionable, and that the agents of a corporation are not liable for following out, in a proper manner, the directions of the corporate authorities.

The first instance of the broad doctrine of liability of municipal corporations for consequential injury, as formerly held in Ohio, occurs in a case where an action was brought for cutting ditches and water courses in such a manner as to cause water to overflow and wash away plaintiff's land. The court below charged that the act must be either illegal or malicious, in order to recover. This was held to be error. Upon this charge the court consider that the only question before them was: "Whether a corporation was liable to repair damages for a consequential injury arising from the exercise of its ordinary powers." They held that it is, and base their holding on the broad principle that, like an individual, it can only exercise its own rights in such a manner as not to injure the rights of others. *Lane, C. J.*, in deciding the case, acknowledges that he goes beyond the decisions in other states, but declares that, in such cases, he does not look so much for precedents as to follow out incontestable principles. He, therefore, distinctly holds that corporations are liable like individuals for injuries done, although the act was not beyond their lawful powers. *Rhodes v. Cleveland*, 10 O., 160.

This decision is the starting point in the course of adjudication upon this subject in our state, and the fact that it was not a case of simple digging down or filling up in front of the owner's premises, but involving a washing away, which approaches very nearly to a taking, is of importance as probably explaining why the decision in the next case, which was based wholly on *Cleveland v. Rhodes*, took the direction which it did.

The action in the case mentioned was against the town council of Akron for cutting down a street, whereby the house and lot of plaintiff suffered injury. *McComb v. Akron*, 15 O., 474. It is mentioned as a fact in the case, that "no previous grade had been established—no building with reference to any grade." The court below refused to give the following charge: "If plaintiff's property has sustained a real and substantial injury by reason of defendant's act in grading the street, that plaintiff might recover, even though the corporate authorities had acted strictly within their legal authority and without any intent to injure the plaintiff's property." This refusal was held to be error. It will be observed that this charge, which should have been given, makes no reference to any previous grade, or improving with reference to any grade. *Reed, J.*, says: "The sole question in the case is, whether a municipal corporation can be rendered liable for an injury resulting to the property of another by an act of such corporation, strictly within the scope of its corporate authority, and unattended by any circumstance of negligence or malice." He, thereupon, basing his judgment of reversal upon the decision in *Rhodes v. Cleveland*, where the identical question was proposed by justice *Lane* in deciding that case, holds that corporations, like individuals, are liable for acts done within the scope of their lawful au-

thority, and adds as an additional reason, that "if a municipal corporation for the good of all within its limits sees proper to cut down a street, it is nothing more than right that an injury there done to a single individual should be shared by all."

This same case made a second appearance in the Supreme Court in a proceeding in error prosecuted by the town of Akron, when the former decision was affirmed. *Akron v. McComb*, 18 O., 229. But one matter of signal importance appeared on the second hearing which was not involved in the first case, which we find in the judge's statement of the facts, viz: that the plaintiff below "had made his improvement with an express view to the level and grade of Howard street, adjoining which the building stood." Although no note was taken of this fact in the decision which follows its statement, it has played an important part in all subsequent decisions and is, we believe, the one consideration which has made a complete change in the extent of the liability of corporations as established by previous decisions; for, when once you begin inquiring whether the owner has adjusted his improvements to a grade, looking to this as a ground of recovery, the question of previous improvements and grade becomes the controlling element in the case.

Hitherto we have heard nothing discussed by our Supreme Court as to the use of judgment and discretion in making improvements, or, in fact, of having any improvements as an element in the question of liability, but all the decisions have been upon the broad ground of an actual, substantial injury. But we now enter upon a new phase of the discussion which was introduced by the decision in the case of *Crawford v. Delaware*, 7 O. S., 459, and, from now on, we hear as much of "ordinary discretion and judgment," "reasonable reference," "reasonable and proper grade" and the like, as we did of "actual and substantial injury" in the previous cases.

The case of *Crawford v. Delaware* is the leading case in Ohio on this subject, and contains the only lucid statement of the law that we find, as modified after the decision in *McComb v. Akron*. This case discloses a statement of facts where an owner of a lot had improved it with reference to an old road, which was not within the corporate limits at the time of the improvement, but was afterward brought into the city of Delaware and graded down several feet in front of plaintiff's premises. The charge to the jury below, upon which were predicated the proceedings in error in the Supreme Court, is quite long, but, inasmuch as it contains the substance of the law in our state to-day, with some slight modifications to be hereafter noted, we give the substance of it at length, separated into paragraphs for ease of comprehension.

1 That a municipal corporation, acting within the scope of its corporate powers, is not liable to the owners of lots in such corporation for injuries sustained by grading the streets, unless such grading be wrongful.

2. That where such corporation, in the exercise of its legal powers, makes a reasonable and proper grade of its streets, without doing any unnecessary injury to the unimproved property along the streets graded; and when such grading is not unreasonably, improperly or wantonly done, it is not wrongful.

3. But when such grading is unreasonably, improperly or wantonly made, it is wrongful, although the property be unimproved.

4. That where the owner builds upon and improves his lot with reference to the grade of a street, and such grade is afterwards changed so that the property is substantially injured, such grading would be wrongful, although the grade is a reasonable one.

5. That where the corporation has not fixed a grade, and none is established for a street, and the owner improves with reference to the then existing state of the road used in front of his lot, and uses ordinary discretion and judgment in making his improvements with reference to future improvements of the street and the right of the corporate authorities to make the same, and a grade is made to his injury, it is wrongful, although the grade may be reasonable.

6. But if under the circumstances of the last proposition, he make his improvements without the exercise of such judgment and discretion, and without such reasonable reference to future reasonable and proper grade of the street, and such reasonable and proper grade is made to his injury, it is not wrongful.

This charge, as a whole, was considered "as favorable to the plaintiff as the principles of law would justify."

The court in concluding their opinion specifically affirm the second, fourth, and fifth propositions, assuming, as they did throughout the opinion, that the grade of an old-established road was equivalent to a grade established by municipal authority, and, inasmuch as the third and sixth are simply the converse of the second and fifth, the whole may be taken as the law of this the leading case on the subject in our state. But to this should be added another proposition, which appears in the opinion of the higher court for the first time:

7. That if the owner of a lot on a street, the grade of which has not been established, that is, where no preparation of the surface of the ground for public travel has been made which would fairly indicate permanency, improves his lot, he must do so with ordinary care and discretion in anticipating a reasonable and proper grade, otherwise the establishment of such grade to his injury will not be wrongful.

The decision in *Youngstown v. Moore*, 30 O. S., 133, is an affirmation of the fifth proposition of the charge in *Crawford v. Delaware*. This was a case where a municipal corporation had adopted as a street a county road, which had been used without change of grade for more than thirty years, and where the owner of a lot abutting thereon had adapted his improvements to such road, which was after ward graded by the authorities to his injury. Held, that in such case, if the owner had used ordinary discretion, care and judgment in making his improvements with reference to the road and with regard to future improvements of the street, he was entitled to a just compensation for his injury, although the grade which injured him was a proper one.

We have in the case of *Akron v. Chamberlain Co.*, 34 O. S., 328, one circumstance which had not appeared before, viz: there was testimony tending to show that the building in question, a mill, had been built before any grade had been established; that a grade had afterward been established suitable to the convenience of the mill; and that afterward this grade had been changed to another, in adjusting the street to which, the plaintiff had been injured. This decision is unfortunate in that it does not give the full charge upon which the proceedings in error are based. If we comprehend its full bearing, the first part of the second section of the syllabus affirms the fourth and fifth propositions of the charge in *Crawford v. Delaware*, as above set forth. And the fourth and last section holds that the peculiar circumstances of the case fall within the principle mentioned in the first part of the second section, which would establish the principle that where one has improved a lot with reference to a reasonable future grade and his anticipations have been realized by the establishment of the grade for which he had prepared, any future change of this anticipated grade to the injury of the owner would be wrongful, and would entitle him to a recovery in the same manner as if he had originally built with reference to the grade first established. But the first section, and the second part of the second section of the syllabus, introduce a new principle, or, rather, qualify the seventh proposition as laid down in *Crawford v. Delaware*. The law as laid down in the seventh proposition in *Crawford v. Delaware* warranted the implication, that if an owner of an unimproved lot upon a street, the grade of which had not been established, used ordinary care and discretion in making his improvements with reference to a future grade, he would be entitled to recover, although the future grade by which he was injured was a reasonable one. That is, the implication here was that the reasonableness of the anticipated grade at the time the improvements were made, governed the right of recovery. But this is here declared not to be the law, and that the reasonableness or unreasonableness of the grade at the time it is established shall govern. In other words, the owner is bound to anticipate every reasonable grade, and his judgment and discretion at the time of building will avail him nothing, if before the grade is established circumstances have so changed as to make reasonable a lower or higher grade than the one he anticipated and with reference to which he built. In short, under such circumstances, he can not recover unless he can show that the grade as finally established is unreasonable at that time. (1) Subject to this qualification of the seventh proposition, the law remains as it was left by the decision in *Crawford v. Delaware*, and may, we think, fairly be stated to be as follows:

(1) The decision in *Akron vs. Chamberlain Co.* can not be looked upon as any considerable contribution to the elucidation of this rather intricate subject. In fact, we believe its effect was rather the opposite. We gather more from the syllabus than from the opinion; but we believe it was the intention of the court to qualify the seventh proposition of the law as laid down in *Crawford vs. Delaware*, at least so far as to justify the ruling made in *Cincinnati vs. Penny*, 21 O. S., 499, which is based upon this question of the anticipation of the use to be made of an unimproved alley.

A municipal corporation while acting within the scope of its legal authority and with proper care, is not liable for injuries to the owner of abutting property, occasioned by digging down or filling up a street to make it conform to an established grade. To which general rule there are the following exceptions:

1. It is liable to the owner of an unimproved lot, if the grade established is an unreasonable or improper one.

2. It is liable to the owner of an improved lot, if the owner has made his improvements with reference to the regularly established grade of a street, and the corporation changes such grade to his injury.

3. It is liable to the owner of an improved lot, if he has made his improvements with reference to the level or grade of a public way, fixed by the direction or under the sanction of the proper authorities, so as to fairly indicate permanency, if such grade or level be afterward changed to his injury. (2)

4. It is liable to the owner of an improved lot, if he has made his improvements with reference to a reasonable future grade before any grade has been established, first, if the corporation establish the grade which the owner anticipated and afterward change it to his injury, or second, if the corporation establish in the first instance an unreasonable grade.

In looking at the manner in which the Ohio courts have arrived at their present holding as above noted, we find that they have passed through two phases of opinion. In all cases previous to that of *Crawford v. Delaware*, we find that the general rule established is, that a corporation acting within its legally constituted powers is liable for all substantial injury which occurs to an individual by grading the street. And this, upon the broad ground that "justice and good morals" require that such should be the rule. But since the decision of *Crawford v. Delaware*, the question has not been simply whether there was an injury which justice and good morals required to be compensated, but whether the injury is one which the owner of the property could, with reasonable judgment, have anticipated. The rule of general liability has been changed to that of general non-liability. From being liable, like individuals, for all acts which cause an injury to another, although in the exercise of lawful powers, municipal corporations have become liable only for those acts which are unlawful, or done after some assurance has been given which would induce a prudent man to suppose that no such injury would occur. In short, the doctrine of liability, as now maintained, is one which depends upon circumstances which confine a recovery practically to a single case—the change of an established grade or its equivalent. We say practically, for the reason that it is doubtful whether the courts have the power to declare that unreasonable which the municipal corporation has by its action considered reasonable. See *Dillon on Mun. Corps.*, section 991, note.

The ground of the liability as it now exists in Ohio is, as we understand it, this: The owner of a lot of land does not, strictly speaking, own the ground, but simply the use of it, to the exclusion of everybody else. His proprietorship consists of a bundle of rights which the law secures to him in order that he may apply the ground to the satisfaction of his wants—that he may enjoy it. All of these rights of user and enjoyment go to make up the value of the lot. If a lot is surrounded by the property of others, the ownership may be complete, but the facility of user is restricted—the right of access falls, and, hence, a part of the value of the lot. If it is situated on the public street, the value is increased, because the right of access is added to facilitate enjoyment. The right of abutting owners to the street "is a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon,—an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value." *Crawford v. Delaware*, 7 O. S., 469. Property in a piece of ground may be said, then, to consist in law, 1st, of the legal title thereto, which means the right to exclude others from the use of it, and 2d, the right to the unobstructed use of it yourself. The former cannot be taken away without compensation, under the provision of the constitution, but, if the latter is gone, the former is of no value. Hence, the

(2) It is to be noted in the matter of grade as used in the decisions of our Courts that they do not contemplate as the only grade which is to be deemed established, one which has been specifically fixed by municipal or other legislative action according to an ordained grade line; but that the use of a road as a permanent passageway for the public is sufficient to justify the owner of abutting property in accommodating his improvements to it. Thus, the grade of an "old road," in *Crawford vs. Delaware*, of a "county road," in *Youngstown vs. Moore*, of a turnpike road made by a private corporation in *Cincinnati vs. Williams*, was considered "established."

latter being one of the elements which go to make up what we call property in land, it is within the spirit of the provision of the constitution, if not within the letter. The conclusion, therefore, is, that when this right of access from the street, which is one of the elements which go to make up the value of a lot, has been taken away or rendered less convenient, the owner has been injured in his property rights, "and no curt phrase like *damnum absque injuria*, can conceal the invasion or substantial injury."

The argument in the abstract is absolutely unanswerable. But there are other considerations. Should not something be sacrificed in order to aid the public in carrying out its works of improvement? Here is the real point of difference between the courts of Ohio and those of other states. In other states, the whole rights of the individual in this respect must yield to the public, while Ohio concedes something, but not all. If an individual has an unimproved lot on a street and is injured in his property rights by a change in it, he must stand the loss for the sake of public improvements; but if he has been induced by the public to suppose that their demands for beneficial improvement have been satisfied, and has expended money and labor in adjusting his premises to a state of things which he could reasonably suppose would be permanent, he will not be sent away, with the empty consolation of having made a sacrifice for public good, but will be given a just compensation for his loss.

II

THE MEASURE OF DAMAGES.

It is for injury to an improved lot only, that the owner is ordinarily entitled to recover damages under the decisions of our courts. But what is an improved lot? As to this our courts have left us in hopeless confusion. A lot may be improved by simply grading it down or filling it up, to make it correspond with the level of a street or road. It may also be improved by building houses, planting trees and shrubbery, etc. Such grading or filling may cost many times as much as building a house on a lot which does not need grading or filling. Suppose an owner has graded down his lot ten feet, to make it correspond to the established grade of a street, with the intention of building upon it, but before he has done so, the city establishes a new grade for the street, twenty feet higher than the previous one, and fills up the street to that height in front of his premises, would he be entitled to recover? We believe that in all good conscience he should, and there is no authority against the position. But on the other hand we know of no positive authority which holds that he could. Certainly all the conditions of a recovery have been fulfilled. He has improved his lot with reference to an established grade, and that grade has been changed to his injury. Our courts in speaking of improvements, make use of the terms "permanent structures," "buildings," "erections," etc., and speak of an owner who "builds upon and improves," or who uses proper judgment in "making improvements or erecting buildings," as being entitled to recover. But they nowhere define what shall be considered an improved lot or what not. But, however it may be with a lot which is not built upon, if a building has been erected, a lot must, according to all authority, be considered improved, and whatever other additions are made for its convenient use and enjoyment, are looked upon as additional improvements.

But building upon and improving a lot in a large city is quite a different thing from building upon and improving a lot in the country. The improvements in the city would probably include simply a house with its necessary approaches—the building would constitute the improvement. While in the country they would include those additions which a person would ordinarily make to fit up a comfortable residence, such as buildings, fences, trees, roadways, outhouses, cisterns, etc. The improvement of a lot for business purposes, would probably include other and different items from the improvement of the same for purposes of residence, etc. It is, however, with an "improved lot" that we have principally to deal, and, however various the improvements may be, they all become of importance when we come to estimate the damage caused by a change of grade. And whatever these improvements are, whether buildings or other incidental arrangements of necessity, comfort, or convenience, they become, by being put upon the lot, a part of it; their value becomes a part of its value, and its value a part of theirs. No true valuation can be placed upon the lot without taking them into consideration, and no injury can be estimated without reference to them.

Now as to damages. The grade or level of the street or road along the improved lot has been changed, has the owner been injured? A change has been made, but this does not necessarily cause, legally an injury to the owner. His feelings may be injured to see his property changed, but for this there is no balm

in law. Is his lot reasonably worth as much as it was before? If it is, he has not been injured, if it is not, he has. The value of his lot before and after the change must, therefore, determine whether there has been an injury, and the difference in value must be the measure of his damages. The measure of damages then would be, the amount in money that the premises are worth less, immediately after the change is made, than they were immediately before. In *Buen v. Wooster*, 19 Mass., 372, the court say that the owner "was entitled to recover the diminution in value occasioned to his property in the condition it was when the change was made from a lower to a higher grade." In *Chase v. Worcester*, 108 Mass., 67, it is expressed thus: "The true nature of the damages is the amount of the depreciation in value, taking into consideration all the circumstances of the condition in which it was left by the changes made in the street."

This statement of the measure of damages is simple enough, and would be a matter of easy computation if all witnesses would put the same estimate on the value of property; but, in practice, the real value which a jury finally determines upon must be made up from the most diverse opinions as to value, and the most different ideas as to the effect of a change. The task of a jury is one of exceeding difficulty, if conscientiously performed, and one which it has been the policy of the courts to aid in the performance of, by allowing a wide range to testimony.

There are two lines of testimony which seem to have been permitted, in order to arrive at a just estimate of the change in value: First, a general inquiry as to values, before and after the change of grade; and second, a special inquiry as to the cost of changes made necessary by the change of grade—both being simply to aid the jury in determining the amount of depreciation in value.

As to the first. A witness, who is competent, may testify directly as to what the value of the premises was immediately before and immediately after the change was made (1), but he may not state whether the property has been damaged, nor the amount of damage which the owner has suffered. (2)

In making this estimate of values, no allowance should be made for general benefits which occur to all the property along the street by reason of having a more commodious thoroughfare in front of them. These are benefits which the owner has a right to share with the rest, without having the amount of damages which he may be entitled to recover for injuries to him individually, and which are not shared by others, reduced by reason of them; and, furthermore, these benefits are paid for in the assessment for the improvement, in all those states where the cost of street improvements is assessed on the abutting owner. *Dillon on Municipal Corps.*, section 625.

There is a question involved in this matter of comparative values which is of great importance to the subject under consideration. At the foundation of the claim for damages is a loss in value. A loss in value as to what? To the improvements, or the lot or to the whole? The district court of Hamilton county, through Force, J., *Chatfield & Woods v. Cincinnati*, 7 Ohio Dec. R., 111, has said, that in case of injury, the jury is to be governed in the amount of damages by the "decrease in the value of the premises." This statement touches the kernel of the whole matter. It is not the injury to "buildings" or "permanent structures," or "improvements" alone that is under consideration on the question of comparative values, but to the "premises." The question involved in an inquiry as to comparative values is, how much less would the premises sell for in the market after the change has been made. Not how much less the buildings would sell for, or the "improvements" would sell for, but the lot with the improvements.

The buildings would be of no value, except for the materials of which they are composed, if separated from the lot, and the lot would lose much of its value if the buildings were taken away. It follows that if the lot is improved, what-

(1) "The court should have admitted the evidence offered to prove the value of the property before and after the improvement was made." *Elgin vs. Eaton*, 83 Ill., 535. It was held in *Dalzell vs. Davenport*, 12 Iowa, 437, that it was competent "for witnesses to state, in their examination in chief, the value of the plaintiff's property before and after the change of grade; but it is not competent for them, on such examination, to give their opinion as to the effect of such change in adding to or taking from such values." See also *Atlantic & Great Western R.R. Co. vs. Campbell*, 4 O. S., 563, and *Cleveland & Pittsburg R.R. Co. vs. Ball*, 5 O. S., 573.

(2) "Was the property of Mr. Church injured or benefited by the grading of 1870?" was held an improper question in *Church vs. Milwaukee*, 31 Wis., 512. Also in appropriation proceedings, the question, "What in your opinion is the damage which Joseph Ball will sustain by reason of this appropriation?" *Cleveland & Pittsburg Railroad Co. vs. Ball*, 5 O. S., 573.

The following answers were held inadmissible in *Dalzell vs. Davenport*, 12 Ia., 437: "The effect of filling in the alley on Perry Street in my judgment, would increase the value of plaintiff's property very considerably." "I never thought the filling in the street and alley was an injury to the value of plaintiff's property. I thought it was an improvement. I should think that the alteration of the grade would more than compensate for the expense of filling up the lot."

ever injury occurs, occurs to the premises—the lot and improvements. Any other doctrine, we believe, would be subversive of those rights which it has been the effort of our courts to protect. We are cognizant of the fact that it was charged, and reiterated in the charge, in *Cincinnati v. Williams*, which precedes this discussion that it was damage to improvements only which the jury were to consider. At the same time, the jury were told that they were to compare values. What values? Of the improvements? The improvements, with some trifling exceptions where there was an actual destruction by the work, looked at simply by themselves, were as valuable after as before the change; and it was only by considering them as part and parcel of a beautiful suburban home that there could be any estimate made of the actual damage. No, it was the depreciation in value of the buildings and other improvements as part of the lot of ground on which they stood that was in question in that case. We believe, that any charge which confines the attention of the jury to the injury to improvements alone, without reference to their being a part of the value of the ground on which they stand, is misleading, and, in some cases, would wholly defeat the rights which our law secures to the owner of a lot injured by a change in the grade of a street.

The practical effect of holding that the claim for damages shall be confined to the improvements, is most forcibly shown by supposing the case of a person whose property has been rendered valueless by the change in grade. Suppose a person had a lot on the grade of a street, worth \$1,000 with a house on it worth \$800, and the city fills up the street to meet a new grade, so high that a man of ordinary prudence would not take the premises and pay the taxes on them—in other words, renders them valueless. Would any reasonable man claim that, under the decisions of our courts, such person would be entitled to recover only the value of his buildings, \$800, while he has been actually damaged \$1,800? (1)

There are, no doubt, cases where the injury is principally to the buildings or other improvements, as, for instance the case of *Akron v. Chamberlain*, where the lot lay low, and the building was built up to anticipate a higher grade, which was afterward established convenient to the building. This grade was afterward changed a few feet higher, so that access to the building was destroyed. The lot was probably little injured, but the building was greatly damaged. Perhaps the taking of a part of the building would have been less injurious to the owner than destroying the access to the whole. But on the other hand, as in the case of *Cincinnati v. Williams*, the injury may be principally to the lot as improved, and the buildings may be injured only by the fact that they form part of the lot, and the whole is less valuable. The idea that the claim for damages must be confined to injuries to improvements, probably arises out of a misconception of the part which improvements play in this question. The improvements are a condition precedent to a claim for damages—there can be damages in law, in Ohio, without improvements—but there can be an injury without improvements, and the only reason that there can be no damages is, because the courts have held that they will not hear the claim, unless the fact of their being improvements is first established. But when the fact of there being improvements is established there is no authority for saying that the damages shall be confined to such improvements. On the contrary, we believe, the whole tenor of the decisions of our Supreme Court is in support of the view, that when the owner of a lot has made improvements, and has been injured by a change of grade, he will be entitled to recover a just compensation for all the injury sustained.

There is a well-considered case in Iowa on this point, *Dalzell v. Davenport*, 12 Ia., 437. This case involved the construction of the statute of that state declaring that when a grade has been established, and improvements have been made with reference to it, and the grade is altered "in such a manner as to injure or diminish the value" of the property improved, the "city shall pay to the owner or owners of said property so injured the amount of such damage or injury." The court below instructed the jury, that under this statute they could only consider the injury to improvements, viewed separately from the damages done to the lot. This was held to be error. The court, Wright, J., say: "If the owner had done no act upon the faith of the continuance of the grade as established, there would seem to be no great impropriety in denying him any possible damages consequent upon the change. When, however, he builds or makes improvements according to the grade, having acted, as he had a right to do, upon the supposition that the grade would remain unchanged, his property is brought within the mean-

(1) The writer is cognizant of a case tried in the superior court of Cincinnati, but which is unfortunately not reported, where a man claimed, and was allowed to recover the value of his whole premises under circumstances such as supposed, upon the testimony of competent witnesses, that they would not take the house and lot after the new street was made and pay the taxes on them.

ing and terms of the statute. And property as herein used, includes the lot, real estate, the tenements, hereditaments, and all rights thereto, and interests therein." The court further say: "There is no reason in the nature of things, to thus confine the assessment of damages. When the improvements are made, they become part of the realty. Much difficulty would necessarily result in every case almost, in separating the damages to the lot as such, from those to the improvements made thereon. If damages are to be confined to the improvements, then the inquiry arises, what are improvements within the meaning of the act? * * * When damages, however, are treated as relating to the entire property, lot as well as improvements, all difficulty is removed, and the law is easily administered."

But the question as to injury to particular improvements is of importance, not as indicating that damages to these alone is to be considered, but in aiding the jury in arriving at an estimate of the amount of damages to be allowed, this being a convenient means of coming at the damages to the premises. The premises have been damaged, but how? By injuring this part, or that part, or the other part; and these parts contributing to make up the value of the whole, the jury may by this means more readily arrive at their final determination—the difference in the value of the whole before, and the whole after the change has been made. And this leads us to the other mode of inquiry to aid the jury in their estimate of the decrease in value.

Second, an inquiry as to the cost of changes made necessary by the change of grade.

This inquiry involves what would be the expense which a prudent man would incur in putting the injured premises in as good a condition with reference to the new grade as they were in with reference to the old; and assumes also that it would cost less than the whole premises are worth. The cost of restoration has, in some cases, been suggested as a possible measure of damages. *Stowell v. Milwaukee*, 31 Wis., 523; *Church v. Milwaukee*, 31 Wis., 512. But, as a general rule, it is obviously wrong, for in some cases it would be too broad, as when it would cost more to restore the premises than they would have sold for in the market before the change was made. In other cases, it would be too narrow, as if when the premises are restored as much as possible, they are still less valuable than before the change. The only case in which it would be a just measure would be, where the premises after the restoration are of the same value as before the change was made. In such case a recovery of the amount expended in restoration would make the owner whole. But it is proper to introduce testimony to show what the manner of injury is or will be, and what would be a proper and economical means of restoring it. And upon such testimony being given, the cost of all those improvements which are destroyed by the change may be shown, and, further, the cost of any changes in the lot or improvements which it is necessary or proper to make, to restore the premises, as nearly as possible, to their original value. Thus, when such work appears to be an economical and proper mode of restoring the premises, the cost of grading down, or filling up the lot, and lowering or raising the house thereon, in order to make it accessible, habitable and fit for use, may be shown. *McCarty v. St. Paul*, 22 Minn., 527; *Church v. Milwaukee*, 31 Wis., 512. In the latter case the court say: "If a change in the premises becomes necessary—as a cutting down of the surface of the lot, or filling it up—a raising or lowering of the buildings and walks—whatever expense was incurred in adjusting the premises to the same relative position to the street after the change of grade as before, was to be allowed." Under like circumstances, held that a witness who had examined and made estimates might state "how much it would cost to cut down the petitioner's lots and build brick basements under the houses, with doors, the ascent to be within the walls, and that this would be a reasonable, proper, and economical use of the estates, and that it would be necessary to do this in order that the estates should conform to the new grade." *Hartshorn v. County of Worcester*, 113 Mass., 111.

But it is not the cost of such changes as the owner may think desirable to make, or such as would be unreasonable for the purpose in view, that can be considered; but such as a prudent man would make, as the most economical and proper means of restoring the premises. Hence, the cost of moving a house which stood 52½ feet from the street, and which it was not necessary to move, was held not to be within the rule. *Chase v. Worcester*, 108 Mass., 67.

Upon proof being offered that the construction of a retaining wall would be necessary to protect the lot on the side against encroachments from the soil and buildings on adjoining lots, the cost of such wall may be shown. *McCarthy v. St. Paul*, 22 Minn., 527.

Also, the cost of a protecting wall along the street. *Bemis v. Springfield*, 122 Mass., 110. In this case the question as to "how much it would cost to erect a protecting wall on the Bemis property on Lyman street," was held competent.

We think it may be stated as a general rule upon which all authorities agree, that the value of everything which is either destroyed or injured, and the cost of all changes and additions which it is necessary to make or construct, as the proper, necessary and most economical means of restoring the injured premises, may be shown in this inquiry, in order to aid the jury in their final estimate. This would include houses and other buildings, trees and shrubbery, fences, gates, roadways, cisterns, drains, etc. But the cost of these items does not in itself form a measure of damages, but is only a means of aiding the jury in estimating the difference in value. And, hence, if it should be found that after the premises are restored as much as may be, they are still of less value than before the change, this depreciation must be added to the costs of restoration.

But how if a value is added? In the inquiry as to general values, only the question as to general benefits can be raised, but here, in allowing for costs of specific items in restoring the premises, if it should appear that by reason of making the restoration, a value has been added, as, for instance, where the grounds were low and flat before the change, and by means of grading to accommodate them to a new grade of the street, they have been given a gentle slope which insures them a good drainage, so that they would sell for more in the market than before the change, should an allowance be made for this local, peculiar benefit, which the owner has derived, which is not shared by others along the street? Our own Supreme Court has not decided this specific question, but they have recognized the doctrine of general and special benefits, and, it seems, have evaded a decision upon the allowance of the latter in appropriation proceedings. *Cleveland & Pittsburg R. R. Co. v. Ball*, 5 O. S., 573; *Little Miami R. R. Co. v. Collett*, 6 O. S., 182. For discussion of general subject see *Dillon on Municipal Corporations*, section 825. But in *Cincinnati v. Williams* (ante), the jury were instructed to make an allowance for such benefits, if any, by deducting the amount from the costs of restoration. This was certainly correct. The very nature of the inquiry requires it. The jury are trying to estimate the depreciation in value, and, to aid them in this, testimony is allowed to show what it would cost to restore the loss as nearly as possible. If in this restoration a value is added, certainly this must be deducted from the costs of restoration, in order to estimate the loss by reason of the change. Any other doctrine would lead to the anomaly of allowing the owner to recover damages for that which is a benefit to him.

The result of this second mode of inquiry may be stated to be:

1. If after the changes which a prudent man would make to restore the premises to as good condition with respect to the new grade as they were in with reference to the old, they are of the same value as before the change of grade, the reasonable costs of such restoration would be what the owner is entitled to recover.
2. If under like circumstances, they are less valuable when restored, than before the change of grade, the amount of this diminution in value should be added to the costs of restoration, as the amount of recovery.
3. If under like circumstances, they are more valuable when restored than they were before the change of grade, there should be a recovery for the difference between the costs of restoration and this increase of value if less than the costs of restoration, but no recovery if more.

ARBITRATION—EVIDENCE.

[Hamilton Common Pleas.]

**MARY PROSS v. E. P. BRADSTREET, EXR.*

1. A suit pending in one court which afterwards, by the terms of an arbitration, becomes a suit in another court, may be found to have been abandoned in the original court where it appears from the facts that the parties so intended.
2. The question of the admissibility of evidence admitted by consent, but subject to objection, must be raised by a motion to rule it out.

AVERY, J.

The arbitration was authorized by section 6093, Rev. Stat. The preceding section of the statute is not overlooked, and undoubtedly the main purpose of the

*This judgment was affirmed by the district court. See opinion, 9 Dec. R., 000. (s. c., 11, B., 117.)

law was to provide for the submission, by an executor or administrator, upon the first presentment of a claim. But there is no reason why, although the claim had been rejected and suit brought, that matters might not by consent be permitted to resume their former position.

The effect of the submission was a discontinuance of the pending suit in the superior court. The words "superior court of Cincinnati," in the title of the cause in the submission, and the provision, that "all questions of law that arise shall be at once put in writing and submitted to the court for decision," are not overlooked. But the construction to be adopted must be according to the apparent intention of the parties, in which connection their subsequent acts are to be considered. *Morse on Arbitrations*, 59, 63. Here the paper was at once filed in this court, and the case docketed, and the rule for reference to the arbitrators issued, on praecipe of the executor. The greater number of cases hold that submission to arbitration in a pending cause works a discontinuance. *Morse on Arbitrations*, 73, and cases cited. It may be otherwise, where the apparent intention of the parties in a pending cause is plainly that the cause shall remain on the docket, and judgment on the award be there entered. *Hearne v. Brown*, 67 Me., 156; *R. R. v. Huggins*, 59 Tenn., 177; *Lary v. Goodnow*, 48 N. H., 170.

In the proceedings of the arbitrators there was no error in admitting the declarations of the deceased that he intended the house on John street for the plaintiff; and as to other evidence admitted subject to objection, if incompetent, upon which no opinion is expressed, there was no motion to rule out and therefore no error. *Thayer v. Luce*, 22 O. S., 62.

The manner of the plaintiff and her two daughters, and of Newell, the arbitrator, when discovered in private conversation as detailed by the affidavits of Mrs. Shaw and Thos. Jeffers, would appear suspicious; but in judging of this, the conduct of the affiants at the time is to be considered. The conduct to have been expected of them, had the occurrences been calculated to induce the impression now sought to be conveyed, would have been a refusal to go on with the hearing. There being no such refusal, it would seem conclusive. The parties if content to proceed with a knowledge of the fact, must be deemed to have relied on the strength of their cause, or the capacity and firmness of the other arbitrators, and to have waived the objection. *Morse on Arbitrations*, 102, 104; *Fox v. Hazelton*, 10 Pick., 275; *Noyes v. Gould*, 57 N. H., 20.

The only oath administered to the arbitrators was by a notary public, but the executor, himself a lawyer and appearing as one of the counsel, was present at the time, and made no objection, nor was any made on the ground that the swearing was not by a judge or justice, until after the award.

This was a waiver. The conclusion follows from the general course of authority on the subject. In New York, under a statute that parties to an arbitration may agree that judgment of any designated court shall be entered on the award, it is held the oath to the arbitrators may be waived. *Howard v. Sexton*, 1 Denio, 440; *S. C.*, 4 Comst., 157; *Browning v. Wheeler*, 24 Wend., 258; *Kelsey v. Darrow*, 22 Hun., 125. The reason given is, that the submission confers jurisdiction on the arbitrators, and omitting to swear them is an irregularity merely. In Wisconsin, under a statute the same as that of New York, there is a similar holding. *Hill v. Taylor*, 15 Wis., 190. The case was on motion for judgment upon an award, and the only oath had been administered by a notary. The holding was, that the oath was only intended to secure to the parties, if either desired it, a hearing and decision by persons sworn to a faithful discharge of their duties, which oath they might dispense with as well as with the oath to a jury or witness. In *Woodrow v. O'Connor*, 28 Vt., 776, it was held, that having agreed that neither the arbitrators nor witnesses need be sworn, the defendant could not after the award make the objection. In *R. R. v. Alfred*, 4 Brad., 511, a decision by one of the district appellate courts of Illinois, the opinion is expressed, although not necessary to the case, that the parties may waive the requirements of the statute, and by tacitly going on with the hearing, before unsworn arbitrators, shall be deemed to have done so.

In New Jersey, Louisiana, Kentucky, Missouri, and Colorado, an award by unsworn arbitrators is void. *Inslee v. Flagg*, 2 Dutch., 368; *Combs v. Little*, 3 Green Ch., 310; *Overton v. Alpha* 13 La. Ann., 558; *Jackson v. Steele*, Sneed, 21; *French v. Mosely*, 1 Litt., 248; *Toler v. Hayden* 18 Mo., 399; *Frizzell v. Ficker*, 27 Mo., 557; *Hepburn v. Jones*, 4 Col., 98.

In Missouri, the statute being a transcript of that of New York, the ruling of the courts of that state, as to waiver, is followed. *Tucker v. Allen*, 47 Mo., 488. The ruling is distinguished, by the courts of New Jersey and Colorado, as resting on the New York statute. *Inslee v. Flagg*, 2 Dutch., 371; *Hepburn v. Jones*, 4 Col.

98. But as pointed out, in *Day v. Hammond*, 57 N. Y., 479, the true ground is, that the setting aside of an award, proceeds upon the same principle as setting aside judgments in equity, and involves the same consideration of circumstances of estoppel.

The statute prescribes, that if legal defects appear in the award or other proceedings, the court may set aside the award, section 5611, Rev. Stat.; but this leaves it open, whether the defect is one of which, under the circumstances, advantage may be taken. In *State v. Jackson*, 36 O. S., 281, the holding, is that to constitute an arbitration under the statute it is required, that the arbitrators and witnesses be sworn, and that an oath administered by a notary in such proceeding is a nullity. But upon a trial in court, the same thing might be said of swearing the jury and witnesses, and the question of waiver still remain.

The jurisdiction of arbitrators to make an award, on which judgment can be entered, is special, created entirely by statute and sustainable only by compliance with the statute. *Morse on Arbitrators*, 44. Courts can only acquire jurisdiction over awards, to enter judgment on them, where the submission and award are executed with the formalities of the statute. *Moody v. Nelson*, 60 Ill., 229; *Fairchild v. Dolen*, 42 Cal., 125; *Abbott v. Dexter*, 6 Cush., 108; *Monosiet v. Post*, 4 Mass., 532; *Steel v. Steel*, 1 Nev., 27; *Adams v. Hammon*, 10 B. Mon., 8. But these are cases of defect in the execution of the submission, or in the return of the award.

There is no question here of that kind. The agreement in writing signed by the parties, with the approval of the probate judge, as provided by the statute, was filed in this court, the cause docketed and the rule referring the controversy to the persons selected, issued by the clerk. Sections 6093, 6095, Rev. Stat. This made a cause pending, and conferred jurisdiction. The reason is the same as in other cases of reference, for disregarding the omission of an oath, tacitly consented to by the parties. *Newcomb v. Wood*, 97 U. S., 581; *Browning v. Marvin*, 5 Abb., N. C., 285; *Nason v. Luddington*, 56 How., 172; *Board of Supervisors v. Ehlers*, 45 Wis., 281; *Allen v. Francis*, 9 Jur., 691.

The exceptions to the award are overruled and judgment may be entered. *Jordan, Jordan & Williams*, for plaintiff.

E. P. Bradstreet and A. J. Cunningham, for defendant.

SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, General Term.]

STEPHEN COLES v. MABOLA L. KEARNEY.

An executrix vested with absolute power of sale signed in her own name, without reference in terms to such power, a contract to convey all of a certain lot belonging to her testatrix, in fee simple, free of all encumbrance. There were debts, but no personal assets to pay them. By the same will she was also devisee in her own right of an undivided half of such lot: Held, that it was not necessary to bind her to convey by virtue of such power as executrix the entire estate of her testatrix that she should sign such contract as executrix or expressly refer to such will, her intention to exercise such power being manifest from the nature of her undertaking and her individual inability to perform it.

HARMON, J.

One Alice A. Smith, the owner of a house and lot, devised the same to defendant one undivided half absolutely, the other in trust for one Mary Thompson, defendant was also nominated and appointed executrix of the will which was probated May 27, 1879, and is still acting as such executrix.

As executrix, if not as trustee, defendant was invested by the will with full and unqualified power to sell said property without order of court at public or private sale.

On November 29, 1881, she in her own name entered into a written contract with plaintiff reciting that she had sold and agreeing to convey

to him for \$1,775, to be by him paid, all of said lot, with the improvements, in fee simple and clear of all encumbrance. There then were and still are debts of said estate amounting to nearly \$400 and no personal assets with which to pay them; and during the negotiations resulting in such contract she informed plaintiff that she was compelled to sell said property to pay such debts.

The action is for specific performance, defendant as executrix being also made a party. As executrix defendant does not plead, but personally she answers admitting the making of such contract and offering as she offered before suit a deed conveying said property to plaintiff executed in her individual capacity only. It is reserved upon bill of evidence disclosing the facts above stated and the further fact that by tender and otherwise plaintiff has complied with all conditions upon his part.

It is contended for defendant that as the contract contains no reference to the will nor to the power therein conferred upon her, and is not signed by her as executrix, she is not bound thereby to exercise such power in making her deed, either by reference thereto or by executing it as executrix, that all plaintiff can lawfully demand is what she offers—her simple individual deed. Plaintiff upon his part contends that, as she can comply with her contract only by exercising the power of sale conferred by the will, he is entitled to a deed properly executed for that purpose.

We have been cited to no reason or authority and are aware of none, which requires the application to powers conferred upon executors of principles different from those which apply to powers conferred upon others. An executor is simply a trustee to be distinguished from other trustees only by the manner of his appointment and the specific duties imposed by statute.

Whatever one may lawfully do he may by contract oblige himself to do. The only difference when a trustee so contracts with reference to the trust property is that the court before requiring performance will inquire whether the contract is in violation or in furtherance of the trust. Hill on Trustees * p. 509.

Defendant here had by the will full power to sell, the existence of debts without personal assets to pay them required the exercise of such power, and there is no suggestion in the record of any collusion, overreaching, or inadequacy of price. So that if the obligation of the contract was that defendant would exercise the power so vested in her there is no reason why she should not be required to do so.

Intention to execute a power is not necessarily to be indicated by direct reference to it, and we see no difference between reference in the body of an instrument and that by the form of signature. It is sufficient if the property which is the subject of the power be described and the relations of the persons to the property be such that the instrument will fail unless it be considered an execution or attempted execution of the power. Bishop v. Remple, 11, O. S., 277; 2 Perry on Trusts, section 511, c.

Applying this principle here it is argued that, defendant being individually vested with an interest in the property, her contract has subject-matter upon which to operate without going further. But her individual title is only to an undivided one-half of the property and is subject to defeasance by the assertion of her power of sale as executrix which payment of the debts requires, while her contract is to convey *all* the property, *in fee simple, free of encumbrance*. It would be sticking in the bark

to hold that such a contract would be satisfied by her conveyance as devisee simply. If she had an estate in the entire property such as a life estate or conditional fee and had undertaken simply to make a conveyance of the property without reference to the extent or character of the title, such argument would prevail. But to the penetrating vision of a court of equity the two undivided halves of this property are the same as two different lots, in this regard. As to one of them the contract can have no effect, and as to the other not the effect indicated by its terms, unless it be held to be an agreement to exercise the power of sale given by the will. And a contract to convey fairly made, will be enforced in equity as a defective execution of a power to convey. 2 Sugden on Powers * p. 116; 2 Chance Powers, section 2911; Watermann on Specific Performance, section 387.

We think the error of counsel for defendant lies in assuming that Marbola L. Kearney and Marbola L. Kearney, executrix, are two distinct persons. There is only one person—she who was served with summons, who retained the learned counsel, who appears in court. It is this person upon whose will the decree of the court is to operate, upon whose body the penalty for disobedience thereof would be visited, whose private seal would be affixed to the deed conveying the property vested in her as executrix, who would individually owe service and make livery of seizin under the old common law. Being satisfied that that person has fairly bound herself by her contract to exercise for plaintiff a power which it is admitted she possesses and which the fulfilment of her trust requires her to employ, the order of the court should be that she do it.

In *Graham v. Oliver*, 3 Beav., 124, an action for specific performance, defendant had contracted to sell, as absolute owner, property part only of which he so owned, and part of which he held as tenant for life with power to direct trustees, who held the fee, to convey; and a reference was ordered to ascertain whether by application to them he could make a good title. See also *Thomas v. Dering*, 1 Keen * p. 729, and *Waterman on Specific Performance*, section 127.

If one having power to call upon others to convey may be ordered to do so, certainly one having the power herself in whatever capacity may in a proper case be required to use it.

But, it is said, if the writing signed by defendant individually have this effect as a contract, a deed executed in like manner would have a similar effect as a conveyance, and as defendant offered this before suit, and still offers it, there is no occasion for a decree. If we agree that the deed offered would in fact have such effect, it does not follow that in offering it defendant has tendered full compliance. Greater formality and precision are expected in a deed, which remains a permanent link in the chain of title, than in a memorandum contract; and plaintiff is entitled to have the intention to exercise the power plainly expressed in his deed—to have not only the title but also the unquestionable evidence and muniment thereof.

The same controversy which now exists concerning the contract would be possible concerning the deed so offered, and the wise policy of avoiding multiplicity of suits requires us to determine it now.

The same reasoning we have employed with reference to the effect of the contract applies to it considered with reference to the statute of frauds.

Decree for plaintiff.

Force and Worthington, JJ., concur.

APPROPRIATION OF PROPERTY—EVIDENCE.

253

[Van Wert District Court.]

Moore, Hughes and Owen, JJ.

CHICAGO AND ATLANTIC RY. CO. v. H. C. WILLIAMS ET AL.

1. In a proceeding under the statute by a railroad company to appropriate lands for its right of way; it is competent for such company to give in evidence to the jury, for its consideration in determining the question: "How much less valuable the remaining portion of said property will be in consequence of such appropriation," any facts tending to show the present condition of such remaining portion, and that the same will necessarily receive special local benefits consequent upon the construction of the road.
2. In such case it is error to refuse to charge the jury—that special benefits such as accrue solely to the owner of the land from which the right of way is taken, as when the excavation of the railroad track has the effect to better drain and reclaim wet and swamp lands and to render them more valuable, should be taken into consideration by the jury in determining how much less valuable, if any, the lands not appropriated are by reason of the appropriation.

ERROR to the Court of Common Pleas of Van Wert county, Ohio.

The plaintiff in error, the plaintiff below, commenced action in the probate court under the appropriation laws, to appropriate a strip of land, through premises owned by the defendant, for right of way.

The preliminary steps having been taken, a jury was empanelled, to determine the compensation due to the defendant and to assess the damages resulting to the residue of the land, by reason of the appropriation.

The jury returned a verdict for the defendant, finding the value of the land appropriated to be \$283.33; the damages to the residue of the defendant's land by reason of the appropriation to be \$1,489.32; and the value of a barn which stood on the land appropriated, to be \$1,137.50. On this verdict the probate court rendered judgment.

Motion to vacate the judgment and set aside the verdict was made and overruled, and exception to the ruling noted by the plaintiff, who then presented his bill of exceptions, which was allowed, signed, sealed and made a part of the record in the case.

A petition in error was then filed by the plaintiff, in the court of common pleas, to reverse said judgment and order of the probate court. At the January term, 1883, of said court, the judgment of the probate court was affirmed.

The plaintiff in error then filed his petition in this court, assigning as error the affirmance by the court of common pleas, of the judgment of the probate court.

To state the question of law involved in the case, it appears from the bill of exceptions that the defendant "gave evidence tending to prove the value of the premises exclusive of all benefits from the proposed improvement; also evidence tending to prove the value of the lands appropriated; also evidence tending to prove that the remaining portion of the lands not taken would be of less value by reason of the appropriation, and tending to prove the amount it would be diminished in value."

The plaintiff also, "gave evidence tending to prove the value of the said premises in the petition described irrespective of any benefits to be derived from said proposed improvement; also tending to prove the value

of the lands, actually appropriated, and the value of the premises subject to the appropriation."

"The said plaintiff also called Spottswood Dandridge, who amongst other things, testified that he was a civil engineer by profession, and that he was the resident engineer of the company, and that he had surveyed and leveled the line of plaintiff's road through the lands in controversy." The said plaintiff propounded the following to said Spottswood Dandridge, to-wit:

"In the construction of the road, what will be its effect upon the drainage of Mr. Williams' (the defendant's land)?"

"By which question the said plaintiff expected to prove that the ditches necessarily made in the construction of the road would drain and make dry the lands of Williams which were otherwise wet—and to which question the defendant objected, and the court sustained the objection. To which ruling the plaintiff by its counsel then and there excepted.

Also the following question:

"What is the nature of Mr. Williams' land and what would be the effect of the making of the ditches and of the grading of the road upon such land?"

"Intending thereby to prove by the witness that the land of Williams was wet and swampy and that the grading and ditching would necessarily benefit said lands. But the said defendants objected to said question, and the court sustained the objection, to which the plaintiff then and there excepted."

Likewise was asked of the same witness the following question:

"Taking into consideration the contour of the line of the road, you may state whether or not the making of the road would necessarily drain and benefit the land of Mr. Williams—of the defendant in the case?"

"The plaintiff thereby expecting to prove by said witness, that the contour of the line of the road was such, that it, of necessity, would drain the wet and bad lands and reclaim the same. But the said defendant objected to said question and the court sustained the objection. To which ruling the said plaintiff by its counsel then and there excepted."

The plaintiff also requested the court to charge the jury as follows, to-wit:

"Special benefits, such as accrue solely to the owner of the lands from which the right of way is taken, as when the excavation of the railroad track has the effect to better drain and reclaim wet and swamp lands, and to render them more valuable, should be taken into consideration by the jury in determining how much less valuable, if any, the lands not appropriated, are by reason of the appropriation."

"Which charge the court refused to give, and to which refusal the plaintiff then and there excepted."

J. N. Alexander and F. L. Hammer, for plaintiff in error.

Counsel for plaintiff, in argument, cited the following authorities:

Fremont, Elkhorn & Missouri R. R. Co. v. Whalen S. C. Neb., cited in 2 O. L. J., 273; Railway v. Longworth, 30 O. S., 108; Railway v. Railway, 30 O. S., 604; Railway v. Ball 5 O. S., 568; 4 O. S.; 6 O. S.

Price & Sweet, for defendants, cited: Railroad v. Ball, supra; Pierce on R. R's., 210-214, Giesey v. Railroad Co., 4 O. S., 308; Hatch v. Railroad, 18 O. S., 92; Railway v. Railway, supra; 22 Am. Rep. 220; 4 Am. Rep., 509; 20 Am. Rep. 220.

MOORE, J.

The record presents two questions for determination. First—That the probate court erred in its refusal to admit certain evidence offered by the plaintiff, tending to prove that the residue of the defendant's land through which the railroad was to be constructed was of such character that it required and would be benefited by drainage and that the ditches that would be made in constructing the road-bed, would necessarily afford such drainage and be of such benefit. This was sought to be proved by the civil engineer who had knowledge of the line of the road and the effect the making of the road-bed would have on the adjacent lands. It was not and could not be claimed that such evidence should be admitted to reduce the compensation for the land actually taken, but only for the purpose of reducing the amount of the damage to be awarded for injury to the residue of the same tract of land owned by the defendants.

The question as presented in the case at bar has not been directly passed upon by the supreme court of our own state.

It appears from the record that the defendants were permitted to give evidence tending to prove that the remaining portion of the same tract of land owned by the defendants from which the appropriation was made, would be of less value by reason thereof and tending to prove the amount it would be diminished in value. This evidence was properly admitted. When we come to consider the findings the jury were called upon to make, under the oath required by the statute; First, the compensation to the owner by reason of the appropriation irrespective of any benefits from the improvement. Second—that in assessing any damage that may occur to the property owner, ascertain how much less valuable the remaining portion of such property will be in consequence of the appropriation.

It seems that it would be proper and necessary, that the jury should know the condition the residue of the defendant's tract of land would be left in after the railroad was made. Suppose, for instance, the civil engineer was called as a witness by the defendants, to establish the fact, that the road-bed would be so constructed as to dam up the water and cause it to flow back upon the remainder of the defendant's land to its injury. Would it be claimed, that such condition could not be proved?

If so, would it not be for the purpose of intelligently informing the jury as to the condition the defendant's tract of land would be left in so that the extent of the injury to such tract could be ascertained and damages awarded accordingly?

I think, with equal propriety, and for the same purpose, it can be shown that the residue of the defendant's tract of land is low and wet and requires drainage, and that the construction of the road will necessarily drain the same and leave it in a good condition for cultivation.

It will show its condition as caused or produced by the improvement. Such benefit so produced is local and incidental to the tract of land from which the appropriation is made. A general benefit such as is common to all lands along the line of the road, as for instance its enhanced value by reason of increased facilities of transportation, etc., are not to be considered, but it can hardly be claimed that such benefit of which we have been speaking and as claimed on the part of the plaintiff comes within this class.

There appears to have been no question made by the courts, but that where a local incidental benefit is blended with, or has an immediate con-

nection with a local incidental injury, the benefit will be taken into consideration in order to estimate the extent of the injury to the residue of the property. This principle is discussed at some length by Judge Bartley in the case of the C. & P. R. R. Co. v. Ball, 5 O. S., 568. The court, however, leaves undertermined the question made in this case.

In *Railway v. Longworth*, 30 O. S., 108. The court say: "Keeping in mind the general rule applicable to all actions for compensation or damage, that it is the actual, as distinguished from any speculative loss that must guide the jury, we think that any facts calculated to fairly enhance the value of the property, or increase the damage to the residue of the tract, may be shown by the owner, and that on the other hand it is equally competent for the railroad company to show the converse for the purpose of reducing the recovery."

The supreme court of Nebraska in a late decision in the case of the *Fremont, Elkhorn & Missouri Valley R. R. Co. v. Whalen*: Held, "Especially benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken."

Therefore, looking to the issues to be submitted to the jury, and in the light of the authorities so far as the question involved has been determined, we are of opinion that the evidence sought to be introduced was competent and relevant as tending to show the condition in which the residue of the defendant's land would be left after the road was constructed and to be taken into consideration by the jury in determining the extent of the injury to such residue and amount of damage to be assessed therefor.

The second claim made by the plaintiff is that the probate court erred in refusing to charge the jury, as requested as follows: "Special benefits such as accrue solely to the owner of the lands from which the right of way is taken, as when the excavation of the railroad track has the effect to better drain and reclaim wet and swamp lands, and to render them more valuable, should be taken into consideration by the jury in determining how much less valuable, if any, the lands not appropriated are by reason of the appropriation."

The conclusion already arrived at by the court virtually determines this question. Applying the same principles and reasoning, we are of opinion that the probate court erred in refusing to charge as requested and that the charge as given was too restricted and limited in its application to the case and tended to mislead the jury.

The judgment of the court of common pleas affirming that of the probate court will be reversed as also that of the probate court, and the cause remanded for further proceedings according to law.

Owen and Hughes, JJ., concurred.

[Superior Court of Cincinnati, General Term.]

JACOB SEASONGOOD ET AL. v. THE MIAMI VALLEY RY. CO. ET AL.

Where a portion only of a tract of land sold to a railroad company is needed for one use of the road, in enforcing payment of the unpaid portion of the price, the part of the land not needed for the road will first be offered for sale, and only where it does not bring sufficient to satisfy the claim, will the entire road be sold.

WORTHINGTON, J.

This case was reserved on the pleadings and evidence.

In August, 1876, the plaintiffs, being owners in fee of a tract of land through which the Miami Valley Ry. Co. wished to construct its railroad, agreed to sell it the land for a certain price, payable in installments, to give immediate possession, and to convey the legal title when the full price was paid, reserving a right of re-entry in case default was made in paying the installments. The contract also contains this clause: "The remedies hereby reserved shall not operate to deprive said Seasongoods and Stall of any other remedies they would have if said remedies had not been reserved."

Under the contract the railway company took possession of the land and located its track, leaving a surplus apparently not essentially necessary for the operation of the road, but which was lawfully acquired because convenient to secure the right of way. Section 3282, Rev. Stat.; *Walsh v. Barton*, 24 O. S., 28.

In November, 1876, the railway company mortgaged its property to secure certain bonds. This mortgage was afterwards foreclosed and the mortgaged property sold and is now held by the defendant, The Cincinnati Northern Ry. Co., as assignee of the purchaser at the sale. The plaintiffs were not made parties to the foreclosure suit, but had knowledge of its pendency, and of the advertisement of the judicial sale. The purchasers at that sale and the Northern Company, at the times of their respective purchases, had no actual knowledge of the contract made with the plaintiffs. Since its purchase the Northern Company has constructed through the land a double track where before the track was single, and has slightly altered the course of the track, so that the ground now actually subjected to the easement of the road-way is not exactly the same as that so subjected at the time of executing the mortgage and of the foreclosure sale.

The plaintiffs seek to obtain payment of the balance due on the original purchase price, and to secure this, ask for the sale of the Cincinnati Northern Ry. as an entirety. The resistance of that company to this procedure is based on the facts above stated; and it further claims that the mortgage and judicial sale did not pass title to the whole tract, but only so much of it as was necessary for the railroad; that it has diverged from the ground, covered by the mortgage and is now occupying land appropriated without right, and for which it can be called to account only by an action to recover the land, or by proceedings to compel a condemnation, and lastly that it has commenced a proceeding in the probate court to condemn the portion of this land it needs, and should only be required to pay the value of that portion and the damages to the residue.

By the agreement between the plaintiffs and the Miami Valley Ry. Co., the equitable title to the entire tract passed to that company, the plaintiffs reserving the legal title. Any person dealing with the railway company as to this land is chargeable with notice that the plaintiffs still held the legal title, because an inspection of the records of deeds would have so informed him; knowing this, it became his duty to inquire what the rights of the railway company were; and he is chargeable with such knowledge as inquiry would have given him. The position of the Northern Ry. Co., is therefore, not bettered by the ignorance of itself and its immediate grantor as to the plaintiffs' rights, though ignorant in fact. In the eye of the law it was well informed, because to obtain information was its duty. This being true, it is further true that the position of that company is not

improved because the plaintiffs knew of the pendency of the foreclosure suit and the impending sale. The plaintiffs took no active course to mislead purchasers at that sale; they had a right to remain quiescent and assume that whoever bought at that sale knew that he was buying subject to their rights: *Fisher's Ex'r v. Mossman*, 11 O. S., 42. It is clear, therefore, that such portion of the land as was mortgaged by the Miami Valley Co., and passed to the Northern Co., under that mortgage, is subject to the rights of the plaintiffs under their contract, and that they are not to be driven to proceedings in the nature of condemnation for the value of their land. But counsel for the Northern Co. claim that it acquired a portion of the tract of which it is now in occupation, not by virtue of the mortgage, but by trespass, or simple taking, referring to that portion which supports the present road-bed, but did not support the road-bed of the Miami Valley Co. at the time of the judicial sale. We think, however, this clearly untenable. It would seem from the evidence that when the mortgage was made, the road had not been constructed at this place. The mortgage included so much of the tract as was necessary for the construction of the road; and this means not merely so much as was at once in the first instance used for the road, but so much of the land in the immediate vicinity of the ground supporting the road-bed, as might then have been reasonably foreseen to be necessary for its proper final location. When the tract was acquired by the Northern Co., the road had not been finished, but was only in process of construction at this place. The quantity of ground really needed for its uses does not appear to have been finally determined. The divergence made by the Northern Co. from the original location after its purchase is so slight as to carry conviction, that the ground thus occupied by it was really necessary to complete the road properly; the action of the Northern Co. is an affirmation of that fact; the latitude of discretion as to the final location of the road vested in the directors of the Miami Valley Co. passed to the Northern Co. in so far as this land is concerned by virtue of the mortgage. And assuming that by the foreclosure sale the Northern Co. only acquired so much of the land as was necessary for the road, we think what now supports its road-bed was necessary and is held by virtue of the mortgage and its foreclosure.

Under these circumstances, the ultimate right of the plaintiffs to the relief granted in *D. X. & B. R. R. v. Lewton*, 20 O. S., 401, cannot, we think, be doubted. The only apparent distinction between *Lewton's* case and the case at bar is that in the former it does not appear that any right of re-entry was expressly reserved, while here there is such a reservation. As to this, it might be urged that the reservation of the legal title of itself implies a right of re-entry, and that no difference is created by expressing what the law would imply. However, be this as it may, the contract here expressly provides that reserving the remedies named shall not deprive the vendors of the rights they would have had if there had been no such reservation. This clause destroys any distinguishing effect that might otherwise have been attributed to the re-entry clause.

But while *Lewton's* case shows the plaintiffs are ultimately entitled, if necessary, to a sale of the Northern Ry. Co. as an entirety, it does not from that follow they can have this relief at once. Counsel for the Northern Co., claiming the mortgage must be construed as covering only the land needed for the road, assert that the residue of the original tract is still owned by the Miami Valley Co., and must be first subjected to satisfy the plaintiff's lien, according to the rule of marshaling incumbered property

in the inverse order of junior sales, as recognized in Ohio in a series of cases. *Smith v. Altick*, 24 O. S., 369.

We have not found it necessary to determine whether the mortgage covers the whole or only a part of the tract, for we think the result in either case is the same. Lewton's case rests on the doctrine of necessity. Public policy forbids selling sections of a railroad-bed to satisfy liens thereon, for that would destroy the unity of the road, and deprive the public of its use. Justice requires that the lienholder should be paid. To preserve the right of the public and the lienholder, the road is therefore sold as an entirety to satisfy a lien upon a part. This is done only from necessity; and where the necessity ceases, the rule ceases too. Where the tract subject to the lien is larger than the needs of the railroad require, the part not needed will first be sold, and the entire railroad sold only in case the lien is not paid from the residue. This principle applied to the case at bar gives the same result as the theory of marshaling claimed by the Northern Co. The plaintiffs are entitled to a decree ascertaining the amount of their claim, and declaring it to be a lien upon the land sold by them to the Miami Valley Co.; and inasmuch as it appears that some part of this land, how much we are unable from the evidence to say, is not needed for the railroad, the decree should further provide that if the amount found due is not paid, that portion of the land should first be offered for sale, and in case it should not be sold, or not bring sufficient to satisfy the plaintiffs' claim, the Northern Ry. Co. should be sold as an entirety. If counsel can agree upon the description of the part of the tract not needed for the railroad, a final decree and order of sale may be entered here; otherwise the decree can only declare the rights of the parties, and the cause must be remanded to special term with instruction to refer to a master to ascertain and report what part of the tract is not needed for the railroad.

One of the defendants, holding a junior lien, the Central Trust Co., of New York, is a foreign corporation, and has been supposed to have been served by publication; on examining the affidavit for publication, however, we find it defective, and a decree for sale taken now must be made without prejudice to the rights of this defendant.

Force and Harmon, JJ., concur.

Jordan & Bettman, for plaintiffs.

Paxton & Warrington, for defendant.

CONTRACTS.

270

[Hamilton District Court.]

JOHN H. DALY v. THE CINCINNATI ST. RY. CO.

A city contractor cannot sue a third party for damages to the streets of a city which the contractor is bound to repair, there being no privity between him and the third party.

Error to the Superior Court of Cincinnati.

SMITH, J.

The action below was commenced by J. H. Daly against the Cincinnati St. Ry. Co. There was a demurrer to the petition. The demurrer was sustained and the plaintiff not desiring to make further amendment, there was a judgment for the defendant. To reverse the judgment, this petition in error was filed. The original petition alleges that John H.

Daly in the years 1877 and 1878 was one of the contractors of the city of Cincinnati for keeping the streets in repair, for district No. 22, including Baymiller street between Hopkins and Wade streets, upon which street the Cincinnati St. Ry. operated a line of street railroad; that the plaintiff had put that street in complete repair in the winter of 1877-1878, when the defendant for the purpose of removing the snow that had accumulated on the tracks, scattered salt thereon, and the combined action of the snow and salt was such as to soften the sub-stratum of the street, so that the heavy vehicles, lumber wagons and drays going over the street rapidly, injured it; that the cost of putting that street in repair caused by the alleged injury of the defendants was some \$800, for which the suit is brought against the Cincinnati St. Ry. Co.

A general demurrer was filed and sustained and judgment for the defendant.

It is apparent from the statement of facts in the petition that there was no privity between these parties. The plaintiff had a contract with the city of Cincinnati. His rights were regulated and determined by the provisions of that contract.

If the city failed in its duty to protect the streets from an improper, unlawful, or an excessive use, or in a manner not contemplated by the parties when this contract was made, it might perhaps be a sufficient excuse for the contractor to give up his contract. Possibly he might be entitled to reclamation. But it gave him no right against the street railroad company by virtue of that contract. There was no such relation between the parties, nothing in the contract that gave him a right of action. He had no such control or possession of the streets as gave him a right of action or imposed upon him the duty of keeping the streets clear and unobstructed. When this case was argued, it was admitted by counsel for plaintiff that no case of the kind could be found in the books, where such an action had been maintained. That of itself is an argument against the plaintiff. In *Lamb v. Stone*, 11 Pick., 527, it was stated that the very fact that there was no precedent for such an action where there were so many occasions for bringing it, was a strong argument against it.

In *Anthony v. Slade and wife*, 11 Met., 290, plaintiff made a contract with the town of Adamstown to keep the poor during the year. While that contract was in force the defendant's wife had committed an assault upon one of the poor by which he was badly hurt and the cost of his support very greatly increased and added to the burden of the plaintiff. He brought suit against the husband and wife for the damages sustained. The court held, Shaw, Chief Justice, giving the opinion, that an action of that kind could not be maintained.

In *Dale v. Grant*, 5 Vroom (N. J.), 142, it was held "that a party who by contract is entitled to all the articles to be manufactured by an incorporated company such party furnishing the raw material, could not maintain an action against a wrong-doer by whose acts it is prevented from furnishing under such contract manufactured goods to as great an extent as it otherwise would have done." This case was very fully considered and the court by way of illustration gives almost this precise case.

This contract was with the city of Cincinnati to keep its streets in repair. It is claimed that a third person by a wrongful use of the streets has made it more difficult for him to perform his contract. It is only the approximate injury that the law aims to compensate, not a mere *damnum absque injuria*.

There is another suggestion. There is no allegation in the petition and there is no statute or ordinance referred to, to show that the acts of the defendant were unlawful of themselves. It was the duty of the city council to keep the streets in repair and free from obstruction and nuisances. The defendants simply adopted one mode of removing the snow from the track. It may have been injurious to plaintiff, but there was no ordinance against it.

So far as appears from the petition, what the defendants did was a lawful act.

It may have imposed a burden on the plaintiff not anticipated when he made the contract, still we do not see how he can maintain this action against the street railroad company for an act not shown to be unlawful in itself.

Judgment affirmed.

Judge O'Connor, for plaintiff in error.

Paxton and Warrington, for defendant.

DIVORCE—JURISDICTION.

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[Hamilton Common Pleas.]

IN RE EDWARD TALBOT, HABEAS CORPUS.

1. The court first acquiring jurisdiction in a divorce case alone can decree as to the custody of children.
2. A suit by the wife in one court with summons issued but returned not served and an alias issued but before its service, the husband brought suit in another county: Held, the attempt to get service being followed by service no other court could get jurisdiction and that the decree in the husband's suit was *coram non judice* and void.
3. Under such circumstances the court will entertain an application in habeas corpus on behalf of the mother for the custody of the child pending the case for divorce.
4. A court in one county having obtained jurisdiction in such a case may send its process in habeas corpus into any county of the state.

JOHNSTON, J.

Clara Talbot, the mother of one Edward Talbot, an infant of tender years, made application to this court on April 4, 1883, for a writ of habeas corpus, alleging that she was the mother of this infant, and that the custody belonged to her; but that he was unlawfully restrained of his liberty, whereby she was deprived of his custody, by Charles S. Talbot, who, it appears, is the father; and she prayed that the writ might issue, that the cause of his illegal detention might be inquired into. This being a privileged writ, a writ of right, it was granted at once.

One of the attorneys at this bar was deputed to execute the writ, take the body of the child, and produce it before the court, which was done. It seems that the child was found in the custody of its father in Hancock county, in this state, where he and the child at that time were living or domiciled, and the body of the child having been produced before the court, the father made return and answer, setting forth in substance that he was its father, that he was a resident of Hancock county, and that in December, 1881, having filed a petition for divorce against his wife Clara, in the Hancock common pleas, that she was duly served with process; and that having prayed in his petition, not only for a divorce from her, but also for the custody of this child, that thereafter, to-wit, at the January term of

that court, 1882, by the judgment of that court, he obtained a divorce from his wife and the court also decreed to him the custody of this child; therefore, he had the lawful custody of the child; and for that reason the petition should be dismissed. He further alleged in his return that his condition and circumstances were the same as at the time the decree was granted; and there was no reason, since the divorce, to justify the court in making a change in the custody. Furthermore, it was claimed that the judgment of the Hancock common pleas remaining in full force and unreversed, that if any modification was to be had of that decree, it must be had there, in that court, and not here, in the common pleas, in a proceeding in habeas corpus; and for these, and other reasons, it was asked that the petition be dismissed, and the custody of this child recommitted to him.

For reply to this return, by the petitioner, it is alleged, that without authority of law or her consent the father had obtained the custody of the child and taken it to Hancock county; that before he commenced his suit in the common pleas of that county for a divorce, she, to-wit, on November 16, 1881, had commenced a like suit against him in the common pleas court of this county, where she resided, where the child was born, and where the father had for a great many years resided, and where they were married, in which she prayed for a divorce against him upon the ground of willful absence and gross neglect of duty, and also asked that she might be decreed the custody, that that action is still pending and undetermined. It is further alleged that the defendant is not, and was not at the time the said decree was rendered, a proper person to take charge of this child; that his habits were such as not to entitle him to have charge of its training; and that never having surrendered the custody to him lawfully, and on account of his being an unfit person to have the care and custody of it, she asks that her petition may be granted, and the custody awarded to her, notwithstanding the proceedings taken in the Hancock common pleas. It is upon the issues thus presented, as substantially stated, that the inquiry has been conducted, and is now submitted to the court for judgment.

It is almost time that these parties should see an end of their tribulations in the courts. It is high time that this child, that has been banded from one court to another for four or five years, should learn its status, and what is to become of it in the future. It is a child, apparently, of much promise, a bright, intelligent lad, some eight years of age, and if once it can be gotten out of the way of the courts, and can receive care, protection and education without contention, he may become a useful citizen. Some three suits have been commenced by the mother against the father for divorce or claims in this court within a few years; in each, praying for the custody of this child. The first of these cases reached a trial and was dismissed, there being no special order made as to the custody of the child. At the time the suit was instituted, at the time it was tried, and at the time the suit was dismissed, the custody in fact was in the mother. During all of its life, the greater portion of the time, it has been in the custody of the mother, and she has supported it in one way or another, with little aid from her husband, chiefly by the assistance of her mother and stepfather. The last suit is yet undetermined.

While these suits were thus pending in this county, and particularly while this last case was pending, in which she must at the time of commencing the action have had the custody of the child, for she alleges the

fact that the father had deserted her and the child, to-wit, November, 1881, while that suit was pending undetermined, thereafter he commenced the action as already stated, in the Hancock common pleas, to obtain a divorce from her, and to obtain the custody of this child; and here arises a question of jurisdiction that underlies the whole case.

The action of divorce is highly equitable, involving the highest interests of the parties, involving not only their personal comfort and their future prospects to a great extent, but involving the interests of any child or children born of their marriage; and it is to regulate and provide for and protect these delicate interests that this suit is authorized. It is a well established rule of practice in equity, that where there are courts of concurrent or equal jurisdiction over the subject matter and the person, that that court obtaining first the jurisdiction, must retain the right and the power to determine all questions between the parties. If it were otherwise, there would be no security in proceedings of this kind, nor, in fact, in any equitable proceedings at all. If the parties were at liberty, after one had brought a suit in one court, to go into another court of concurrent jurisdiction and bring a like action, one court would be contending with another court of like jurisdiction, each seeking to take the jurisdiction of the other away, in effect enjoining the proceeding of the other court.

Our supreme court has referred to the inconsistency of such a practice, and perhaps in no case more clearly than in that of *Merrill v. Lake et al.*, 16 O., 374, 405. That, it is true, was a case in which an injunction was sought to restrain a court of concurrent jurisdiction from proceeding. Say the court: "The chief ground for dissolving the attachment is that it restrains the action of a court of equal and concurrent jurisdiction. It is true that an injunction to restrain proceedings in chancery is a novelty in equity practice; but whether a case might not arise which would induce the exercise of the restraining power in this mode, which, in England, is of frequent exercise in a different form, not suited to the organization of our courts, it is not necessary for us to decide. We shall confine ourselves to the inquiry whether a court of equal jurisdiction can enjoin the proceedings of another court of equal jurisdiction. This, I presume, would not be claimed. But so far as the injunction proceeds in this case, it extends to matters over which the court of common pleas has precisely the same jurisdiction as the supreme court. If the supreme court could enjoin the proceedings of the court of common pleas, the common pleas could equally enjoin the proceedings of the supreme court. And if the supreme court can take the cases pending in the common pleas, and draw them to its own jurisdiction, we see no reason why the common pleas could not, with equal propriety, enjoin the proceedings in this court, and take possession of this very case. The rule is, where there are courts of equal and concurrent jurisdiction, that the court possesses the case in which jurisdiction first attaches."

So again in *Keating v. Spink*, 3 O., 126, the supreme court, having the question of jurisdiction under consideration, announced this as the true doctrine, adopting the view of another court, a case in *Peck v. Jenness*, How., 612: "It is a doctrine too long established to require the citation of authorities, that where the jurisdiction of the court and the right of the plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but necessity.

For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy."

The action of the wife in this court was commenced on November 16, 1881, that of the husband in the Hancock common pleas on December 3, 1881. Unquestionably, her suit was first in point of time. There was this peculiarity about it, that although filed first, the first summons being immediately issued, was not served upon the defendant, but immediately upon its return, an alias summons issued to the sheriff of Hancock county, and on December 18, 1881, with a copy of the petition in the case here, were both served upon the husband. The summons in the case in Hancock county was first served upon the wife here. He was advised, however, December 18, 1881, that he had been sued here by the wife, that she had filed a petition before he had filed a petition against her. He took no notice of the proceedings in this court at all, until after he had gone forward with this knowledge, and in the early part of February, 1882, obtained a decree of divorce from his wife in the Hancock common pleas, in which the court awarded to him the custody of this child. Thereafter he appeared in this court and by motion asked to have her action dismissed on account of the decree already in the Hancock common pleas. This motion was overruled.

Our statute provides, section 4987, "that an attempt to commence an action shall be deemed equivalent to the commencement thereof, when the party diligently endeavors to procure a service, but such attempt must be followed by service within sixty days." That was done in this case. She commenced her action on November 16, 1881. She endeavored to obtain immediate service, but failed upon the first writ; an alias summons issued, and she was successful within the sixty days; so that, by a fair construction of this statute, her action has commenced on November 16, 1881, within the meaning of the law. The effect of this action was to draw to this court, by virtue of its process upon him, the husband; it drew him within the jurisdiction of this court. This court had unquestionably jurisdiction of the subject-matter, divorce, alimony, the custody of the child. It had jurisdiction over her, because she submitted herself to the jurisdiction, and invoked it by filing here her petition; so that, he having been drawn within the jurisdiction of this court by its process, long before he obtained his decree of divorce, and he well knowing the nature of the proceedings pending here against him, it would seem to the court that any action of the common pleas court in Hancock county, thereafter, was *coram non iudice*. There is a difference between a lack or want of power in a court to act, and the irregular or defective exercise of the power belonging to the court. This is the former. The Hancock common pleas undertook to act in a matter in which it had no jurisdiction; that is to say, the jurisdiction to try and determine the question of divorce between the husband and the wife had been taken by the common pleas court of this county, and it possessed it at the time the common pleas court of Hancock county undertook to enter the decree. If this court, therefore, possessed the right, had jurisdiction over both of the parties and the subject matter, it would necessarily follow that the right did not belong to the Hancock common pleas. The right to try and determine the same question between said parties could not exist in both courts at the same time.

"A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ

draws the person or thing within the power of the court; the court, once having by its process acquired the right to adjudicate upon a person or thing, it has what is called jurisdiction. This power of jurisdiction is only acquired by its process. To give jurisdiction is the object of process. A court then may act first, without power or jurisdiction; second, having power or jurisdiction may exercise it wrongfully; or third, irregularly. In the first instance, the act, or judgment of the court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power." *Paine v. Mooreland*, 15 O., 444.

I desire to refer again to the case of *Merril v. Lake*, supra, page 405, and to repeat that: "The rule is, where there are courts of equal and concurrent jurisdiction, that the court possesses the case in which jurisdiction first attaches." "It possesses the case." At the time, therefore, that the Hancock common pleas undertook to enter a judgment in this case on behalf of the husband, the Hamilton common pleas possessed the case, as between these two parties, and alone had the right to try and determine the questions between them. For the same questions to be determined in the Hancock common pleas would have compelled the plaintiff here to have abandoned her case and have gone to the common pleas of Hancock county and by a cross petition sought the relief she sought here, and that would be doing virtually what is characterized as an anomaly in the practice; it would have virtually been the Hancock common pleas enjoining this court from proceeding in an action over which it first had the undoubted jurisdiction, both of the person and the subject matter. Therefore, the question raised in argument by counsel for the respondent, cannot be sustained, to-wit, that it appearing in evidence that this petitioner was a party to the suit in the Hancock common pleas; that having failed to take any notice of that case and there having been a decree rendered against her, she is barred by that proceeding, she is estopped to gainsay the action of that court, she cannot in this proceeding inquire into that jurisdiction for that would be attacking the record of a court of competent jurisdiction collaterally. If the action of the Hancock common pleas had simply been erroneous or irregular, that is to say, if it had acquired properly jurisdiction in the premises, the position taken by counsel for the respondent would be correct. A party may not collaterally attack the judgment of a court, where it had jurisdiction over the person and the subject matter. The judgment if erroneous in such cases is simply voidable, not absolutely void, and, therefore, the party in the action where the irregularity or error occurred must by motion for new trial, or by petition in error in a higher court, have that irregularity or erroneous judgment reversed. But this doctrine does not apply where there is offered in evidence the judgment of a court, which, by the evidence in the case, it appears was coram non iudice, another court of concurrent jurisdiction at that time having acquired the right to determine all questions involved. Where it appears that the court was without jurisdiction at the time the judgment was rendered, that fact may be shown collaterally; not so, however, where the court at the time had jurisdiction, and the judgment was simply erroneous or voidable. Every judgment depends for its force and validity on the competency and authority of the tribunal which pronounces it, and

may be assailed by showing a want or failure of jurisdiction over the subject matter or the person even although absolutely conclusive in other particulars, *Pennywit v. Foote*, 27 O. S., 600, 615. And in *Rose v. Himely*, 4 Cranch, 269, Marshall, C. J., said: "In some cases the jurisdiction depends as well on the state of things as on the constitution of the court," and *Endel v. Leibrock*, 33 O. S., 250, 256; 37 O. S., 317, also are in point.

That then leaves, as it seems to the court, the husband, or respondent in this case, without any benefits derived from the judgment of the Hancock common pleas, that he may set up as against the wife in this proceeding. In other words, the rule of practice does not apply, as already referred to, that the mother, in order to obtain a modification of the decree, must go to Hancock county, and in that case ask to have it done.

That decree, in the opinion of this court, having no binding efficacy upon her, nor upon the child, as to its custody, the question then arises simply whether the evidence in this case shows the father rather than the mother, at least for the time being, to be the fitter custodian of the child. All things being equal as between the husband and the wife, neither one showing any more fitness to take charge of their child than the other, as a matter of law the custody belongs to the father; he is recognized in law as the head of the family; he is obliged to support his minor children. But the interests of the child are paramount to the naked legal right of either parent. "Neither of the parents has any right that can be made to conflict with the welfare of their child." *Gishwiler v. Dodez*, 4 O. S., 615. What does the evidence show in this case? It shows that there has been a great deal of trouble between these parties. Four years ago, while sitting in this room, it appears, although it has faded from my recollection entirely, this father and mother were here to have the case of divorce to which reference has been made, tried; and upon the hearing of all the evidence in the case, it was the judgment of this court that there was no good reason why they should not blot out their past differences, and, going away to themselves, away from perhaps the unwarrantable interference of parents upon either side, commence life anew, both of them being persons, apparently at least, of intelligence, and of respectability, and well-appearing personally. At that time, as already stated, no order was made as to the custody of the child, but, the mother having the custody, it seems with the consent of the father retained it. He stood upon what perhaps he considered his reserved rights; she upon her reserved rights, and not heeding the admonitions of the court, they continued to pull apart and remained unreconciled, and this child has served little better than a bone of contention between the two, ever since. At that time the child was of very tender years, only some four years of age. It does not seem for a time, at least, that he expressed any particular desire to take charge of it or support it; but its maintenance and support and nursing were by his consent devolved upon his wife, and he contributed nothing to her support, and she was left to take care of this child in its very tender years as best as she could, by working and aiding her mother in housekeeping. A short time before his suit was commenced by him in the Hancock common pleas in 1881, probably, under the representations that he intended to take the child out in the city and get it a suit of clothes and some shoes, he took it away from the place where the mother and child were domiciled, on Eighth street, near Central avenue, and failed to return it; and from that time it might be stated that he claimed the custody of the child as against the mother, and it was about that time, or shortly afterwards, without, as the

evidence shows, the concurrence of the mother, but against her wishes, it was taken to Hancock county, where the father at that time was employed, and where the child, the court must say, was well taken care of by its aunt, Mrs. Phillips.

The mother has shown her fitness, at least for the time being, to take charge of this child.

There was one fact developed in this case that the court is pleased to say has been with reasonable satisfaction cleared up, and otherwise would have gone very far in denying the mother the custody of this child, and that was the fact that at one time she took the child and placed it in an orphan asylum. That is not the proper place for a child with both parents living. It is a proper place for children who are so unfortunate as to have been left without either father or mother, and in indigent circumstances, but it is an extreme case that will excuse a mother, having the custody of a child as bright and deserving as this, under any circumstances placing it in a public institution of that kind, the father and the mother both living, and its grandparents residing in the very city where it was done.

As already stated, one parent being just as fit to take the custody of their child as the other, in law the custody belongs to the father. But the evidence in this case discloses a state of facts that the court must say does not present the case of a father and mother, equally fit. The father, unfortunately, has been shown to be irregular in his habits; that he is drinking rather too much, and associating with a class of people that does not become a father, nor, in fact, anybody. It is unnecessary to refer to the testimony that was introduced in evidence yesterday of some of the officers of Findlay, in Hancock county. At one time it was intimated that perhaps the mother was not living in a proper manner, but that I think has been brushed away. For the present it seems she is rooming on the corner of Twelfth and Vine, and there has this child. It was intimated that some improper relations existed between her and her stepfather, but I feel satisfied from the evidence that nothing improper has occurred between them. The stepfather, it seems, when this mother was of tender years, married her mother, and has been quite a father to this petitioner and some three or four other members of the family ever since, and has expressed a willingness, and has shown the ability, to protect this mother, if necessary, and certainly this child, so that it shall not want. He is connected with one of the most respectable business firms in this city, and has been for eighteen or nineteen years, and certainly a man above suspicion, to have occupied the responsible position he has for that length of time in so respectable a business firm. He has shown himself to be a man of property, and to receive salary enough to protect his child in the event that the mother should be unable to do so.

The suit is pending in this court for divorce between these parties, and for the custody of this child, and any disposition the court now makes of this child is liable, of course, to be modified upon a trial of that case, and the sooner it be tried, in my opinion, the better for both of these parties. I think that I know enough about these parties now that they ought to be divorced, and the sooner, the better for society, morality, the parties, and for this child. The jurisdiction having, in my opinion failed in the other case, might cause some embarrassments, and if they were not legally divorced, there is a case here pending that is ready and ripe for trial, where, if the parties both desire to be rid each of the other, it will not be difficult to obtain a decree, which will settle their legal status for all time

to come, and enable each, if they desire to assume new relations, to do so without the fear of a cloud cast upon, so to speak, their title or right to do so.

The mother, by the weight of the evidence, having shown herself to be capable of taking care of the child, and a fit custodian of it, at least until her relations may change very materially, is given the custody by the court; and in doing this I must make it a part of the order, that while she is to have the custody of this boy, she must not forget that Charles W. Talbot is its father, and he must, conducting himself in a proper manner at all suitable and reasonable times have the right to see the child, and to talk to him; and he should never be taught to believe that his father was dead, until removed by the act of God. It appears in evidence here that this child had in some way been advised that its mother was dead. That is very improper teaching, and the order of the court will be that the custody shall be given to the mother, with the right at all times of the father to call and see it, if he conduct himself in proper manner; and this order will remain in force until the disposition of the divorce case. When that case is tried, then the custody of this child will be determined, definitely, subject, however, to future modification as decided in *Hoffman v. Hoffman*, 15 O. S., 427.

Nicholas Longworth and F. A. Thompson, for petitioner.

E. T. Dunn and F. W. Brown, for defendant.

BASTARDY.

[Hamilton District Court.]

WILLIAM SCHAFFER v. ROSA B. MUELLER.

Where a married woman gave birth to a child during her marriage, but born after obtaining a divorce, and the testimony showed that she had been deserted by her husband several years previous and could not have had access to him, a verdict and judgment that the child was a bastard and that defendant was his father, will not be disturbed.

Error to the Common Pleas.

JOHNSTON, J.

This action was commenced in the court below for the purpose of establishing the paternity of a child alleged to have been begotten and born out of lawful wedlock; in other words a proceeding under the bastardy act. There was a verdict for the plaintiff against the putative father thereof, and judgment fixing \$300 as the amount he should pay.

The trial of the case took place at the November term, 1880, and it is a case rather unlike the majority of this class of cases. The testimony developed that the child was born in December, 1878; that in November, 1878, this same mother obtained a decree of divorce in this county from her then husband, who was not Mr. Schaffer, the alleged father of her child. The child according to the ordinary course of nature must have been begotten somewhere in the month of March. According to the record, she was at that time a married woman.

When the mother was sworn, objection was made by defendant, that she was an incompetent witness for the reason that she was at the time this child was alleged to have been begotten a married woman, and for her

to tell anything about the paternity of this child would be developing communications that must have passed between the husband and wife out of the presence of a known third party, which the statute has prohibited on the ground of public policy and morality. The court, however, subject to the objection of counsel, permitted her to testify, and other witnesses were permitted to testify, whose testimony corroborated that of the plaintiff. The testimony of the plaintiff was that while it was true that in March, 1878, this child must have been begotten, she was a married woman, but she proceeded to testify, against the objection of defendant, that while she was married to Mueller, in 1874, that he deserted her in six months after the marriage, and that she never had seen him since, that they had never cohabited together thereafter. She is corroborated in this statement by her mother, Mrs. Anderson, who testifies that immediately after the desertion, which was in 1875, and this child, according to the evidence, must have been begotten in 1878, that from and after the early part of 1875, the husband was never known by the mother to have visited his wife at all. A motion was made for a non-suit, when the plaintiff rested her case on the ground that it appearing from the testimony that this child must have been begotten during wedlock, the presumption was conclusive that it was a legitimate child, although born after the marriage relation had ceased to exist. The court overruled the motion for a non-suit, and put the defendant upon his defense. He did not deny but that he might have been the father of this child, but his testimony consisted of statements to the effect that access to the wife by her husband during all the year 1878 and month of March, 1878, was not impossible; that he seen them talking together; that he had visited his wife at different places; that he tried to get up a reconciliation with her during that year. Evidently the jury did not believe this. A question of practice was first argued and submitted to the court. This trial took place in November, 1880. A motion was made for a new trial to set aside the verdict on account of errors occurring during the progress of the trial, for refusal of the court to non-suit the plaintiff when she rested her case, and for errors occurring in refusing certain special charges asked by defendant, and for the reason that the court erred in his general charge to the jury. This motion was not disposed of until November term, 1881, a year after the trial. The docket and journal entries show that not until April, 1882, was a bill of exceptions signed, sealed and made a part of the record. The petition in error is prosecuted upon a record presenting this state of facts, assigning errors that appear upon the face of the bill of exceptions, taken apparently almost eighteen months after the trial term and more than thirty days after the term at which the motion for a new trial was overruled. In the argument of the case, the first question presented to this court by defendant in error was, that there was not a bill of exceptions a part of the record which this court could in law consider, for two reasons, first, that it was not taken at the trial term, nor was it taken at the term at which the motion for a new trial was overruled, nor within thirty days thereafter. The entry of the judge trying this case was in proper form and the endorsement in proper form, to-wit; although in fact endorsed by him, that is in the bill of exceptions, made a part of the record in April, 1882, the endorsement plainly written was entered as of November term, 1881, on the minutes of December 31, 1881, being the last day of that term. The clerk, although afterwards, as we find, having done his duty, yet upon the appearance docket

noted in the margin that the entry allowing the bill of exceptions was entered as of April 22, 1882. Upon an examination of the minutes we find that this bill of exceptions taken to the overruling of the motion for a new trial, was entered and made part of the record at November term, 1881, at which time the motion was overruled, so that that objection made by defendant in error that no bill of exceptions was presented for our consideration, is not well taken. It, however, does not bring upon the record for consideration anything but the alleged error, that the court erred in overruling the motion for a new trial. The exceptions taken during the progress of the trial to the admission of the testimony of this woman, can not be considered. All other exceptions taken during the progress of the trial to the admission of evidence cannot be considered. This is well settled and in no place perhaps is it better considered than in *Dayton v. Hinsey*, 32 O. S., 258, 263, where it was held, that a bill of exceptions must be signed and sealed as of the trial term or within thirty days thereafter, and objections to the decision should be taken when the ruling is made, and where a bill of exceptions is made at the trial term embodying all the evidence, errors of law occurring at the trial not saved by special bill of exceptions, will be lost. That brings us to the question whether the court erred in not granting a new trial, and this assignment of error permits us to look into the whole record of the case as presented upon the evidence and charge of the court, and special charges given and refused, to ascertain whether any error has intervened to the prejudice of the plaintiff in error. I have briefly referred to the character of the evidence introduced on the trial of the case. The court charged the jury upon the vital question raised in the case in this language:

"Next the plaintiff must have been delivered of a bastard child. Now, in the first place a bastard is one begotten and born out of lawful wedlock, and the law presumes that a person begotten during wedlock is a legitimate child, it therefore, appearing in testimony that at the time this child was begotten plaintiff was a married woman, the presumption in law was that the child was legitimate; but this presumption may be overcome by testimony, but to overcome this presumption, the plaintiff must satisfy you by affirmative testimony conclusively; that there was such a separation between plaintiff and her alleged husband at and about the time the child was begotten as to preclude the idea of access between the parties; the burden is upon the plaintiff to satisfy you, not simply by preponderance of evidence, but must prove to your entire satisfaction that there was such a separation at the time the child was begotten as to preclude him from being the father. If such proof has been presented, and you are satisfied beyond a reasonable doubt that at the time the child was begotten there was such a separation as to preclude any access between them, then you may find that the child was a bastard child * * * and proceed to find whether or not he was the father of that child. But unless you so find that there was such a separation, etc., then you will return a verdict of not guilty." We have examined the various authorities presented for and against this proposition, and we think the decided weight of authorities is that the court gave the law properly to the jury. There is a case very much relied upon by counsel for plaintiff in error; it is also relied upon by counsel for this woman as supporting his theory; that of *Haworth v. Gill*, 30 O. S., 627. The court say many things in the body of the decision that do not appear in the syllabus of the case. The syllabus, we understand,

of our Ohio State Reports covers the principles of law decided or intended to be decided in the body of the case; anything outside of that is simply the opinion of the judge announcing it. The syllabus of that case is: "Proceedings in bastardy cannot be maintained on complaint of the mother, under the act of April 3, 1873, for the maintenance and support of illegitimate children, when the child in question was begotten and born during the lawful wedlock." That case differs from this in this respect, that while begotten in lawful wedlock, the child was born out of wedlock. The woman was divorced in November, 1878, and the child was born in November following.

The statute, section 5614, reads "When an unmarried woman, who has been delivered of or is pregnant with a bastard child, makes complaint thereof, etc."

The case at bar is the case of an unmarried woman being delivered of a bastard child, who made complaint.

Many cases have been cited bearing upon this question of the impropriety of the parent of a child being permitted in a court of justice to bastardize it by testifying to its illegitimacy. As already stated in the charge as given by the court to the jury, so jealous is the state of its citizens and the right of its citizens, and the relations existing between man and wife, that nothing that takes place between them in the confidence reposed by one in the other on account of the moral relations, ought to be permitted to be divulged in a court of justice unless said or done in the presence of a known third party.

For a still greater reason, ought not a mother to be permitted in a court of justice to testify that her child is not the offspring of herself and husband, and while this presumption is so strong and so firmly upheld by courts of law and public policy, it is not conclusive presumption, but may under certain circumstances yield when the facts and circumstances are such as to over-ride it and break it down. The law is, and very wisely too, that the testimony of the mother alone will not be sufficient. She must not only be corroborated in showing that it was a physical impossibility for her husband to have been the father of the child, but it must be established with the same degree of testimony required in criminal cases. The facts must be established beyond a reasonable doubt, and when thus established, where it is demonstrated to the jury beyond any doubt whatever, that the child could not have been begotten by the husband of complainant, this strong presumption is broken down.

One English case is cited as laying down this law very clearly. *Hargrave v. Hargrave*, 9 Bev., 555. "The presumption of legitimacy may be wholly removed by showing that the husband was absent during the entire period during which the child in the course of nature must have been begotten. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman."

It is not necessary to add to the authorities already cited.

The charge of the court was within these decisions. A series of special charges were asked and refused.

A general exception was taken at the end of the series. Some of the charges asked contained good; others, bad law. It is settled in *Ins. Co. v. Tobin et al.*, 32 O. S., 77, that where a series of propositions are asked to be given by the court as a whole, and it be found that any one of the series contains bad law, a general exception that the court refused to give the series, is bad.

For the reasons stated, therefore, we think that this case involving as it did some singular questions, was properly tried, that no injustice was done this plaintiff in error and that the judgment entered upon the verdict must stand.

Therefore, the judgment of the court below will be affirmed.

Thos. F. Shay, for plaintiff in error.

Sage and Hinkle and S. Harris, for defendant in error.

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[Hamilton District Court.]

J. W. SOHN v. HENRY FREIBERG.

For opinion in this case see 6 Ohio Dec. R., 1175 (s. c. 11 Am. Law Rec., 736).

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PAYMENT OF A LEGACY.

[Hamilton District Court.]

JOHN H. BRINKER v. ALFRED SPEER, EXR..

Where the payment of a legacy depends upon the discretion of the executor of a will, the legatee cannot recover it for himself, and it cannot be subjected the payment of his debts.

Error to the Court of Common Pleas.

SMITH, J.

The plaintiff below filed a petition alleging that he recovered a judgment against Charles Speer, that execution issued and was returned unsatisfied, and that he had certain interests in a will made by his father, that he commenced proceedings in aid of execution before the probate court and caused an order to issue to the defendant, Alfred Speer, the executor of his father's estate, for an examination before a referee directing him not to pay over any money on account of the legacy; that notwithstanding this order, which was properly issued, the executor had paid sundry sums of money to the legatee, and the prayer of the petition was that the said executor be required to refund or repay to the plaintiff the amount on his judgment.

The defendant, Alfred Speer, filed an answer admitting that he was the executor of his father's estate, and that an affidavit had been filed, and citation issued from the probate court, but denied that this operated as a restraining order, or that he was restrained by reason of that citation from paying over the money to Charles Speer, and denied that there was any interest which Charles Speer held under the will of his father liable to be taken in execution or proceeding in aid of execution.

There was another defense filed, setting up certain proceedings before the probate court, which it was claimed was a bar to a further prosecution of this suit. No reply was filed to this answer. The case came on for trial in the common pleas court.

The bill of exceptions contains the will of Nelson Speer, deceased, certain agreements of counsel and the testimony of Alfred Speer.

The will of Nelson Speer, probated in 1876, provides for the payment of his debts, and certain legacies to certain other of his children. The fourth article reads as follows: "I give to my son, Charles Speer, \$2,500,

to be paid to him or his family as thought best by my executor. I make no charge against him for board nor for any money I have paid to him or for him before the day of this instrument."

The fifth clause provides for the payment of certain legacies to another son, and the eighth and ninth for the distribution of the residue of the estate by the executor to different members of his family and different children as thought best by the executor. Alfred Speer, upon the stand, testified that he was the executor of his father's estate, and had made payments to Charles Speer from time to time for his support in sundry sums, some large, some small, in pursuance of the discretion vested in him by the fourth article of the will; that these payment had been made after he had been served with notice issued from the probate court in 1876. The substantial question in this case is, what was the interest, if any, of Charles Speer in the will of his father's estate by virtue of this provision.

I think it clear that the testator had a right to give his bounty as he saw fit, and exclude it in terms, if he so desired from the creditors of the legatee. In *Nichol's Assignee v. Eaton*, 97 U. S., 727, that proposition seems to be very fully considered and numerous authorities are cited by the judge giving the opinion. In that case the testator had given an annual income to his son with the provision that if his son became insolvent, then the income should cease and go to his family. It was claimed on the part of the assignee that that provision was invalid by law, that the testator could not give a life estate and deprive creditors of its benefit, not cut it off in case the legatee became insolvent. The supreme court took a different view of the case and held that it could be done.

It is apparent from this will that it was the intention of the testator that no part of this legacy should be appropriated to the payment of his son's debts. In the same clause, he says, in substance: "I make no charge against him for board nor for any money, etc."

"Whatever I have done for him, whatever moneys I have paid for him, I remit."

He would not be very likely to remit his own debts and leave a legacy or bounty in such a shape intentionally that it might be given to his son's creditors. It seems to me also from the construction of the will that this legacy was not one which Charles Speer himself could collect by law or enforce. Although the first part purports to be a gift to his son, yet it is not payable to him, but payable to him or his family according to the discretion of the executor.

Payment depends upon the discretion of the executor.

Now, it seems to me that where a legacy is payable to a legatee only upon the discretion of another, he cannot recover for it himself, and if he cannot recover for it himself neither can it be subjected to the payment of his debts. In *White v. Jenkins & Turner, Trustees, etc.*, 16 Mass., 62, an attempt was made to subject to garnishee process a legacy given to certain trustees to be expended for the support of the son of the donor, and if he should not live to expend the same in his necessary support, then to be paid over to the other children of the donor, and the court decided that the trustees could not be held as garnishees of the son. See also *Ward v. Morgan*, 5 Cold., (Tenn.), 407; *Dierbert's Appeal*, 78 Pa., 296; *Portsmouth v. Shackelford*, 46 N. H., 425; *Nichols, Assignee, v. Eaton*, 91 U. S., 724; 1 *Perry on Trusts*, section 250.

If that be the case, if this was a legacy which Charles Speer could not himself collect by law; and was payable at the discretion of the executor

either to him or to his family, it seems to us it could not be reached by a proceeding in aid of execution.

Judgment affirmed.

J. D. Macneale, for plaintiff in error.

D. B. Huston for defendant in error.

PARTY WALL—INJUNCTION.

[Hamilton Common Pleas.]

LOUIS DUHME ET AL. v. FRANCIS D. JONES AND JULIUS VOSS.

1. Where an owner of property on which he built two houses having a common wall, conveys the houses to the persons by one deed as tenants in common and they, by amicable partition, divide the property, having the middle line of the wall as the division, these facts do not distinguish the case from *Hieatt v. Morris*, 10 O. S., 523, and where fifty years afterwards the owner of one house desires to put on improvements more suitable to the increased values, he may take down his wall.
2. And where no application for a restraining order was made until after great expense had been incurred this also would be a sufficient reason for refusing an injunction.

The plaintiff, the widow and heirs of Herman H. Duhme, being the owners of the premises, 108 West Fifth street, under lease to Julius Voss for a term of years for a jeweler's store, filed their petition against Frances D. Jones, owner of adjoining premises, to restrain her from taking down a partition wall between the two stores. A preliminary restraining order was granted, and pending the motion to vacate the injunction, Julius Voss, tenant of the plaintiffs, was made a party and filed his answer and cross-petition, also asking a restraining order against the defendant. It appeared the two houses were part of one structure built in 1836 by Abel Shawk; that he had built three buildings and put in division walls eight inches thick; that in 1856 Shawk conveyed all three by one deed to Louis Rosentiel, John Crawford and Herman H. Duhme, and they, by deed among themselves partitioned the land, each taking a building described as running to the center of the division walls. The defendant is a grantee under John Crawford, and the claim is that under these deeds, these walls could not be removed, except by mutual consent.

JOHNSTON, J.

The case comes up upon a motion to dissolve the restraining order, also for a restraining order upon the cross-petition of Voss, the tenant. The question arises whether the seemingly sacred character given to a common wall between adjoining premises shall forever remain an embargo on the future improvement of the adjoining properties, until both adjoining owners shall consent to its being taken down.

There is a question independent of this consideration that virtually disposes of the motion to dissolve the injunction. It appears from the evidence that long before Mrs. Jones proceeded to take down the party wall to improve her property, she notified the Duhmes and their tenant, and that the application for an injunction by them, was not made until after she had torn down her west wall and had been to great expense otherwise.

It is a well settled principle in equity that if a party would avail himself of his equitable rights in an action of this character, he should not

be guilty of laches; that he should be vigilant, and not suffer the other party to incur expense, or leave him under the impression that no adverse steps are to be taken against him. Irrespective of this question, the claim of the plaintiffs as well as of their tenant, Voss, is without equity, as against Mrs. Jones.

It appears from the evidence, that this common wall was built almost fifty years ago; that it is wholly unsuited to the character of the improvements being made in the vicinity, and the value of the property on which it stands; that it is weak and cracked, and when the end walls of Mrs. Jones' building are removed, it is doubtful if the common wall will stand.

It is the law everywhere, that an adjoining owner may remove a common wall and rebuild it or repair it where it has become unsafe, and he desires to improve his property. In many of the states it is held that the adjoining proprietor may be compelled to contribute a portion of the expense. *Campbell v. Meisen*, 4 John., Ch., 333; *Wood on Nuisances*, section 230; 15 N. Y., 601; *Partridge v. Culbert*, 50 Jd., 643; *Freeman on Cotenancy*, section 255, and various English cases cited; 4 Duer, 65.

Hence being an unsafe wall, the injunction might well be refused.

Upon the claim specially made by the tenant that the wall is not in a ruinous or unsafe condition, and that the defendant could not under any circumstances, remove a brick in a common wall that might tend to weaken it without his consent, if this were the only question of law involved, the court would have little hesitancy in saying that the decisions of the supreme court of this state in two cases clearly indicate that the old doctrine, adhered to yet in many of the American courts, that a party wall cannot be taken down in part where an adjoining proprietor desires to improve his property without the other's consent, is not recognized as law in Ohio. The case of *Hieatt v. Morris*, 10 O. S., 523, was the first departure from the old doctrine, and while it has been characterized by some text writers as not of very high authority, there is a virtual affirmation of the doctrine, though in a different form, in the case of *Mullen v. Striker*, 19 O. S., 135.

It seems to be the law in this state to-day, that either adjoining proprietor, upon giving notice to the other of his intention to take down his half of a sound party wall, may do so where he intends to rebuild the same, and if he uses ordinary care, he will not be responsible if the remaining half of the wall should fall.

The old doctrine is held to be unsuited to this age of improvement and advancement, and wholly unadapted to densely populated cities where every person in purchasing real estate, unless the deed contains some restriction, expects he will have the full right to build upon his property as he may see proper. It was claimed that this case is distinguishable from the *Hieatt & Morris* case, in that this wall was built by a common owner, and not by the adjoining owners. A dictum of Peck, J., wherein he refers to the cases reported in 3, 4 and 6 Duer, is relied upon. This is not the case of a common owner, conveying one house to one, and the other to another, fixing the center of the wall as the boundary line. The common owner, Shawk, conveyed the entire property by one deed to three persons as tenants in common and they afterwards by an amicable arrangement agreed upon a partition, fixing the center of these walls as the boundary between their properties, instead of building by agreement dividing walls at other points upon the property. In principle I cannot see that this

differs from the Hieatt & Morris case; there they built the wall by agreement, here it was already built and they agreed to make the center of it their boundary line. Shawk did not fix the line, or denominate any of the walls, as "party," "partition," or "common walls."

As already intimated, our supreme court is in the advance upon this question. The suggestions of Denio, J., in 15 N. Y., *supra*, and followed with approval by Freeman in his work on Cotenancy, section 256, and the concluding portions of the decision in Hoffman v. Kuhn, 57 Miss., 751, are worthy of observation, all tending in the direction of the Ohio decisions.

The temporary injunction heretofore granted, is accordingly dissolved, and the motion for injunction on cross-petition of Voss denied.

E. H. Kleinschmidt for plaintiff.

E. W. Kittredge, for Mrs. Jones, and

William Disney, for Julius Voss.

PARTNERSHIP—WITNESSES.

[Hamilton Common Pleas.]

BRINKER v. SCHREIBER & PFEIFFER.

Where a surviving partner brought action on a note made to his firm against two makers as individuals and not as partners, and one of them is in default for answer and makes no defense, he is a competent witness for the other as to transactions with the deceased partner.

CONNER, J.

Brinker, a surviving partner of the firm of Brinker & Henke, brought suit against Schreiber & Pfeiffer, as individuals, not as partners, to recover \$250 upon the sale of a wagon and buggy which had been made by the deceased partner, Henke. Pfeiffer was in default for answer and made no defense at the time of the trial.

Schreiber filed an answer setting up a general denial. The plaintiff, to prove his case, offered a book of the firm showing an entry made by the deceased partner, Henke, charging the items against Schreiber and Pfeiffer, as individuals. Schreiber called his co-defendant, Pfeiffer, who was in default as a witness, but the plaintiff objected to his competency claiming that he was an adverse party and was excluded by the statute from testifying to the transactions of a surviving partner, not having been present at the time of the sale.

It was held by the supreme court in the case of Baxter v. Leith, 28 O. S., that in an action by a surviving partner, an adverse party cannot testify to any transaction with a deceased partner or any declarations by him, unless such transactions took place or declarations were made in the presence of the surviving partner. The only question remaining to be determined as to the admissibility of the evidence of Pfeiffer, was whether or not he was an adverse party, and it having been decided by the supreme court in the case of Baker v. Kellogg, 29 O. S., 663, that an adverse party must be adverse in interest and not simply in status in the case, it was there distinctly held that a party to a suit who was in default for answer was not adverse in interest, and could be called as a witness by his co-defendant who had answered. Under this decision, Pfeiffer was a competent witness and his testimony should have been admitted upon the trial.

Motion for a new trial granted.

Evans & Roettinger, for plaintiff.

W. G. Mayer, for defendant.

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[Superior Court of Cincinnati, General Term, April, 1883.]

A. P. C. BONTE'S Admr. v. B. HINMAN et al.

For opinion in this case, see 6 Dec. R., 1173 (s. c. 11 Am. Law Rec., 649). The judgment in this case was reversed by the Supreme Court without report December 1, 1885.

TRIAL—ERROR.

308

[Hamilton District Court.]

JAMES F. BYRNE v. ALICE WOOD.

Where a cause triable by jury has been set in a submitted room and no notice of its setting is given to the opposite counsel, it is error in the court to render judgment by submission.

ERROR to the Superior Court of Cincinnati.

The plaintiff below, Alice Wood, brought an action in the superior court of Cincinnati against James F. Byrne, defendant below, for the recovery of money only.

The petition alleges it was for services in the care and management of his household, for one hundred and eight weeks at four dollars a week; that she had been paid \$80 on account, leaving a balance of \$352 due.

There is an answer filed denying each and every allegation of the petition.

The pleadings, therefore, raised an issue, in which either party was entitled to a trial by jury. The case was set down for trial in room No. 1, superior court of Cincinnati, by plaintiff's attorney. When the case was called for trial, defendant not appearing, it was tried on submission in his absence an judgment rendered for the plaintiff on the evidence for the amount claimed. Defendant, on the following day, filed his motion to set aside the judgment. In support of this motion he filed two affidavits. The court overruled the motion. The defendant took a bill of exceptions containing these affidavits, and the bill of exceptions recited that these affidavits were all the evidence before the court on the hearing of the motion. Upon this bill of exceptions the petition in error was filed in this court. The evidence consists of the affidavits of Mr. Byrne and his attorney, Mr. Dempsey. The defendant himself says that he was entitled to a trial by jury; that he never waived a jury in fact nor intended to waive a jury; that he was informed by counsel that the case was not set for trial, and was not present when the trial took place; that he had a good and meritorious defense that plaintiff never contracted to work for him, never worked for him in fact and he was not indebted to her in any sum whatever.

The affidavit of Mr. Dempsey, the attorney, recites that neither himself nor his client intended to waive a jury; that it was a case triable by a jury, and by the rules, regulations and course of procedure in the superior court of Cincinnati distributing and classifying the business of that court, there were three rooms, in which were held separate sessions of the court for the trial of causes; that in room No. 1, cases were set for trial without a jury, and cases triable by jury were set for trial in rooms No. 2 and 3; that it was one of the rules of that court that no case triable by jury could be set for trial until previous notice had been given to the opposite party

by the party setting the case for trial; that in this case no such notice had been given; that neither the client nor the attorney had such notice.

No examination was in fact made of the calendar in room No. 1, because as he claimed, under the rules of the court it could not be properly set there, being a jury case. This was substantially all the evidence.

Edward J. Dempsey, for plaintiff in error.

W. T. Porter, for defendant in error.

SMITH, J

The rules of the superior court are not before us, except so far as they appear in this affidavit. We cannot judicially take notice of its rules, 48 Cal., 178; 13 Bush., 419.

Such being the case, whatever other rules, if any there may be, regulating setting of cases in the various rooms of the superior court except as stated in the affidavit, we can have no cognizance of.

So far as appears, the only rules are those recited in the affidavit, and there is no contradictory testimony.

By an inspection of the pleadings it is clear this was a case triable by jury. Either party had a right to demand a jury, unless he had waived it expressly or impliedly. We think on a fair construction of this affidavit, that by the rules of this court a case triable by jury was triable in rooms 2 or 3, and a case triable by jury could not be set for trial, unless notice of such setting had been given to the opposite party by the persons setting it for trial. It also appears from the affidavit that no such notice was given and that neither defendant nor his attorney had any notice of the setting of this case for trial at that time. So far as appears from the testimony, we think the defendant was excused from examining the calendar in room No. 1. Neither the defendant nor his attorney ever expressly waived a jury in the case.

Has he impliedly waived it?

Section 5204, Rev. Stat., provides that a jury may be waived "by the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney."

When this case was called for trial in room No. 1, neither defendant nor his attorney was present.

If this case was properly set there at the time, the defendant by not appearing impliedly waived the jury. But if the case was improperly set there for trial at the time and defendant not required to be there, he was not in default.

Nor by his absence under the circumstances can it be held that he has waived his right to a jury. It was error on the part of the court to render judgment by submission at the time.

Such being the case, the motion made on the following day to set aside the judgment on the ground of irregularity and surprise should have been granted. It was an irregularity on the part of the court to permit a case to be set for trial in conflict with its own rules, and if defendant has been prejudiced, the judgment should be reversed.

The order of the superior court overruling the motion is reversed and the case remanded to that court with instructions to grant the motion setting aside the judgment and for a new trial.

CONTRACTS.

310

[Superior Court of Cincinnati, May 16, 1883.]

THE MCBIRNEY & JOHNSTON WHITE LEAD CO. v. THE CONSOLIDATED LEAD CO.

Plaintiff contracted with defendant for the sale of white lead at certain prices. The contract on its face was not unlawful; but when it appeared in evidence that the white lead manufacturers of the United States west of Buffalo, formed themselves into a corporation for the purpose of restricting the production of white lead, controlling the sale and keeping up the price, that the defendant being such corporation, the plaintiff one of the stockholders, and the contract being the contract between the members and the corporation, and the means by which the purpose of the combination was carried out:

Held, the contract being an essential part of an unlawful scheme, is itself unlawful.

2. The unlawfulness may be shown by the defendant if the plaintiff makes out a *prima facie* case for recovery without developing the fact.
3. Enforcing the payment of the price agreed to be given for doing an unlawful thing, after the thing has been done; or enforcing an account between the parties to an unlawful enterprise, is carrying out an unlawful agreement, and therefore such will not be enforced.

FORCE, J.

The action is brought to recover a balance claimed to be due on an account. The items of the account are items growing out of a contract between plaintiff and defendant. The contract is claimed to be void. This question must be met in two aspects: First, the character of the contract itself; second, whether or not the suit is really for the purpose of enforcing the illegal part of the agreement.

The contract upon its face is simply a provision between this plaintiff and this defendant as to the price to be obtained for lead turned in; it is not an isolated contract unconnected with others, it is an essential part of a scheme. The scheme was this, that the manufacturers of white lead in the United States, west of the longitude of Buffalo, agreed to form themselves into a corporation, in which corporation each corrodor shall have a certain amount of stock; that each member of the corporation, that is, each manufacturer of white lead west of Buffalo, shall be entitled to manufacture a certain amount of white lead proportionate to his amount of stock, and no more; that he shall sell at prices fixed, not by himself but by the corporation; that a member who fails to sell as much as he is entitled to, shall be entitled to turn the surplus undisposed of over to the corporation, and the corporation shall pay him the average price that he got from others; and that when he was so successful as to dispose of more than he was entitled to, he shall have unloaded upon him by the defendant corporation the amount turned in to the defendant by unsuccessful dealers. This scheme was to be carried out by means of contracts with the members of the corporation, such as the one in this case. The question is not whether or not the contract between the plaintiff and defendant taken by itself, unconnected with anything else, is invalid; but is this contract, as a part of this scheme, from which it takes its color and character, invalid. Of course a contract by which parties agree to do a thing, either illegal or against morals, or against public policy, is a contract which is not enforceable by law. It is said, the contract in this case is against public policy, by creating a monopoly. In general, contracts creating a monopoly in trade are unlawful, because the public demands and has a right to demand that

every able-bodied man shall have a right to contribute to the public weal by the untrammelled exercises of his ability and labor; and hence a contract restraining a man from work, is a contract which is against public policy, and will not be enforced. To that there are two marked exceptions; first, where the labor, the exercise of which is to be restricted, is one which is limited of its own nature, as being either a patent right or being a trade secret; another is that where there is a sale of an entire business, the person who purchases has a right for his own protection, and in order to get the whole value of that which he purchases, to contract that the seller shall not practice that business within reasonable limits and for a reasonable length of time. The case now presented is not quite the same, but it comes within the principle of the case, and has been specifically passed upon in several places. The contract here is a contract, a scheme, which was entered into for the purpose of controlling and restricting the manufacture and the production of white lead in the United States west of the longitude of Buffalo, and restricting the prices, so that the prices should not fall below a certain amount. It is for the benefit of the manufacturers, and they have a right to contract. Manufacturers and laborers have a right to make a contract for their own protection, so far as it is reasonable, and so far as it does not conflict with the interest of the public. But as has been said by the supreme court of Pennsylvania, where an agreement or contract of that sort is made with the view to injure the public, the public will not, through the courts, enforce that contract. Hence, where a combination is made for the purpose of diminishing product or increasing prices generally as against the public, the courts will not carry out that contract. Where some coal companies in the northern part of Pennsylvania made an agreement restricting the amount of coal to be put upon the market, and fixing the price, the court of appeals in New York said that was a contract which was injurious to the public, and could not be enforced by courts of law. *Arnot v. P. & E. Coal Co.*, 68 N. Y., 558. In *Morris Run Coal Co. v. Bradley Coal Co.*, 68 Pa. St., a similar contract was held inimical to the public and void. *Salt Co. v. Guthrie*, 35 O. S., 666, is a case where the salt makers of one district in the state of Ohio made an agreement by which a company should control the product and sale of the salt made by the members of the company. This was held inimical to the public, as creating a monopoly, and could not be enforced.

In *Craft v. McConoughy*, 79 Ill., 346, where the wheat dealers of one town made a contract among themselves, by which they should sell individually whatever wheat they could sell, but would keep through one, the agent for all, a statement of the sales made by all and the profits made by all, and then at the end of the month they would share around so that they should all make equal profits, it was held that that was hostile to the public, and should not be enforced. And when, in the city of New Orleans, the dealers in bagging combined together to keep up the price of bagging, the supreme court of Louisiana held their agreement could not be enforced. *Indiana Bagging Co. v. Knox*, 14 La. Ann., 168. A like ruling was made as to a combination of stevedores in one port to control the business of stevedoring. *Collins v. Lock*, L. R., App. Ca. To the same effect are, *Crawford v. Wich*, 18 O. S., 190; *People v. Fisher*, 14 Wend., 10, and *King v. Winants*, 71 N. C., 469.

But it is further said that this suit is not for the purpose of enforcing the contract; that the defendant corporation is existing simply for the purpose of winding up; it does not propose to carry on any more business,

and this action is not to compel the carrying on of business, but is merely for the purpose of getting pay for business that has been done. According to the decision of the supreme court of the United States in *Brooks v. Martin*, 2 Wall., 70, that, apparently, can be done. That case followed the opinion in the case of *Sharp v. Taylor*, 2 Phill., 801, which had a few years before been pronounced by Lord Chancellor Cottenham. But in *Sykes v. Beadon*, L. R., Ch. Div., 1, four years ago, the court of appeals *Sykes v. Beadon*, L. R., 11 Ch. Div. 1, four years ago, the court of appeals in a very elaborate opinion held that the rules of law as laid down by Lord Cottenham in *Sharp v. Taylor* were not law, and were overruled. In the United States, the language used by the judge in the case of *Brooks v. Martin*, *supra*, has not been followed by other courts. The courts either attempt to distinguish it or decline to follow it. In two cases, the court in New Jersey, whose opinion in equity cases are specially valuable: *Watson v. Murray*, 23 N. J., Eq., 257, and *Todd v. Bafferty's Adm.*, 30 N. J., Eq., 254, says that in New Jersey at all events, it is not law; that where two parties have agreed to carry out an illegal enterprise, one party has a right to compel, by the aid of a court, a settlement of the profits arising from that illegal enterprise. In *King v. Winants*, 71 N. C., 469, it is held that where two parties have combined in an illegal transaction, that that illegal transaction cannot be a lawful consideration for a payment or settlement between two parties. In *Snell v. Dwight*, 120 Mass., 9, the court decline to accept as law the language in *Brooks v. Martin* and in *Craft v. McConoughy*, 79 Ill., 346.

And, indeed, where two parties have agreed to do an unlawful thing and divide the proceeds or agree to an unlawful thing and pay a certain price for the doing of that unlawful thing, how can a court undertake to divide those proceeds, or enforce the payment of that money, except by enforcing the carrying out of the unlawful agreement? Perhaps if there has been an agreement to carry out an unlawful transaction, and proceeds have resulted from it, and those proceeds have been ascertained and divided, and one party not only has in his possession the proceeds, but has admitted to the other: "I have so much money belonging to you, which I hold in trust for you" that a subsequent promise based on that declaration might be so disconnected with the original agreement that it might be enforced, but where a suit is brought to enforce payment for doing a thing which the law says is illegal, I don't see how the court can enforce that payment without enforcing the agreement which it itself says is illegal. Now it is true, the petition says that the plaintiff sold so much white lead, on which so much is due, as if it were a suit brought for a quantum valebat. But there are two objections to that. The matter as developed by the evidence—and it does not matter whether it appears from the evidence of the plaintiff or defendant, so that it appears—it appears from the evidence, that the thing sought is not the market value, but the agreed price, and the dispute is as to what the agreed price was; and second, if the suit were really and simply for the market value, then it could not be maintained in this suit, because there is no evidence at all that the market value of lead was greater than the price which the defendant has actually paid.

But I find that the action is to recover a stipulated price, and that the price is an unlawful stipulation and cannot be enforced, and judgment will be for the defendant.

McCoy, Follett & Hyman, for plaintiff.

Wulsin & Perkins for defendant.

312 **BANKRUPTCY—PARTNERSHIP—APPEARANCE.**

[Superior Court of Cincinnati.]

SARVER, GRAY & COOK v. W. W. SCARLETT, R. W. SCARLETT AND J. A. SCARLETT.

In an action brought against the members of a dissolved firm, the resident members have not authority by reason of their relation to enter appearance for non-resident member so as to warrant a personal judgment against him.

FORCE, J.

This action was brought on transcript of a judgment rendered by a court in Pennsylvania. Judgment was rendered against four defendants; one named Brown, R. W. Scarlett, W. W. Scarlett, and J. H. Scarlett. Mr. Brown is dead, R. W. Scarlett, who lives in Maryland has not been served and the two others have answered.

W. W. Scarlett by way of answer, sets up his discharge in bankruptcy, and the evidence shows that this particular claim now sued on was presented in the bankruptcy proceedings.

While the courts are not entirely agreed as to whether or not proceedings in bankruptcy by one partner discharge him of his individual debts only, it is agreed by all that where one is asking for a discharge alone if in that proceeding his joint debts are stated, the discharge obtained is a discharge against his partnership as well as his individual debts; *Wilkins v. Davis*, 15 Nat. Bankruptcy Rep., 60; *Keeler v. Snodgrass et al.*, ante 000.

J. A. Scarlett's defense is that he was not served in the action brought in Pennsylvania, where the judgment was rendered and that he never authorized any one directly or indirectly to enter an appearance for him.

It appears from the evidence that the firm was composed of these four men mentioned, that two of them, W. W. Scarlett and J. A. Scarlett lived in Newport, Ky., Mr. Brown in Cincinnati, and R. W. Scarlett in Baltimore; and that the business was carried on in Cincinnati during the life of the firm; that after seven or eight months of business here Brown went on to Philadelphia to reside and there made one contract, being the same contract on which the judgment was rendered on which this action is brought.

That was the only business done by the firm in Philadelphia. In the action brought in Philadelphia upon that contract, Brown was served.

The firm then dissolved. More than three years after the dissolution R. W. Scarlett while passing through Philadelphia was served with process, and afterwards his counsel entered an appearance for all four of the members and filed a plea of the general issue. The cause went to trial and judgment was rendered.

R. W. Scarlett was not authorized by J. A. S. to enter appearance for him, and had no such authority unless authority was given by the fact that they had been partners.

It is claimed by plaintiff here: First, that a partner as a partner has a right not only during the partnership, but after the dissolution of the partnership to enter an appearance for his co-partners in an action brought against the members of the dissolved firm. That is denied.

The question as to the right of a member of a firm during the existence of the partnership to enter the appearance of his co-partners, is a matter largely disputed.

The English text books say there is such an authority during the life of the firm. That is also the law in Pennsylvania. But although it is the law in Pennsylvania, and a judgment rendered in the state against a non-resident partner is valid in that state, where such non-resident partner is not served with process and his appearance is only entered by a resident partner; still, as the question is one of jurisdiction, the validity of such judgment can be inquired into in any other state, and it will not be held valid in states where partners are held not to have such power.

The supreme court of Massachusetts in a very elaborate opinion, hold, that a partner has no power to enter appearance for his non-resident partner as foundation for a personal judgment against such non-resident. *Phelps v. Brewer*, 9 Cush., 390.

The supreme court of the United States hold with the court of Massachusetts that a partner has no such right, at least after dissolution.

The question has not been decided in Ohio by the supreme court.

This court in general term in *Marks v. Fordyce*, 5 Dec. R., 81; (s. c. 2 Am. Law Rec., 392), *Yaple, J.*, giving the opinion, held that: "When partners reside in different states, but part of them reside in the state where the firm business is carried on, and manage and control the business for all, and a suit is brought in a court of record in the state where the firm is located, against all the partners jointly to enforce a liability arising out of the partnership transaction, and non-resident partners are not personally served with process, and do not appear in person to defend, but the resident partners employ an attorney to defend for all, who does so, such resident partners are the agents of the non resident partners for such purpose, and have implied authority to employ such attorney in behalf of all, and his appearance for them binds all."

But that case does not cover the one now on trial; on the contrary, the court carefully distinguishes it from such a case as the present.

In the absence of any authority in this state, it would be safe to follow the ruling of the supreme court of the United States; and it has distinctly held in *Hall v. Zanning et al.*, 91 U. S., (1 Otto.), 160, that "a member of a partnership residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another state against all the partners after a dissolution of the firm, although the other members were served or did appear and cause an appearance to be entered for all, and although the law of the state where the suit was brought, authorized such judgment, and that after the dissolution of a partnership, one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm."

In *Duncan v. Tombeckbee Bank*, 4 Port., (Ala.), 184, it was held that after dissolution, at all events, one partner had no authority to enter an appearance for a non-resident co-partner.

So far as I know there is no authority anywhere that a partner, after the dissolution of a firm, has that authority. And hence although in Ohio it has been held that one partner may submit to arbitration on behalf of the firm. *Wilcox v. Singletary*, *Wright's R.*, 420, and that one member of a dissolved firm may admit the amount of indebtedness where the fact of indebtedness otherwise appears. *Feigley v. Whitaker*, 22 O. S., 606, and that resident managing partners may, during the life of the firm enter the

appearance for a non-resident partner in the place where the business is carried on, *Marks v. Fordyce*, supra; yet there is nothing to show that the rule extends to the authority of a partner to enter appearance after dissolution, or to a case where the suit is brought in a place where the firm does not exist and carry on its business, and where the appearance is entered by a member of the firm who is himself a non-resident. It may be noted that while there has been no decision yet in Ohio upon the power of a member of a dissolved firm to enter appearance for a non-resident member the rule is precisely the same in Ohio as in Massachusetts, as to the power of such member to admit the amount of a balance due by the dissolved firm. *Feigley v. Whitaker*, 22 O. S., 606; *Ide v. Ingraham*, 5 Gray, 106.

Further, the clear preponderance of the evidence is that R. W. Scarlett did not authorize or direct the attorney in Philadelphia to enter an appearance for any one but himself. The attorney assumed, or took for granted that he was to appear for the firm and did accordingly. It is also clear, that J. A. Scarlett was not advised that appearance had been entered for him, and never affirmed such appearance.

Judgment for defendants.

Evans & Halsey, for plaintiffs.

Howard Douglass, for defendants.

PROSECUTING ATTORNEY—APPEALS.

[Hocking Common Pleas.]

SETH WELDY v. BOARD OF COMMISSIONERS.

1. It is the duty of the county commissioners, where an attorney has been appointed to assist the prosecutor, under Rev. Stat. 7196, and after the approval of his bill by the court, to act and allow such sum as they deem just but the court cannot command them to allow any specific sum.
2. In case of their refusal to act, a mandamus will require them to act and allow such sum as the court approved and to them seem just and proper.

The plaintiff, an attorney at law, of the Hocking county bar, was appointed by the common please court of that county, to assist the prosecuting attorney in the trial of a homicide case in that court. The appointment was accepted and services performed thereunder.

The court thereupon approved a bill for \$200 as being a fair compensation for such services. The bill thus approved, coming before the commissioners for their allowance, they refused to allow the same, but did allow as a just and reasonable compensation for such services, the sum of \$150. From this action of the defendants, the plaintiff gave notice of his intention to appeal, taking all the necessary steps to perfect his appeal. The case came up upon motion to dismiss this appeal.

FRIESNER, J.

1st.—If this were a claim against the county, to be allowed by the county commissioners, concerning which a right of trial existed, then this appeal would be the proper remedy, and not an action commenced against the county; this being a claim dependent upon a statute exclusively.

Commissioners v. Zeiglehofter, 38 O. S.,—

2nd.—The words "any case" in sec. 896, R. S. authorizing an appeal "from the board of commissioners," are limited to their action upon claims or cases concerning which a right of trial exists.

3rd.—Services performed by an attorney under an appointment as in this case, create no claim against the county with a right of trial thereon, nor is the action of that board allowing the bill of an attorney for such services a case before them from which an appeal lies.

4th.—Whether an attorney is bound by his duty as an officer of the court to accept such an appointment is not decided, and is not deemed important to this case.

It is clear that it is no part of the obligation of the county to prosecute crimes or employ and pay lawyers therefor independent of the statute.

The statute that creates the obligation may well fix the mode of ascertaining and determining the compensation, and make that mode conclusive. If it is objected that the mode selected may not do justice, the answer is, do not accept the appointment if that may be refused; or cease being such officer of the court, if it is desired to avoid the duties of the position.

5th.—The legislature has invested the court with power to appoint an attorney to assist the prosecuting attorney in a proper case, and has indicated the way in which his compensation shall be determined by the concurrent action of the court in which the services are performed, and the commissioners of the county in which the trial is had—such sum as the court shall approve and the commissioners may deem just and reasonable.

In the absence of fraud or mistake, the result of their action is conclusive. No matter what these commissioners may deem just and reasonable, and allow, it is not sufficient unless the court approves it; and no matter how much the court may feel justified in approving, it is of no force unless the commissioners shall deem it just and reasonable. No appeal lies to the action of the court approving, or of the commissioners, allowing the compensation.

Motion to dismiss appeal sustained.

Bright & Wright, for plaintiff.

Burgess & Hansen, for defendant.

GAS COMPANY—CONTRACTS.

321

[Hamilton District Court.]

*VILLAGE OF AVONDALE v. CINCINNATI GASLIGHT & COKE CO.

A contract for lighting a village adjoining a city which attempts to transfer from the legislative authorities of the village to the legislative authorities of the city all regulation as to the quantity and price of gas furnished to the village is in contravention of the principle that legislative power cannot be transferred or ceded.

Error to the Common Pleas Court of Hamilton county.

In an action in the Court of Common Pleas against the incorporated village of Avondale, the Cincinnati Gas Light & Coke Co. filed its petition, alleging that on May 24, 1871, an agreement was entered into, by the terms of which the said company agreed to furnish the said defendant at the lamp posts in said village such quantity of gas as should be required for lighting the public lamps therein, and to clean, light and keep lighted and in ordinary repair said lamps for the same time as said company then did for the city of Cincinnati, and the quality of gas furnished to be the same; that said company complied with its obligations under said contract until May 1, 1880, and that the village paid the monthly bills presented by said company, up to November 1, 1879, since which time, it

*The judgment in this case was reversed by the Supreme Court, see opinion 43 O. S., 257.

has refused to pay—and that there was due the sum of \$8,575.37 for gas furnished from May 1, 1879, to May 1, 1880.

The answer of the village and the subsequent proceedings below, including the judgment of the court against the village for the full amount claimed for gas furnished, present the question, whether the court erred in rendering judgment against the village upon the allegations of the answer of the village, to the effect: 1. That the village had no authority or power under the laws of the state to enter into the said contract, and that the same is null and void. 2. That on February 13, 1879, the council of said village passed an ordinance, fixing the quantity of gas required for the lighting of the public lamps in said village, and caused a copy thereof to be then and there delivered to said company. The 4th and 5th items of the contract are as follows:

Section 4. That in further consideration of the privileges hereby granted, the said company and its successors shall furnish at said lamp posts to said village such quantity of gas as may be required for the lighting of the public lamps and shall clean, light and keep lighted and in ordinary repair said lamps for the same time and price payable at the same time as said company now does for the city of Cincinnati, the burners and other conditions being the same as those now in use and force in said city, and the quality of gas furnished to be the same as for said city.

Section 5. The price at which said company shall furnish gas to the public buildings of said village and to the citizens and private consumers shall be the same for each thousand cubic feet so furnished as the price respectively for gas furnished to the public buildings and private consumers in the city of Cincinnati and under the same regulations and conditions.

The village is ready and willing to pay for gas furnished as specified in the ordinance of February 18, 1879, that is, up to one o'clock at night for lighting the lamps, and claims that the provisions of the contract sued upon are an attempt to interfere with its legislative authority and its right to determine how much gas shall be supplied and the hours during which the public lamps shall be kept burning, and that it is an attempt to give the company the right to furnish gas at the public lamps at the same price and the same time as may be fixed from time to time by the city of Cincinnati, under the statutory regulations as to price, quantity and quality of gas.

The authority of the village to contract for gas to light the streets and public buildings is admitted.

To meet the wants of particular localities, the legislature has provided that it shall be lawful for any gas company in any city or incorporated village in this state, organized in pursuance of any of the laws of the same to extend their pipes used for conveying gas to the various localities and inhabitants of such city or incorporated village to any point, place or places in the vicinity of such city or incorporated village outside the corporate limits thereof, provided the right of way be obtained from the corporation or other authorities, of any person or persons, place or places to be affected by such extension. 56 O. L., 92, (1859).

Under this authority the company extended its pipes into the village, the contract granting the use of the streets and avenues of the village for the purpose of supplying gas to the public lamps and buildings.

The village insists, however, that the contract is invalid for the reason that the right to purchase the works of the company and all the appurtenances belonging thereto at any time within the existence of such contract or agreement as provided for by section 2480 of the Rev. Stat., "regulating gas companies in cities and villages," are not reserved.

We assume that the village council by the passage of the ordinance of February 13, 1879, fixing the time for lighting the public lamps, desires to continue to receive the gas manufactured and conveyed through the pipes of the said gas company, now in the streets and avenues of the village, and is not complaining, except that the company seeks to furnish a supply of gas in excess of the necessities of the public use.

Whether the contract is affected by any right of purchase not being reserved, is unnecessary to consider for the reason that even if the contract can stand as within the statute and as in a general sense for the sale of gas by the company, in effect an agreement that the village should have the privilege of using the property of the company for the purpose of lighting the streets and avenues, it can be regarded as valid only to such an extent as in the judgment of the village council the public necessities might require.

As the time for lighting public lamps and the price are matters materially affecting the corporate revenues, the village authorities in that respect are not vested with the power to adopt irrevocable legislation or deprive the village of the right to regulate within reasonable periods and from time to time the quantity, quality and price of gas furnished. If section 2478 of the Revised Statutes, reserving to a city or village in which a gas company may be established, the power to regulate, does in fact apply to a village in which no gas company is established, then the power exercised by this ordinance of February 13, 1879, is one expressly conferred, but it is not required for the purpose of this enquiry to determine whether the power be express.

The provisions of sections 4 and 5 of the contract are in effect an attempt to transfer from the legislative authorities of the village of Avondale to the legislative authorities of the city of Cincinnati all regulations as to the quantity and price of gas furnished to the village in contravention of the well-known principle that legislative power cannot be transferred or ceded.

The record shows that the village objected to the action of the court below in admitting in evidence the contract in question and to the refusal to admit in evidence the ordinance of February 13, 1879, and the exception of the village thereto. The finding of the court was that the agreement set out and referred to in the petition was valid and binding; that by the terms thereof said plaintiff was entitled to furnish and said defendant bound to receive gas for lighting the public lamps in the village, according to the time table then in use in the city of Cincinnati; that the defendant had no right by ordinance or otherwise to fix the quantity of gas required to be furnished for the public lamps and that the amount due from the defendant to plaintiff with interest to January, 1882, after deducting \$2,000 paid by defendant, with interest, was \$7,136.59.

The judgment for the amount in excess of the quantity of gas required to be furnished by the ordinance of February 13, 1879, is erroneous, and for such error the judgment is reversed.

Stallo & Kittredge and Joseph Wilby, for plaintiff in error.

E. A. Ferguson, for defendant in error.

COUNTY COMMISSIONERS.

322

[Hamilton District Court.]

*DALTON v. COMMISSIONERS.

1. Where the employment of a janitor by the clerk of the courts is a necessary expense, it is the duty of the county commissioners to make an allowance for the wages of such janitor.
2. The remedy is not by mandamus, but by appeal to the court of common pleas.

MOORE, J.

The petitioner, Daniel J. Dalton, represents that as clerk of the courts of Hamilton county, he is entrusted with the custody of the files and records of the several courts of said county, and charged with the duty of taking proper care of, and preserving said files and records; of keeping in proper order the rooms in the court-house of said county, designated and set apart for the use of the clerk of the court, and in which the duties of such clerk are chiefly performed, and where said files are kept, and that a janitor is necessary for the proper performance of the duties of his said office.

That as such clerk he is entitled to the entire management and control of all the parts and rooms of his office, and of all the persons in charge of the same, and that it is the duty of the county commissioners of said county as prescribed by the statutes to allow and order to be paid, as other claims against the county, reasonable compensation for the services of the jan-

*This case is distinguished by the circuit court in the case of *Deters v. Commissioners*, 1 Ohio Circ. Dec., 162, 165, in which case it was pointed out that the statute under which this decision was made has been repealed.

itor employed by the petitioner, as such clerk, to take care of such clerk's office.

That he has employed G. S., a competent and suitable person, to perform the duties of said janitor of said clerk's office for a reasonable compensation and the price usually paid for such services,—that a claim for the services of said G. S. as such janitor for three weeks and two days to Saturday, March 3, 1883, was duly presented to said county commissioners, and they refused to allow or order the same to be paid, alleging as a reason therefor, that the said G. S. had been appointed by the petitioner without their consent or approval, and that they had appointed a person as a janitor for said clerk's office whom they were paying out of county funds for such services.

That the janitor so designated by said county commissioners is performing no service, and that said county commissioners seek to force upon him a janitor he does not want, and prays that a writ of mandamus may issue against said board of commissioners, and that they be commanded to allow and order to be paid as other claims against said county, the compensation of said G. S. or such other person as may be appointed by the petitioner.

The demurrer to the petition filed by the county commissioners in effect, admits the statements of the petition including the reasonableness and necessity of the services of a janitor and at the wages therein stated.

The substantial question is, whether the county commissioners are required by statute to allow as other claims against the county, reasonable compensation for the services of a janitor employed by the clerk of the court of common pleas.

Sec. 1 of an act of the general assembly, providing for the erection of public buildings passed June 1, 1831, S. & C., 1228, reads as follows:

"There shall be erected and finished in each county within this state, whenever the commissioners of the county may deem it necessary, a good and convenient courthouse, a strong and sufficient jail or prison for the reception and confinement of prisoners and criminals, also one or more fire-proof buildings in some convenient place or places near the courthouse in which shall be kept the offices of the clerk of the supreme court, court of common pleas, sheriff, recorder of deeds, county auditor and county treasurer. Provided, however, that the commissioners aforesaid may at their discretion, provide and furnish one or more suitable rooms within the walls of the courthouse or other building for the use of the whole or a part of the officers aforesaid; and the commissioners may assign such room or rooms to the sole and exclusive use of such officers as they may deem expedient." So that when the present courthouse was built, the county commissioners by authority and direction of the statute, assigned rooms for the use of the clerk within the walls of the court-house to be under his sole and exclusive use as he might deem expedient.

If the statute intended that the clerk should have the exclusive control of his rooms, then it follows that the clerk is entitled to use them, exclusive of the interference of other persons, and in a manner consistent with the welfare of the public service.

It cannot be said that because the language of the statute indicating in general terms that the county commissioners are charged with the care and control of the courthouse, and because these several offices are within the walls of the courthouse that the county commissioners have the right to interfere with rooms set apart by a previous statute to the exclusive use

of the public officer in charge, and therein exercise the right of appointment of a person incident to the duties of that office.

Sec. 1002 of the Revised Statutes, amended January 31, 1881, (78, O. L., 22,) which provides that the county commissioners may employ a county engineer, a superintendent of the courthouse, and such watchman, janitors and other employees as may be necessary to the care and custody of the courthouse and jail, in no way affects or limits the former direction of the statute requiring the county commissioners to assign rooms within the walls of the courthouse to be under the sole and exclusive control of the several officers for the convenient discharge of their official duties. After such assignment of rooms for office purposes other portions of the court-house, requiring the exercise of that care and control, indicated by the language of the statute remain for the attention of the county commissioners.

The adoption of the fee system in this county by the act of April 6, 1870. Saylor's statutes, page 2285, sec. 3, wrought a change in the manner of employment and payment of employees in the several county offices, and the statute in respect to the question under consideration was in no way changed by the Revised Statutes of 1880, sec. 1343, and is now the same and reads as follows:

"Sec. 3. The judges of the court of common pleas, in joint session, shall from time to time fix the maximum compensation of all deputies, clerks, book-keepers and other assistants who may be employed by the treasurer, auditor, recorder, sheriff, probate judge and clerk, which compensation shall be paid to them monthly out of the county treasury upon the warrant of the county auditor, and the number of clerks, deputies, book-keepers and other assistants of the offices named in the first section of this act shall be determined by said officers respectively subject to the approval of the judges of the court of common pleas, and for no official act or duty shall any such deputy, clerk, book-keeper or other assistant receive to be retained by himself any additional fee, salary or compensation, other than that fixed and provided for in this section, and no officer shall receive or be paid directly or indirectly any part of such salary or compensation of such deputy, clerk, book-keeper or other assistant, or any fee or reward for appointing him to such position.

The county commissioners shall allow and order to be paid, as other claims against the county, all other reasonable expenses necessary to the proper discharge of the duties of any of the above named officers, provided, however, that the compensation of all deputies, clerks, book-keepers and assistants hereby authorized to be paid, shall be first paid out of the fees, costs, percentages, penalties or allowances collected by said officer and accounted for and paid into the county treasury."

In the light of legislation, by which we are governed and the issue presented, it appears that the clerk having the exclusive control of the rooms assigned him for office purposes, is entitled to employ whomsoever he pleases to clean and render the same convenient, and the county commissioners having admitted by their demurrer the necessity of such service and the reasonableness of the wages and being charged by the statute with the allowance and payment, as other claims against the county, all reasonable expenses other than the salaries of the deputies, clerks, book-keepers and other assistants necessary to the proper discharge of the duties of such officer, it is their duty and they are bound to make the allowance, if the employment of a janitor is a necessary expense.

It seems to us the legislature intended to leave to the officer, the management of the internal affairs of his office, he to say whether he wishes a janitor or not, to be the judge of the necessities of his office, to have some discretion in the way in which his rooms shall be arranged and cared for, and by analogy we may presume that such was the intention, for section 1264, of the Rev. Statutes provides that "the county commissioners shall furnish to the clerk all blank books, blank stationery and all things necessary to the prompt discharge of his duty, all which articles the clerk may procure and shall be allowed for upon his certificate" * * * subject, however, to enquiry in case of unreasonableness of supply, etc.

But we are of the opinion, that the writ cannot be allowed. The relator does not allege that he has paid the janitor or that he has incurred an expense, for which he is entitled to an allowance, and further, the county commissioners have acted upon the matter and considered it on the merits and the remedy is not by mandamus, but by appeal to the court of common pleas under the statutes. See the case of the State ex rel. Gerke v. Commissioners, 26 O. S., 364.

Writ refused.

Follett, Hyman & Dawson, for petitioner.

O. J. Cosgrave, contra.

BILLS AND NOTES.

[Hamilton Common Pleas.]

C. C. ARCHER v. J. J. SOLOR ET AL.

The endorsee of a dishonored note must within a reasonable time after becoming the owner thereof, demand payment of the maker and give notice to such last endorser of non-payment in order to hold him liable thereon.

JOHNSTON, J.

The action is on a promissory note. The petition alleged in substance that J. J. Solor executed and delivered to Charles H. Young, his certain promissory note; that before maturity, Young endorsed said note to J. Huston, Jr. Huston was the owner and holder at maturity, and caused said note to be duly protested and notice of non-payment given to his endorser, Young; that after the maturity and dishonor of said note, Huston transferred said note by endorsement to C. C. Archer, the plaintiff. The petition contained no allegation that Archer had demanded payment, and notified Huston of non-payment. Huston demurred to the petition. The question raised by the demurrer, was whether an endorser of an overdue note was entitled to demand and notice of non-payment in order to make him liable on the instrument. It seems to be well settled by the authorities that the endorsement of an overdue note is, as to the endorser, equivalent to making a new note, payable on demand; that the endorsee must make demand, and notify the endorser within a reasonable time, and upon failure to do so, the endorser is released. Also that the petition must aver the fact of demand and notice. The claim of plaintiff that such endorser becomes a guarantor and not entitled to notice is not supported by the authorities. The case of Parker v. Riddle, 11 O., 103, 107, is against it and sustains the position taken by defendant, that the endorser after maturity is entitled to notice. The following authorities are in

point: Edwards on Bills and Notes, sections 377 and 380; 29 Ia.. 188; 12 Cal., 308; 13 Kan., 550; 21 Me., 455; 18 Pick., 260; 2 N. H., 159; 2 Conn., 419; 50 Mo., 331; 33 Ia., 348; 9 Ala., 153; 8 S. & R. (Penn.), 351; 18 Penn. St., 426; 9 Johnson, 120; 2 Nott. & McCord, 283; 2 Bailey's (S. C.), 157; Daniels on Negotiable Securities, see 996.

Cornell & Marsh, for demurrer.

J. T. DeMar, contra.

CORPORATIONS.

335

[Hamilton District Court.]

C. WALLBRECHT v. F. PUCKETAT.

The individual liability of trustees of an incorporated benevolent association for "debts contracted by them," as prescribed, S. & C., 310, section 78, Rev. Stat., 3261, is collateral and conditional to the principal obligation, which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment cannot be enforced against it by ordinary process.

ERROR to the Court of Common Pleas of Hamilton county.

AVERY, J.

The judgment was upon a written obligation in the following form:

| | | |
|-----------|----------------|--------|
| "No. 246. | Arbeiter Bund. | \$500. |
|-----------|----------------|--------|

"Cincinnati, June 4, 1878.

"The treasurer of the Arbeiter Bund does hereby certify to having received of Mr. Franz Pucketat, the sum of five hundred dollars, at six per cent. interest per annum."

"The Trustees:

"A. SCHEIDEMANN.

"C. WALLBRECHT.

"J. FREHSE."

The petition set forth that the "Arbeiter Bund" was a benevolent association, incorporated under the laws of this state in 1863; that the defendants in 1878, were the trustees, and borrowed of the plaintiff, \$500, and gave the obligation in question; that the association had wound up its business, dissolved, and gone out of existence, leaving no property of any sort; and that payment had been refused by the defendants on demand. The prayer was for judgment. The answer was a general denial.

The evidence established the fact of the incorporation under sec. 66, of the general act for the creation of corporations. S. & C., 305. There was no evidence that the defendants were trustees, except as appeared upon the face of the paper. The evidence of signing the paper consisted only in this: that the plaintiff testified, that he took the money to the office on Walnut street, and received the written obligation, that those persons were there, and it was signed at the same time." He could not say who signed it, or who gave it to him, but he testified he went there in a year, and they paid him the interest. The majority of the court are of the opinion, that taking this in the connection, it implies that the defendants paid him the interest, and as evidence of an acknowledgment of the indebtedness was sufficient, in the absence of contradiction, to sustain the action. There was no contradiction since the defendant rested on a motion for nonsuit, and the motion being overruled, submitted the case. But there was

no evidence that the property of the "Bund" had been exhausted. The only evidence, as to its affairs, consisted in the testimony of the plaintiff, that he became a member, stating the time, and remained until it failed in 1880.

The liability of the trustees of associations of this kind is prescribed by section 78, of the general act, as amended, Swan & Critchfield 310. In the original act, there were two sections, one providing for the liability of stockholders of railroad, turnpike, bridge, telegraph, and joint stock companies, to an amount equal to their stock; the other providing for the individual liability of trustees of associations incorporated under section 66. By the amendment, these two sections were united in one as follows:

"All stockholders of any railroad, turnpike, or plank road, magnetic telegraph or bridge company, or any joint stock company organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of such company, and the trustees or directors of every society or association incorporated under the provisions of the sixty-sixth section of this act, shall be deemed and held individually liable for all debts contracted by them for their respective societies or associations."

In *Brown v. Hitchcock*, 36 O. S., 667, the entire section is recited, and is said to have been passed by the legislature in pursuance of the provision of the Constitution, Art. 13, section 3; "Dues from corporations shall be secured by such individual liability of the stockholders, and other means as may be prescribed by law."

In *Wright v. McCormick*, 17 O. S., 87, it is held, that the liability of stockholders "is not a primary resource or fund for the payment of the debts of the corporation, but is collateral and conditional to the principal obligation, which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment cannot be enforced against it, by ordinary process."

We are of opinion, that the liability of trustees is of the same nature. The language is, "the trustees shall be deemed and held individually liable for all debts contracted by them." But by the nature of the corporation, it is only the trustees, who are capable of contracting or being contracted with, and the debt though contracted by them, is still the debt of the corporation.

The revised statutes, which classify corporations into those for profit, and those not, express this clearly: Sec. 3261, "The trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted."

The reason upon which the liability of stockholders is held to be only secondary, is because of the language, as well of the constitution itself, as of the statute carrying the constitutional provision into effect, that the liability shall be "for the purpose of securing the creditors." The difference, in imposing liability upon the trustees, is because of the difference between the two classes of corporations, those of this class having no capital stock; but the liability is in our opinion of the same nature, to be resorted to by creditors, only when the debt can not be made against the corporation itself. It may not be necessary that a judgment should be obtained and execution issued. That the debt cannot be made out of the corporation may be shown in any way. But it is not sufficient to show merely an

act of insolvency, or failure; because, notwithstanding a failure to meet obligations, property may remain.

The judgment must be reversed and the cause remanded for new trial.

L. H. Pummill and P. Roettinger, Jr., for plaintiff in error.

P. Dolle, for defendant in error.

HOMESTEAD.

337

[Hamilton District Court, June 12, 1883.]

H. W. BOETTGER v. PETER FISCHER ET AL.

A widower with no other family than an unmarried daughter living with him, is entitled to the homestead exemption, provided in section 5435, Rev. Stat., notwithstanding such daughter is over the age of minority. The statute distinguishes in this respect between a son and daughter.

APPEAL from the Court of Common Pleas of Hamilton county.

EVERY, J.

This is an appeal from an order of distribution, under a sale in foreclosure of a real estate mortgage. At the time of the sale, Peter Fischer, the mortgagor, lived on the land with an unmarried daughter of about 40. His wife had died pending the suit. He had no other family. The mortgage being executed by his wife, precluded the allowance of a homestead, but after satisfaction of that lien there is a surplus.

The single question is, whether a widower with no other family than an unmarried daughter, who has passed her minority, is entitled to the provision of \$500, in lieu of a homestead.

The revised statutes provide, Sec. 5435, "A widower living with an unmarried daughter or unmarried minor son may hold exempt from sale, on judgment or order, a family homestead not exceeding \$1,000 in value:" Sec. 5440, "When a homestead is charged with liens, some of which as against the head of the family, preclude the allowance, and a sale of such homestead is had, then, after the payment, out of the proceeds of such sale, of the liens so precluding such allowance, the balance, not exceeding \$500, shall be awarded to the head of the family."

Sec. 5435 was enacted in 1878, by the act, "to revise and consolidate the laws relating to civil procedure," 75 O. L., 692. The act of May 1, 1871, 68 O. L., 106, entitled, "An act to amend Sec. 4 of the act of March 23, 1850, to exempt the homestead of families from forced sales on execution," was repealed at the same time. 75 O. L., 800.

"The act, 68 O. L., 106, provided, that, "every widower, having an unmarried minor child or children residing with him, as part of his family," should have the benefit of the exemption.

It is insisted that, where an act of the legislature has been revised, the rule is, that the same construction will be given to its provisions, as before the revision; and that sec. 5435, in view of the former limitation to unmarried minor children, is to be read as if written, "a widower living with an unmarried minor daughter."

The rule certainly is, as is contended. The court is only warranted in holding the construction of a statute, which has undergone revision, to be changed, when the intent of the legislature to make such change is clear, or the language used in the new act plainly requires it. Boynton, J

State v. Commissioners, 36 O. S., 326, 330; Miller v. Oehler, 36 O. S., 624, 627.

We are of opinion, however, that the intent of the legislature is clear, to distinguish in respect to homestead exemption, between the dependence for support of a son, and of a daughter. The reason for the distinction is, that the dependence of a son may be regarded as limited to his minority, but that of a daughter as continuing so long as she shall remain unmarried.

Order may be taken for allowance of the \$500 out of proceeds, after satisfaction of the mortgage; the residue to be for judgment creditors according to their priority.

N. Bird, for appellant.

Gasser and Spangenberg, for Fischer.

MECHANIC'S LIEN.

[Superior Court of Cincinnati.]

JOHN O'BRIEN v. CHARLES MYER ET AL.

A parol agreement to lease, partly performed by the delivery of possession and the making of permanent valuable improvements by the intending lessee, creates such an interest in lands as may be subjected to a mechanic's lien

PECK, J.

This is an action to foreclose certain mechanics' liens, claimed to have been obtained under the following circumstances: Meyer was in possession of premises owned by one Newell, under a verbal agreement to the effect that if he put upon the premises certain valuable improvements, and paid the rent during the time the improvements were being made, he should have a lease for a period of five years at a rental of \$100 per month, with a privilege of renewal for a like period at a rental increased twenty-five per cent. above that of the first five years. Meyer made the improvements, and paid the rent for the four months of his occupancy, though not with promptness. The improvements were valuable, costing over \$2,000, and were of such a nature as to increase the value of the premises. When it came to the execution of the lease, Newell prepared a draft and submitted it to Meyer and his attorney, but it was not satisfactory to them, and was not executed. The points of difference appear to have been that Newell wanted the rent payable in advance, Meyer at the end of the month; Newell wanted the premises insured in his name as security to him for the rent, Meyer was willing to insure but wanted the policy taken out in his name; Newell wanted the lease to include a lien on the chattels of Meyer in the house, as security for the rent, but Meyer was unwilling to have such a clause inserted. Newell prepared a second draft omitting this last point of difference, but it was not acceptable to Meyer and was not executed. Soon afterwards the negotiation appears to have been terminated by agreement between the parties, as the result of which the defendant, Wentzel, paid Meyer \$2,000, and took possession of the premises under a lease from Newell to him, substantially the same in its terms as that which Newell had agreed to give Meyer. The work for which the liens of plaintiff and others were taken out, formed part of the improvements made by Meyer during his occupancy, and it appears that Newell and Wentzel had notice of it and of the claims of plaintiff and other parties,

claiming liens at and prior to the time of the termination of Meyer's tenancy and the lease to Wentzel. The liens were duly recorded within four months of the completion of the work, some of them before and some after the lease to Wentzel.

The question in the case is whether Meyer had an interest in the premises such as could be subjected to a mechanic's lien. It is claimed in the first place that an agreement to lease does not give the intending lessee any interest in the property, but only a right of action against the owner, and some cases are cited to sustain that proposition, notably one in 103 Mass., 369.

On examination I find that doctrine to be applied only in cases where there is such an agreement unaccompanied by possession or any act of performance. A distinction is made where such an agreement is accompanied by possession and especially when valuable improvements have been made by the tenant on the faith of the agreement to lease. Illustrating this point see *Haynes v. Baker*, 5 O. S., 254, 255. Under such circumstances the tenant has such an interest, as entitles him to a specific performance of the agreement. It is said that the making of valuable permanent improvements on the land by a vendee or lessee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell and convey, or to lease, is taken out of the statute of frauds." *Pomeroy on Specific Performance*, 178, and cases there cited.

But it is contended that Meyer could not have enforced the specific performance of his agreement with Newell, because it was not sufficiently certain, and in support of that proposition reference is made to the points of disagreement, which arose between them, when they undertook to execute the lease. It has already been stated that Newell abandoned one of the claims he then made and as to the other two points of difference, both appear to have been after-thoughts on the part of Newell. It does not appear that it was agreed at the outset, that the rent should be payable in advance and in the absence of such agreement, it would be presumed that it was to be paid in the ordinary way, at the end of the month. As to insurance, nothing appears to have been said at the time the agreement to lease was made and Newell's claim on that point made when the lease was to be executed, was therefore an attempt to introduce a new feature into the contract.

The contract was for a lease for a definite term of years, beginning with the date of Meyer's entry into possession, at a fixed rental payable monthly, with a privilege of renewal for a like term, at an increased rent agreed upon. It seems to me that equity would have compelled Newell to execute to Meyer a lease with the ordinary covenants for the term and at the rent agreed upon, after Newell had permitted Meyer to enter into possession and on the faith of that agreement to make the valuable improvements mentioned, if the latter had taken the proper steps to enforce his rights.

Such being the position of Meyer, was his interest one that could be subjected to a mechanic's lien? The language of section 3185, Rev. Stat., is that the lien of the mechanic shall rest upon "the interest of the owner in the lot of land on which the same (the building) may stand." This language has been construed by the supreme court to cover a leasehold interest. *Choteau v. Thompson*, 2 O. S., 114; *Dutro v. Wilson*, 4 O. S.,

101. An agreement for a lease enforceable by specific performance, accompanied by possession and expenditure for valuable permanent improvements, would seem to come within the same rule. In such case the tenant has about all the rights he would have under a lease, has everything in fact except the formal instrument which would be the indisputable evidence of his rights, and as above stated a court of equity would give him that. Suppose it had been a parol contract to sell, partly performed in the same manner, is there any doubt that the interest of the party taking possession under such an agreement could be subjected to a mechanic's lien, even if the agreement to purchase were abandoned after the work, which furnished the basis of the lien had been done?

Our supreme court having held the owner of a lease subject to a mechanic's lien the same as the owner of the fee, it would seem correct to say that a possessor under an agreement to lease would stand on the same footing in this respect as a possessor under an agreement to buy. Equity will in either case enforce the agreement, and carry out the transaction. The holder under such an agreement has an interest which may be subjected to a mechanic's lien, 14 Ala., 33; 53 Ia., 221, and such interest having become subject to the lien during his possession and the existence of the agreement, no subsequent surrender or transfer by such possessor can divest the lienholder of his rights, especially where the party taking the transfer had knowledge of the claims to the liens, afterwards recorded within the statutory time.

Meyer had a right to a lease for five years with privilege of a renewal for a like period; that lease and privilege are now held by Wentzel, who had notice of the claims of the lienholders. The lease including the privilege of renewal will therefore be subjected in his hands for the payments of the liens. The \$800 remaining in Wentzel's hands of the purchase-money due Meyer may by him be applied towards the payment of the liens, and his liability to Meyer and Mrs. Deshwander, the assignee of Meyer's claim, will be cancelled. A decree may be taken accordingly.

Dustin, Diehl & McCarthy, for plaintiff.

W. T. Porter, Logan & Rulison, for cross-petitioning lienholders.

M. F. Wilson and M. Kohn, for Meyer & Wentzel, defendants.

ASSIGNMENT FOR CREDITORS.

[Hamilton District Court.]

FLEMING, ASSIGNEE, v. STIEFEL.

1. A general assignment for the benefit of creditors, made in another state, valid in the state where made and in general harmony with the laws of Ohio, regulating assignments for the benefit of the creditors, will transfer debts due the assignor from citizens of this state, as against subsequent attaching creditors of the assignor.
2. A., a citizen of Tennessee, made a general assignment of all his property to B., also a citizen of Tennessee, to be distributed pro rata among all his creditors. C., a citizen of Ohio, was indebted to A. on an account. His indebtedness was garnisheed by D., a citizen of Ohio, in the courts of Ohio, after the assignment was made: Held, that the assignment carried the debt, and was superior to the attachment.
3. Where a person in failing circumstances makes a general assignment for benefit of all his creditors, the acceptance by them will be presumed.

ERROR to the Common Pleas Court of Hamilton county.**SMITH, J.**

The controversy in this case is, who is entitled to a certain fund in the possession of defendants, B. Steinharter & Co. It is claimed by Fleming as general assignee of one Donnelly, of Nashville, Tenn., who made an assignment for the benefit of creditors; by the Fourth National Bank of Nashville, on a draft given by Donnelly to it, also by Gustave Stiefel on an attachment issued against Donnelly before a magistrate of this city, in which Steinharter & Co. were garnisheed.

The facts as they appear by the bill of exceptions are these.

Prior to September, 19, 1881, Donnelly, a resident of Nashville, engaged as a commission merchant, had occasionally shipped goods and merchandise to Steinharter & Co., of Cincinnati for sale on commission.

On September 19th, claiming to have made or that he was about to make a shipment he drew a bill of exchange for \$250 on Steinharter & Co. payable two days after sight, to his own order, which he took to the Fourth National Bank of Nashville to have it discounted. The bank discounted it. He represented to the bank that he was about to ship goods to Steinharter & Co., and that this bill was drawn against the shipment. No bill of lading was given to the bank. The bank having received the draft, transmitted it to the Merchants National Bank of Cincinnati for collection.

This bank gave it to its messenger who presented it to Steinharter & Co. the next day. They declined to accept it because the goods had not then arrived. The draft was returned to the Fourth National Bank of Nashville.

Two or three days afterwards, Donnelly shipped eleven or twelve bags of wool consigned to A. D. Bullock & Co., of Cincinnati, and took the bill of lading himself and came on in person.

He saw Steinharter in Cincinnati and asked him if he had accepted the draft. Steinharter said he had not. Donnelly said it was all right and that he would provide for it at Nashville. But he gave Steinharter an order on Bullock & Co. for the wool shipped by him with directions to sell it and transmit the proceeds to him at Nashville.

By the 3d or 4th of October, Steinharter & Co. having got possession of the wool, took it for themselves at an agreed price and remitted by express \$200, part of the proceeds to Donnelly at Nashville.

This money was received by Donnelly on October 11th. On the same day he made an assignment to one J. W. Lawlers in Nashville for the benefit of his creditors. The assignment was in due form conveying all his property real and personal, debts, book accounts, notes, etc., in trust for the payment of his debts. It was such an assignment as would be valid by the laws of Ohio, if executed here.

On the same day the Fourth National Bank of Nashville, wrote to Steinharter & Co., a letter of inquiry, asking whether they had any money in their hands belonging to Donnelly and whether they had received any goods under any shipment or consignment, and whether the draft previously presented, if sent again would be paid or any part thereof.

It does not appear that any reply was made to that letter.

The assignee named in the assignment declined to accept it and under certain proceedings of the courts at Nashville, Fleming was appointed the assignee.

On November 24, of the same year the defendant Steifel brought an action against Donnelly before a magistrate and garnisheed Steinharter & Co., who made answer that they had \$160 in their possession belonging to Donnelly.

Nothing further seems to have been done until the following spring when this action was commenced by the Fourth National Bank against the various parties named.

The petition seems to have been framed in a double aspect. There seems to be an attempt to charge Steinharter on a promise to accept the draft, and make him liable as acceptor.

Then it is claimed that this draft was in legal effect an equitable assignment of the fund and the other parties were brought before the court to determine who, in fact, was entitled to it.

All these parties filed their claims and the court of common pleas determined that Stiefel, the attaching creditor, was entitled to the fund and gave judgment in his favor against the plaintiff and the other defendant.

A bill of exceptions was taken embodying all the evidence and a petition in error was filed by Fleming representing the general creditors. A cross-petition in error was filed by the Fourth National Bank.

Upon these two petitions in error the case is presented to this court.

Another fact also appears, that before this attachment was commenced by Stiefel, Steinharter & Co. had notice of Donnelly's assignment and that Fleming was the assignee.

It is claimed on behalf of the Fourth National Bank that what took place when this draft was presented by the messenger of the Merchants National Bank to Steinharter was equivalent to a promise to accept and that Steinharter might be held as acceptor of the draft.

When the draft was returned to Nashville there was a pencil memorandum on its back, "goods not received, will remit."

This seems to be in the handwriting of the messenger of the bank. The messenger files an affidavit stating that he has no knowledge or recollection of having made it or what took place, but takes for granted that some statement was made by the drawee else the memorandum would not have been made.

Steinharter declares he made no promise; that he refused to accept the draft. We think the evidence warrants the finding of the court below that there was no acceptance in fact and no promise to accept the draft by Steinharter & Co. The action of the Fourth National Bank confirms it. The draft was payable two days after sight. When the draft was returned to the Fourth National Bank, they never sent it back for payment. But when Donnelly made the assignment they wrote a letter to Steinharter & Co., claiming not that the draft had been accepted or that they were liable as acceptors but to make inquiry whether Steinharter & Co. had any money belonging to Donnelly or whether any goods had been shipped or whether there was any prospect of the draft being paid or any portion of it from any money belonging to Donnelly.

Also the manner of bringing this suit. If the Fourth National Bank intended to charge Steinharter & Co. as acceptors then they would be liable at common law on their promise and it would be irregular to join the other defendants.

Its claim is furthermore that there was an equitable assignment of this fund by the drawing of the draft. We think not. There was no bill of lading attached to the draft. It was not drawn against a consign-

ment. There was no shipment to Steinharter & Co. The shipment was to A. D. Bullock & Co. and the bill of lading instead of being sent to Bullock was taken by Donnelly himself, and when he came to Cincinnati and found there was no danger of the draft being paid from the proceeds of the goods, he then ordered the goods into the custody of Steinharter & Co., with directions that the proceeds be remitted to him and he would take care of the draft. There was no fund which could be equitably assigned under the circumstances and supposing there was, an equitable assignment of part unless by consent of the parties would be inoperative. The judgment of the court below was correct as to the claim of the Fourth National Bank.

The next and more important question arises between the claims presented by Fleming, the assignee for the general creditors, and Stiefel the attaching creditor.

It will be recollected that the assignment was by one citizen of Tennessee to another citizen of that state and of all his property for the benefit of his creditors. No preference was given. It was an assignment which if made in Ohio would be valid. It was in complete harmony with the policy of our law regulating assignments for the benefit of creditors.

The fund in controversy in this case if it had any situs at all, was situated in Tennessee the place where the assignment was made. It was a debt due from a citizen of Ohio to a citizen of Tennessee, and we think the weight of authority is that the situs of a debt is the domicile of the creditor, 2 Wallace, Jr., 132; Grier, J. 35 Conn., 307; 35 N. Y., 657.

Such being the case it was a valid assignment at common law of the property by one citizen of Tennessee to another citizen of that state.

The property was situated in that state. If it had been an assignment to an individual, there would have been no question about it. It may be claimed, however, it being an assignment to a trustee for the benefit of creditors that the assigned property did not vest in the assignee until there had been an acceptance. It is held by the courts of some states, especially in the courts of Massachusetts, that in an assignment made for the benefit of creditors the assignee is simply an agent or representative of the assignor until the assignment has been accepted by the creditors and acted upon by them. And unless there has been evidence of acceptance by the creditors it does not operate as a conveyance of the property. *Way v. Warnemaker*, 111 Mass., 202.

That is not the rule in Ohio, nor in Tennessee. The rule in these states is that where an assignment is made for the benefit of creditors, the acceptance will be presumed. 3 McLean, 177; 4 Cold (Tenn.) 627.

This assignment was valid by the laws of Tennessee. It conveyed the debt to the assignee and if so, it should be held by the assignee not only under the assignment, but even against attaching creditors.

It is claimed, however, that the courts of this state will not require its own citizens to go beyond its territorial limits to receive dividends under an assignment made in another state, when they can collect the debt by process in the courts of their own state, *Johnston v. Parker*, 4 Bush. 149.

In that case George C. Glass, a banker of Cincinnati, made an assignment for the benefit of his creditors. The assignment was valid under the laws of Ohio. Certain creditors of Glass in Kentucky, finding debts due him in the state of Kentucky brought suit against him and garnisheed these debts. A controversy arose in Kentucky who was entitled to the

fund, the assignee by virtue of assignment, or the attaching creditors and it was held that the courts of Kentucky would not require one of its own citizens, to come into the state of Ohio to take its dividends where the payment of its own citizens could be reached by garnishee process.

I merely cite this as an instance because the courts of many of the states seem to have adhered to that doctrine.

Perhaps no case precisely like this has been found in Ohio, but we think the general spirit of our decisions in Ohio has been the reverse.

We think the cases, so far as they have been found, recognize the commercial relations existing between the states and will protect an assignment made in another state for the benefit of creditors generally; which is in harmony with our laws against an attachment made by a creditor in our state.

This question first arose in *Sortwell v. Jewett*, 9 O., 180. In that case there had been an assignment made in the state of New York for the benefit of creditors. This assignment covered a large amount of property in Ohio. That property was covered by a mortgage, but after a sale under the mortgage there was a fund of \$12,000 for distribution and this property was attached by proceedings in our courts. The question arose, who was entitled to the fund, the general assignee under the assignment made in the state of New York, or creditors under an attachment, and it was held the assignment would not be superseded by the subsequent attachment.

Lane, Chief Justice, says:

"The states of Maine, Massachusetts and Louisiana seem to declare that even a voluntary assignment by a foreign insolvent debtor will be superseded by a subsequent attachment." * * "And an effort is made to place their conclusion upon some rule of policy, that a state should preserve and prefer the rights of its own citizens, and exempt them from the laws and acts of citizens of other states. Neither the expediency nor the justice of this discrimination are admitted especially as between citizens of the United States."

This decision was made in 1840 and represents the policy of this state as then in opposition to the policy of the states of Massachusetts, Maine, Louisiana and others.

This case was recently referred to and approved in the case of *Johnson v. Sharp*, 31 O. S., 611.

This was a case where a deed of assignment was prepared by a creditor of the assignor at Steubenville and transmitted to him, who was a citizen of Missouri. This assignment was executed according to the laws of Ohio and mailed from Missouri direct to the assignee. Between the time of depositing this deed in the mail and its receipt by the assignee, the property was attached by one of the creditors of the assignor. The controversy arose as to priority, viz: when the assignment took effect and whether it was valid as against attaching creditors. *McIllvaine, J.*, having held that the assignment took effect from the time it was deposited in the mail, directed to the assignee and therefore had priority over the attachment, sees fit to discuss the general question which has been discussed in so many cases as to precedence between an attachment and foreign assignment made by the act of the parties for the benefit of creditors and says:

"The proposition involved in this inquiry is somewhat analagous to the conflicting claims arising under our attachment laws and a foreign

bankrupt assignment; but, in our judgment, the solution of the question before us cannot be determined by the weight of the authorities upon the latter; and chiefly for the reason that the principle of comity should be recognized in a greater degree between the members of our Union, which are subject, under the general government, to a common system of bankrupt laws, than between our own and foreign governments, with whom we sustain no such intimate governmental relations.

"It must be conceded, that the decided weight of authority, in this country, is, that our courts will not subject our citizens to the inconvenience of seeking dividends under a foreign assignment in bankruptcy, when they have the means of satisfying their claims at home; and, possibly, the same may be said when the preference is sought over any involuntary assignment of the debtor's property, made in invitum or by operation of law.

"But it appears to us that a different rule should be maintained where a voluntary assignment is made in one state of the Union of property situate in another, and in conformity with the policy and requirements of the laws of the latter state. The common right of everyone to dispose of his property wherever he may be, and a reasonable acknowledgment of the principle of comity, which should exist between sister states of this Union, would seem to require a different rule, and such doctrine has been recognized in several of the states. *Hanford v. Payne*, 32 Vt., 442; *Farrington v. Allen*, 6 Rh. Isl., 449; *Law v. Mills*, 18 Penn. St., 185; *Varnam v. Camp*, 1 Green, 326; *Moore v. Bonnell*, 2 Vroom, 90; *Coskie v. Brown*, 2 Wallace jr., 131; *Bholen v. Cleveland*, 5 Mason, 174; *Moore v. Willett*, 35 Barb., 663.

"In our own state, it was held in *Sortwell v. Jewett*, 9 Ohio, 180, that an assignment made by an insolvent debtor, residing abroad, of lands situate in Ohio, will not be superseded by a subsequent foreign attachment, and in *Fuller v. Steiglitz*, 27 O. S., 355, it was held that an assignment of a chose in action by a foreign insolvent debtor for the benefit of his creditors passed the title and right of action to the assignee, as against a subsequently matured cross-demand held by the debtor in this state.

"It is true, that great contrariety of opinion on this general subject has been expressed by the courts of this country, but on the whole, we think that Mr. Wharton, in his work on the conflict of laws, sec. 353, has fairly stated the view most fully sustained in these words:

"We may therefore hold it to be the law in the United States, that on assignment made in one state of personal property in another (such property not being in transit or following the owner's person) passes no title to such property as against attaching creditors of the assignor, such creditors being domiciled in the latter state, when such assignment is invalid by its laws. And we think the implication arising from the language quoted is also sustained by the weight of current authorities, namely: 'that if such assignment be valid, or in other words, be in harmony with the laws of the state where the property is situated, the title passes, and the rights of the assignee should be protected against subsequent attaching creditors.'"

We think this reasoning covers all the elements of this case. This case is perhaps stronger because it was a transfer not of property located here but of a debt which was situated in the state where the assignment was made.

We are, we think, notwithstanding the weight of authority to the contrary, justified in following this doctrine.

The judgment of the court of common pleas in holding that the attaching creditor had a title superior to the general assignee is reversed and remanded for a new trial, but affirmed in holding that the Fourth National Bank was not entitled to the fund.

F. A. Thomson, for Fourth National Bank.

H. M. Cist, for Fleming, assignee.

Pugh and Schwab and C. W. Girard, for Stiefel.

E. W. Spangenberg, for Steinharter & Co.

BANK—TAXATION.

[Hamilton Common Pleas Court.]

*CHARLES A. MILLER, TREAS., v. FIRST NATIONAL BANK, CINCINNATI.

An agreement by a bank to pay the taxes assessed on the shares of stockholders does not make the bank liable for assets not returned or admitted by the bank or stockholders to be assessable, nor for any other than the current tax on the duplicate. Such agreement does not authorize the assessment of a back tax against the bank upon what is claimed to be newly discovered resources not returned for back years.

BUCHWALTER, J.

This cause (with others raising like issues) was heard upon general demurrer to plaintiff's petition.

The petition states that for each of the fiscal years 1877, 1878, 1879, 1880 and 1881, the cashier of the First National Bank filed with the auditor of the county his verified return of the resources and liabilities of that bank, and that instead of giving the names and residences of the stockholders, together with the number of shares held by each, as required by law, he filed on behalf of the bank a written agreement that the bank would pay the taxes as assessed thereon. The petition further avers that the returns made during each of those years by the cashier were found by the auditor to be false, and that after notice given to the cashier of the bank, the auditor, on April 8, 1881, proceeded to place on the tax duplicate certain sums of money which he found the cashier had omitted during the several years to return as part of the resources of the bank; that since these various false returns made for each of the years 1877 to 1881, inclusive, various stockholders (without naming which ones) had sold and transferred their stock, and the bank had permitted them to be transferred on its books; that various sums of money and dividends thereafter becoming due to the several stockholders, had been paid out to them by the bank, and that although the bank has in its possession dividends and money belonging to the present stockholders, sufficient to pay the taxes claimed to be due, the bank refuses to so apply it; and that although the bank did pay all taxes, assessed upon the returns as made by its officers during the several years, yet it refuses to pay the back taxes, as now claimed to be due, in about the sum of \$50,000. The plaintiff prays a judgment against the bank and for a restraining order preventing the payment of dividends to stock and transfers of stock as between any of the stockholders.

Thus it appears, that the auditor did not have the names and residences of the stockholders of the bank, nor the number of shares held by each, before him in making the assessment. Nor were the shares of stock listed for taxation, nor was the assessment made as against the shares or in the names of the stockholders proportioned according to the number of shares held and owned by each. It was simply against the bank as a corporation and as an assessment in gross or bulk upon its net resources, for the current tax as paid for the years 1877 to 1881 inclusive, based upon the returns made by the cashier and also as for the back tax

*This judgment was affirmed by the Supreme Court. See opinion, 46 O. S., 424, 427.

claimed upon newly discovered resources not returned for those years and now put by the auditor on the duplicate of 1881.

The question to be determined is, was such listing for taxation valid, were the proceedings of the auditor in placing the back tax on the duplicate of 1881 according to law, so that a recovery may be had thereon as against the bank corporations.

"Section 5210 U. S. Revised Statutes provide: The president and cashier of every national banking-association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such lists shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority during business hours of each day in which business may be legally transacted, a copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier shall be transmitted to the comptroller of the currency.

And section 5219, U. S. Revised Statutes, provides:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine the manner and place of taxing all the shares of national banking associations located within the state subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent according to its value as other real property is taxed.

Besides the general provisions for listing and taxing personal property, the following sections of the revised statutes of Ohio have special reference to this subject:

Section 2762—"All the shares of the stockholders in any incorporated bank, * * * whether organized under the laws of the state or United States shall be listed at their true value in money and taxed in the city or ward, where such bank is located and not elsewhere."

Section 2763—"The real estate of such bank shall be taxed in the place where the same may be located, the same as the real estate of individuals."

Section 2764—"There shall at all times be kept in the office * * * of such bank, a full and correct list of the names and residences of the stockholders therein and the number of shares held by each, which shall be at all times during business hours open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation."

Section 2765—"That the cashier of each bank shall make out and return to the auditor of the county * * * annually a report in duplicate, under oath exhibiting in detail * * * the resources and liabilities of such bank, on Wednesday next preceding the second Monday of May, together with a full statement of the names and residences of the stockholders herein, with the number of shares held by each and the par value of each share."

Section 2766—(which with other sections amended, 77 O. L., 191), provides in substance that the auditor shall fix total value of such shares, deduct the value of real estate and transmit the same with the cashier's report and all papers pertaining hereto to the proper board of equalization, and then it becomes the duty of the board of equalization to pass on the same with power to add to or deduct from such values.

Section 2769 provides that when the bank fails to make out such statement and return as the law directs or makes out a false one, that it becomes the duty of the county auditor to examine the bank-books and the officers under oath and make out the return himself, such return to stand in all respects as if made out by the cashier.

Section 2839 provides that any taxes assessed on any shares of stock or the value thereof of any such bank shall remain a lien thereon from the first Monday of May of each year till paid, and in case of non-payment of such taxes at the time required by law by any shareholder, after notice from the county treasurer of such non-payment, it shall be unlawful for the "cashier or other officer of such bank to permit the transfer of any part of such stock until said taxes are paid,

and no dividend shall be paid on any stock so delinquent until said taxes are paid."

Section 2840—"It shall be lawful for any such bank * * * to pay the treasurer of the county * * * the taxes that may be assessed upon its shares, as aforesaid, in the hands of its shareholders respectively and deduct the same from any dividends due or thereafter becoming due on any such shares, or * * * from any fund * * * of such shareholder."

From these statutory provisions it is evident there is no power delegated to the auditor or assessing officer of the state to tax the bank, the corporation, nor to list the shares of the stockholders in the name of the bank, nor to list them in the aggregate. The ultimate liability of the national bank can only accrue, after a valid assessment has been made in the way directed, and the shareholder has defaulted with payment of tax listed in his name and assessed on the tax-duplicate against him, and then only to be a stake holder or keeper of the securities of the shareholder until his tax be paid, although it is the option of the bank to pay a valid tax due on shares lawfully listed and to detain the same out of the shareholder's dividends and funds in its possession.

The auditor's duty clearly was to have required a statement of the resources and liabilities of the bank, the names and residences of the stockholders with the number of shares held by each, the par value of each share, and if not given to his satisfaction, voluntarily to have proceeded under the statute to make it himself, having gotten the same, to assess a total value, to deduct the value of the real estate and transmit the total balance with all returns and papers pertaining thereto to the proper board of equalization, and upon the return thereof to him to place the same on the tax duplicate in the respective names of the shareholders like their other property as per Rev. Stat. secs. 1034 and 1036.

It is not claimed that the requirements of the statute were observed in these assessments in issue, but because the cashier of the bank agreed to pay the tax for the stockholders, that thereby the bank itself became liable.

The only reasonable intentment of that agreement is that the bank would pay the current tax on the return made by him on behalf of the stockholders. It is not an agreement to pay taxes on assets not returned or admitted by the bank or stockholders to be assessable, nor on any other than current tax on the duplicate for him to agree to pay tax on \$100,000 of resources belonging to A. B. & C., is not an agreement to pay on an additional \$100,000 of resources not named in the statement.

Therefore the agreement does not authorize the assessment of a bank tax herein against the bank upon what is claimed to be newly discovered resources not returned for the years 1877 to 1881, inclusive.

And as the law does not authorize an assessment against the bank, it must be against the individual stockholders; not an assessment on a gross or aggregate sum, but distributed according to the ownership and number of shares held by each stockholder.

Besides, by the petition, the stockholders are not the same as during the years when it is claimed insufficient taxes were paid.

To require the bank to now pay the tax and to keep it out of dividends of the present stockholders would be to require bona fide purchasers of stock to pay a tax for which, by the books of the county auditor and the books of the bank at the time of their purchase, no claim was made, and to require such stockholder to pay a tax which ought to have been paid by a former owner of the stock would be unjust. If paid by the bank and not kept out of the dividends or other distributed moneys belonging to the stockholders then the only fund or property with which to pay such tax would be the real estate or the capital itself, the securities and bonds held by the bank as the foundation of its circulating medium. To require payment out of these resources would thereby permit the state by its law or officers to destroy the very powers of the agency constituted to do the service of the United States government.

The United States has not delegated to any state the power by taxation or otherwise to weaken or destroy its federal instrumentalities.

It has only specially provided that the state may list and tax the shares of stock at their true monied value as like unto other taxable monied property in such state, which power, supplemented by the Ohio statute, lists and taxes such stock in the name of the individual shareholders.

The general demurrer is sustained. See various authorities cited and considered on the several issues herein decided:

4 Wheaton, 316; 9 Wheaton, 739; 2 Black, 633-39; 2 Wallace, 200; 3 Wallace, 361; 9 Wallace, 477; 11 Wallace, 377; 18 Wallace, 594; 95 U. S., 19; 101 U. S., 143 and 153; 105 U. S., 322; 35 Iowa, 272; 62 Ala., 284; 62 Ala., 284; 6 Fed'l Rep., 425; 13 Fed'l Rep., 325; 7 Fed'l Rep., 372; 12 Fed'l Rep., 82, 92 and 96; 11 Vroom, 558. Goss & Peck, for plaintiff.

King, Thompson & Maxwell, Lincoln Stephens & Slattery and J. W. Heron, for defendant.

PLEADINGS.

355

[Superior Court of Cincinnati.]

*CITIZENS NATIONAL BANK v. C. N. O. T. P. & Y. C.

1. A plaintiff seeking a single recovery upon two grounds, both of which may be true, may state both grounds in a single cause of action.
2. A plaintiff claiming to recover upon either of two causes of action, both of which cannot be true, and he does not know which one is true, may state them as separate causes of action, stating them in the alternative, in one petition.
3. Where a plaintiff claims that he bought shares of stock in a corporation, which the corporation refuses to transfer to him, the petition is not multifarious if it states such facts and also states that the plaintiff before purchasing and with a view to such purchase, first consulted the president of the corporation and was assured by him that the shares were valid.
4. The plaintiff in his petition may claim that the shares were valid, and also claim that, if invalid, he is entitled to damages for being misled into making the purchase.
5. Since the Revised Statutes have omitted the clause that the claim in the petition must be stated without repetition, the petition may state as cause of action the refusal of the defendant to transfer the shares on the books of the company, and as another cause of action, damages for misleading to purchase if the shares are in fact invalid.

FORCE, J.

In each of these cases, two causes of action are stated. The first states that the plaintiff became the owner of certain shares of stock in the defendant company; that before he became the owner, the plaintiff asked the president of the company, if they were good, and he was informed that they were, and thereupon he made the purchase; that thereafter the defendant denied their validity, and refused to issue a certificate to the plaintiff; thereupon the plaintiff asks for the value of the stock on the ground that the defendant thereby converted plaintiff's stock.

The second cause of action states all that there is in the first cause of action, except the prayer for relief, and adds the further allegation, that if it is true that these shares of stock were void, being non-issue or over-issue, then that the defendant by its officers deceived the plaintiff into paying sixteen thousand dollars for the purchase money, and asks upon that ground, and in that case to recover the amount of money which he was induced by such false statement to advance.

There are three motions made in this case: First. To strike out of the statement of each cause of action, the allegation, that the defendant, by its president, made such representations. The second motion is to require the plaintiff to state specifically whether he claims the stock to be valid or to be a fraudulent over-issue; and the third is to require the plaintiff to elect on which of the two causes of action he will proceed.

As to the first motion. The plaintiff states first that he became the

*This decision was sustained by a subsequent one at the time of trial. See 10 Ohio Dec. R., (s. c., 11 B., 86.)

owner of valid shares of stock. Second. That the defendant by its agent assured the plaintiff upon inquiry that they were valid before he made the purchase, and the motion is to strike out the second allegation as immaterial, if the plaintiff is as alleged the owner of valid shares of stock. That question was passed upon in this court in the case of *Fox v. Pennsylvania Railroad Co.*, 2 Handy, 172. In that case the petition stated two causes of action, one that the plaintiff had been damaged, and the other that the defendant agreed to pay him a reasonable compensation. A motion was made to strike out one of the causes of action. The court held that the plaintiff might recover on either, but not upon both; his proof might fail as to either, and suffice as to the other, and allowed the plaintiff to amend by striking out the marks of separation and the formal allegations in the second cause of action, so as to make the whole statement constitute one cause of action. It is true that that was a decision at *nisi prius*, but the judge pronouncing it was Judge Gohlson. Precisely the same ruling was made in *New York. Walters v. Continental Ins. Co.*; 5 Hun., 343. There the cause of action as drawn stated two grounds for recovery. The defendant claimed that those two grounds constituted separate causes of action and should be separately stated and numbered, but was overruled.

The second motion is to require the plaintiff to state whether he holds the stock as valid or invalid, so as to confine the plaintiff to a direct allegation and not an alternative statement of fact. The code pleading is a substitute for both the common law and chancery pleading. A party has a right to state any grievance or ground for action and demand appropriate relief, whether such was formerly stated by means of the common law action or formerly by means of a bill in chancery.

When a plaintiff was uncertain as to the form in which his ground of action would be established by evidence, he could in a common law action state it positively in various forms, by means of various counts; in chancery he stated his case in the alternative, precisely in accordance with the fact of his claim.

At all events since Lord Hardwicke decided *Bennet v. Vade*, 2 Atkins, 324, it has been a perfectly settled rule, and ordinary practice in pleadings in chancery to state, not merely an alternative prayer for relief, but to state alternatively the facts out of which the claim grew. This rule of equity pleading is fully discussed in *Williams v. Flight*, 5 Beav., 41; *Perry v. Phillips*, 17 Ves., 173, and *Rawlings v. Lambert*, 1 J. & Hem., 458, 466. This rule is stated in all the text-books on equity pleadings. It is recognized in *Cadwallader v. Granville Society*, 11 O., 292 where Judge Lane sustaining a demurrer to a creditor's bill, said the bill would not have been demurrable if the plaintiff had stated his facts in the alternative and demanded corresponding alternative relief. As the code has not taken away any right, but only affects the mode of stating a right, the plaintiff still has a right to present in his petition two distinct grounds for a single recovery, when he is uncertain which can be successfully established by evidence, and the motion to require the plaintiff to state whether he relies upon the stock being valid or not, must be overruled.

The last motion is to require the plaintiff to elect between the two causes of action. This presents the question, whether the plaintiff in drafting a petition under the code presenting two alternative grounds for recovery, in one of which the stock is claimed to be valid and in the other it is admitted it may be invalid, may state these two alternative grounds in separate causes of action, or shall state them both in one cause

of action. In New York it has been held that where a party claims to have one of several grounds for a single recovery, he may state all those grounds as separate causes in one petition, and he will be entitled to recover upon the proof of any one. *Birdseye v. Smith*, 32; *Barb.* 217. In *Whitney v. Railway Co.*, 27 *Wis.* 327, where a shipper had lost goods on a railway, and he did not know and could not swear whether they were lost while in transit, or whether they had arrived at the destination and were lost by fire in the warehouse, he was allowed by the court to draw up separate causes of action, one charging the defendant as common carrier, and the other as warehouseman on a loss by fire.

Some courts have gone a great deal further. In Indiana, where the code is like ours, except it says that each cause of action shall constitute a separate paragraph, the supreme court in *Stearns v. Dubois*, 55 *Ind.* 257, held that the word "paragraph" in the code is identical with the word "count" at the common law, and under the code the plaintiff can have as many paragraphs as he could have counts at the common law.

In Iowa it was held formerly, as in *Thatcher v. Haun*, 12 *Iowa*, 393 that where a party demands alternative relief, not being able to state certainly on which ground he relies he could state it in one article; but since the revision of the code, it has been held as in Indiana that the party in such case may state several separate causes of action. *Pearson v. Milwaukee & St. Paul Railway*, 45 *Iowa*: 497; *Van Brunt v. Mather*, 48 *Iowa*, 503.

These cases are approved in the text books on code pleading, *Pomeroy* and *Bliss*. Outside of Ohio, therefore, this mode of pleading is recognized as correct. What is the rule in Ohio? There is no question that the commissioners who drafted the code, understood that in a petition under the code there would be, in a case like this, not two causes of action but one, incorporating in one all the facts together with a prayer for alternative relief.

In the report of the code, they speak of three things, which they specially desired to remedy; the mode of allegation in common law pleading; second, the multiplication of counts in common law pleading; third, the formal technical parts of a bill in chancery. They specifically state that they do not propose to change the mode of allegation in a bill of chancery, but intend to give up or do away with the formal parts, that is the charging part, the conspiracy, and the interrogatory part. So, that according to their report, their idea of a petition under the code was a pleading drawn exactly like the stating part of a bill in chancery and the prayer, with nothing more.

The commissioners in commenting upon their own work lay great stress upon the clause in the code that the petition must be drawn in "ordinary and concise language and without repetition." Now, the revisers of the statutes have dropped out from the code the words "and without repetition," as if to bring code pleading in Ohio in accord with code pleading in the other states. The clause "and without repetition" applied only to petition, not to subsequent pleadings. Hence, the provision of the code as to pleading causes of action, is the same now as the provision always has been as to pleading several defenses. Now where a party has one of two defenses, and he cannot certainly state which one, he has been allowed without qualification by the supreme court to state those two defenses as separate defenses; as where a party being charged upon a promissory note, the answer was he did not sign the note for the first ground :

second, if he did the signature was obtained by fraud. *Citizens' Bank v. Closson*, 29 O. S., 78. And I take it that this ruling as to defenses would now apply to causes of action. The motion to require the plaintiff will also be overruled.

Hoadly, Johnston & Colston, for motions.

Stallo & Kittredge and Paxton & Warrington, contra.

†The New York Register made the following comments on this decision.

"A case of general interest upon the subject of pleading under the Code is *Citizens' National Bank v. Cincinnati*, New Orleans and Texas Pacific R. R. Co. (Superior Court of Cincinnati; 9 Cincinnati Law Bulletin, 355), where the practice of stating several grounds of recovery, although constituting one cause of action, was sanctioned by the Superior Court of Cincinnati.

"There are many cases in which a plaintiff has a grievance for which he is entitled to redress under circumstances which present themselves in several aspects, in either one of which he is entitled to the same relief, and the pleader is in doubt as to what is the cause of action. There is another similarly doubtful class of cases in which plaintiff knows that he has been injured and is entitled to redress, but has not yet been able to learn the facts on which alone it can be determined whether he is entitled to one kind of relief or another kind.

"These two classes of cases present the much mooted subject of alternative and hypothetical pleading. In the one class, plaintiff is clear what redress he is entitled to and has adequate information of several classes of facts, either of which will entitle him to it; and his attorney's uncertainty is as to whether he shall plead only one of the grounds entitling him to the relief or the several grounds which are consistent as matter of fact, but all save one of which are superfluous as matter of law.

"In the other class of cases he knows that the facts entitle him to some relief, and the question is, whether, being in ignorance of the details or in uncertainty as to the true rule of law, he shall demand one kind of relief only, or demand both in the alternative. The case to which we refer was of this second class.

"Plaintiff being about to take a transfer of stock in a corporation, asked the president of the company if the shares were good; he said they were, and thereupon plaintiff purchased them. But the company subsequently denied their validity and refused to issue a certificate.

"The pleader appears to have been unable to determine whether the stock was in fact valid or not; but it appearing to him that if it were valid, the corporation was a wrongdoer in refusing to issue a certificate; and if it were void the corporation was a wrongdoer in the deceit it practiced by its officer, he put the dilemma in his complaint by alleging the representation, and the purchase on the faith of it, and the refusal; and thereupon demanded judgment as for conversion; and he then restated "as a second cause of action" the facts already once stated, adding that if the shares were void, defendant, by its officer, deceived plaintiff; and thereupon asked judgment for damages for the deceit.

"The court, reviewing the practice in New York and other states, hold that the former rule in chancery—that a plaintiff, uncertain as to the form in which his ground of action would be established, could state in the alternative—is still in force, and that, since the Ohio Code has omitted the words "without repetition" from the provision directing the mode of pleading, a plaintiff may, if he choose, set forth such alternative claims as a separate cause of action. The conclusion accords with the recent decisions in our own courts, which have sanctioned the same method of pleading in actions of a common law nature (see *Vellie v. Newark City Ins. Co.*, 12 Abb. N. C., 304; *Dennis v. Coman*, 16 N. Y., 642; *Barr v. Shaw*, 10 Hun., 580; *Nebenzahl v. Townsend*, 61 How. Pr., 353, to the contrary, probably unsound. Compare *Exner v. Exner*, 2 Abb. N. C., 108).

"In *Roberts v. Leslie* (46 Super. Ct., J. & S., 76), it is intimated that when the number of plaintiff's claims is augmented, and the issues enlarged beyond the real facts, the complaint representing distinct and separate transactions, occurring at different times, being renewals of preceding ones, a refusal to compel an election, or to require the jury to answer specific questions as to each separate cause of action, is improper.

"In *Hammer v. Chicago, R. I. and P. R. Co.*, (Iowa, April 20, 1883; 15 Northwestern Rep., 597), it is intimated that the various facts constituting negligence of defendants' employes in operating the train—for example, negligence in the first instance, and subsequent negligence, not taking the proper steps to protect against the peril after it was discovered—constitute but one cause of action, and should not be stated in two counts."

CERTIFICATE OF DEPOSIT.

361

[Hamilton District Court.]

*BROWN v. THE CITIZENS' NATIONAL BANK.

An action will lie at the suit of the original owner of a certificate of deposit, payable on return thereof lost after the expiration of a reasonable period short and the owner is not required to indemnify the maker.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

Eugene E. Brown deposited in the Citizens' National Bank of Cincinnati, eleven hundred and forty-five dollars (\$1,145.00), and received at the time a certificate of deposit as follows:

August 8, 1882.

"No. 762. Citizens' National Bank of Cincinnati.

Eugene E. Brown has deposited in this bank eleven hundred and forty-five dollars, payable to the order of himself, on return of this certificate in current funds."

On the 16th day of September, 1882, Brown lost the certificate of deposit and has not been able to recover the same. It was not indorsed by him.

Having demanded \$1,145 of the bank and been refused, he brought his action in the court below for money had and received.

A demurrer to the petition was sustained and judgment entered for defendant and to the action of the court in that respect. Brown excepted and filed his petition in error in this court asking a reversal of the judgment.

The bank admits the deposit of money and is willing to pay the same to the plaintiff if indemnity is given against subsequent demand and recovery on the part of the finder or holder of the certificate.

If the bank is correct in the position it assumes, it must be because it is responsible to the person who might come into possession of the certificate as a bona fide holder after its loss by Brown.

The certificate was not indorsed by Brown and knowledge of its loss was made known to the bank immediately, and payment was demanded about one month after its issue and date. In its legal position, the bank is entitled to the production of the certificate before payment of the money but that is physically impossible and the question arises whether Brown must tender to the bank a sufficient indemnity in some form, against any future claim by a finder or holder of the certificate.

In the United States the decisions of the courts vary in the mode of procedure under the circumstances stated. In some of the states the distinction between negotiable instruments lost before, and those lost after maturity is recognized and when lost after maturity the right to an action at law without making an indemnity is maintained. *Thayer v. King*, 15 O., 242; *Jones v. Fols*, 5 Mass., 101.

It is asserted that the American rule upon indemnity is simply that if it can be shown in any way, that the defendant may be injured by paying, he may require security but only then. See 2 *Parsons on Notes and Bills*, 304, and cases cited.

There are several exceptions to the rule denying the right to sue at law when the lost instrument is negotiable, and among them is the case where the instrument is not indorsed by the payee, for in such case no legal title can pass so as to invest any one with the privileges of a bona fide holder and no indemnity is necessary in such case.

*For decision of the Superior Court which is reversed in this opinion, see 10 Ohio Dec. R. 000 (s. c., 16 B., 421.) After the decision of this demurrer, a trial was had, and Brown obtained judgment, error was again prosecuted in the district court, but the judgment was affirmed, 11 B. 220. To reverse this judgment error was prosecuted to the Supreme Court, but the district court was affirmed, two judges dissenting. See opinion, 45 O. S., 39.

That the certificate of deposit in question was negotiable, because containing negotiable words, and in legal effect a promissory note is supported by the weight of authority, therefore the principle applicable to promissory notes payable on demand should apply.

It has been held after a careful review of all the authorities that, "a certificate of deposit payable on the return thereof, properly indorsed is, in legal effect, a promissory note, payable on demand, and the principles applicable to notes should be applied to these certificates."

Certificates of deposit are not intended for long circulation or for more than a temporary convenience, and to hold that any ostensible demand paper could be circulated or used as bank bills, would be contrary to the general policy of our banking laws. 36 Mich., 494; 37 Ill., 137 and cases cited.

An important inquiry is whether, at the time the certificate was lost, it had become due, for if it was due the finder would take it subject to all equities existing between the bank and Brown and there could be no recovery upon it.

The uniform weight of authority is that a note payable on demand must be presented within a reasonable time or be deemed overdue and that a negligent transferee would take it subject to all equities existing between the original parties. See *Howe v. Hill*, 11 O. S., p. 449.

In the case of *Herrick v. Wolverton*, 41 New York Rep., 581, a well considered case, it was held that "a note payable on demand, with interest transferred nearly three (3) months after date where the parties have their places of business in the same street and the same city, is subject in the hands of the transferee to any defense existing in behalf of the makers against the payee previous to the transfer."

No one can become a bona fide purchaser of a certificate of deposit who does not take it within some reasonably short period, for the reason that banks would then be able to issue certificates of deposit of any denomination, for circulation as ordinary bank bills and with like effect. See 36 Mich., 495, and cases cited in opinion.

The language of the certificate "payable to the order of the plaintiff on the presentation of the certificate properly indorsed" does not alter the legal effect of the instrument. 25 Mich., 191; 37 Ill., 137; 40 Vt., 377; and in the case in 64 N. Y., 155, it was held that a written instrument acknowledging the receipt of a specified sum of money in paper currency for account of a person named and promising to pay the same to such person or order on return of the receipt" did not make it payable upon a contingency or constitute a condition precedent and the words "on the return" did not make it payable upon a contingency. If so, then no recovery could be had without a return of the certificate. The same implication might be applied to every promissory note, for as already stated, the maker or indorser has a right to the return of his paper, upon payment and there is also an implied exception on account of accident or mistake.

Therefore the question is narrowed down to the simple matter of indemnity and if the instrument was due at the time of its loss, and we are inclined to the opinion that it was due, the finder or subsequent holder takes it subject to all the equities existing between the original parties and the recovery by or payment to the original holder would be a bar to another action by a person who receives the instrument after maturity.

In the case of *Thayer v. King*, 15 Ohio, 241, it was held that "an action will lie at the suit of the owner of negotiable paper which has been lost before due, the remedy is in chancery where the owner can be required to indemnify the maker" and that if a former recovery or payment would be a complete bar to any subsequent payment or recovery, the reason of the rule ceases and the objection to a recovery no longer exists.

And hence it follows that the defendant is not wronged by being required to pay to the plaintiff, without indemnity, because there is no existing legal obligation to recognize the finder of the lost instrument as a bona fide holder. Judgment reversed.

T. Q. Hildebrandt, for plaintiff in error.

Paxton & Warrington, contra.

HUSBAND AND WIFE—BILLS AND NOTES.**362**

[Hamilton District Court.]

EZRA A. HILL v. TABITHA MYERS.

The note of a married woman not naming a place of payment, but dated and signed in Indiana and delivered to a creditor of her husband there, in consideration of extension of time and the withdrawal of a threatened attachment against household goods and furniture, she and her husband being then on their way, removing from Indiana to this state, which was their original domicile, and where she owned at the time and continues to own separate real property acquired by gift, may be enforced against such property, notwithstanding that by the statutes of Indiana, it was provided, "a married woman shall not mortgage or in any manner incur her separate property acquired by gift, as security for a debt or liability of her husband or any other person."

APPEAL from the Court of Common Pleas of Hamilton county.

EVERY, J.

The action is, to subject the separate real estate of a married woman, in this county, upon the following note, signed by herself and husband.

Grandview, Ind. December 2, 1880.

For value received, we promise to pay Ezra A. Hill, nine hundred dollars, payable two hundred dollars in twelve months; and second payment, two hundred dollars in two years; third payment, two hundred dollars in three years, and fourth payment, three hundred dollars in four years, all bearing eight per cent. interest from date, and on failure of either payment, the whole becomes due.

TABITHA MYERS.

JOHN MYERS."

At the time of giving the note, the wife and her husband were on their way to their present residence in this county, from a farm in Indiana on which they had resided a number of years. The farm had been sold for debt, and with their household goods and furniture they were on the wharfboat, at Grandview, Indiana, waiting for a steamboat that was to carry them here, when the plaintiff, who was a creditor of the husband, threatened an attachment, and to avoid it, the wife with her husband executed the note. She then owned the real property, that it is sought to subject. It is not denied, that it is her separate estate, and came to her by gift. By the statutes of Indiana in force, it was provided, "a married woman shall not mortgage or in any manner incur her separate property, acquired by descent, devise, or gift, as security for a debt or liability of her husband, or any other person." Laws of 1879, 160. See *McCarty v. Tarr*, 83 Ind., 444.

The application of the law of a particular locality to a contract rests upon the presumed consent of the parties. In general, the law of the place where the contract is made or to be performed, furnishes the rules for expounding the nature and extent of the obligation. *Wharton, Conf. L.*, sec. 397, sec. 401, and note. The question, however, like every other question of the intention of parties to a contract, is one of construction, and regard is to be had to attendant circumstances.

The contract here was made in Indiana. The note was signed there, and delivered to plaintiff who was a resident of that state. But the defendant and her husband were, at the time, on their way back to this state, which was their original domicile. They had abandoned their residence in Indiana, and by putting themselves in motion to come hither, their original domicile had been restored. *Story, Conf. L.*, sec. 47; *Wharton, Conf. L.*, sec. 53; *Reed's Appeal*, 71 Penn. St., 378, 383; *Forbes v. Forbes*, Kay, 341. The note had no effect to bind the wife personally; and since the intention must be presumed to have been according to the capacity she had, it could only have been to bind her property. That property was in this state. The note was the note of her husband as well, but the circumstances show that the chief regard was to her.

It is said by Parsons, that a note made in one state and dated in another, is presumed to be payable where dated, and will be governed by the laws of this state.

*For common pleas decision sustained by this judgment, see ante 695. The judgment of the district court was affirmed by the Supreme Court without report, March 16, 1886. The case was remanded, and again came before the Supreme Court and was again affirmed. See opinion, 46 O. S., 183.

2 Parsons on Contracts, 6th Ed., 585. This is because no reason is to be otherwise found for so dating it. Tillotson v. Tillotson, 34 Conn., 367. But a like presumption does not follow from a contract, dated at the place it is made, since the sufficient reason in such case, may be simply that the parties were there at the time. "It can only be from a special understanding of the parties, which, if not expressed, must be implied from circumstances, showing that they virtually looked to the law of the place at which they stood at the time of agreement, as that by which the obligation was to be controlled," Wharton, Conf. L., sec. 398.

Generally, it is the duty of the debtor to seek out the creditor; and the presumption, that the place of contracting the debt, was intended to be the place of payment, may thus be supplied. But this can be, only where there is a debt to be personally discharged. The liability of a married woman in respect to her separate estate, is a liability of property. It is not from any capacity conferred to bind herself personally by contract, but is from the right of disposition incident to the ownership of the separate estate. *Levi v. Earl*, 30 O. S., 147, 165-6; *Phillips v. Graves*, 20 O. S., 371. Property in real estate, and the rights of disposition incident to ownership, are to be determined by the law of the place of location. The real estate of the defendant was within this state. The legislative power of the state over the thing itself, made it her separate property. The right of disposition, whosoever exercised, could take effect only where the property was. The presumption of intent, arising from her contract, and laid hold of in equity as the exercise by her of such right, was to charge property in this state. Her note had no other effect; the property was the debtor. *Williams v. Urmston* 35 O. S., 296, 301.

The intention to look to this state, as the place of performance of the wife's contract, and to the law of this state, is confirmed by the consideration, that for a debt of this kind a married woman could not charge such property in Indiana. The application of particular local law to a contract rests upon the presumed consent of the parties, and it is a reasonable principle, that they will not be presumed to have consented to that one of two conflicting laws, by which the engagement entered into would be made void. Wharton, Conf. L., sec. 507.

This principle has been recognized in a recent decision of the Supreme Court, upon the question whether a note made and delivered here, for a loan negotiated in Illinois, should be governed by the interest laws of this state or that. *Scott v. Perlee*, 39 O. S., 63.

But the principle is not confined to questions of interest and usury.

In *Pritchard v. Norton*, 106 U. S., 124, upon a bond of indemnity executed in New York against a liability undertaken in Louisiana, which bond had no sufficient consideration by the laws of New York, but was sufficient by the laws of Louisiana, it was held, "It is to be presumed in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one, by which it would be defeated."

In *Bell v. Packard*, 69 Me., 105, where a note signed in Massachusetts by a wife as surety for her husband, both residents of that state, and mailed to the payee in Maine, was held binding upon her by virtue of the laws of the latter state; although the judgment was grounded on the note having been mailed to the payee in Maine, the court say: "But even if this were not conclusive, we should have no hesitation in deciding, that the construction and legal effect of the note must be determined by the laws of this state, on the ground, that no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law which it was competent for the parties to adopt."
* * * * If made in Massachusetts and intended to be payable there, it was illegal and void and an intended fraud by the makers, whereas if made or intended to be paid in this state, it would be lawful and valid. It should, therefore, in the absence of any legal principle forbidding it, be considered as intended by the parties, to have been made with reference to the law of the place, where legal."

We are of opinion, therefore, that the plaintiff is entitled to payment. The wife's property was here, the parties may reasonably be taken to have regarded this as the place of performance; the inference from the execution of the note of the wife's intention to charge the property is a rule of evidence. *Williams v. Urmston*, 35 O. S., 296; *Phillips v. Graves*, 20 O. S., 371, 387. Rules of evidence are governed by the law of the place, where the remedy is sought. *Kanaga v. Taylor*, 7 O. S., 134; *Bain v. Whitehaven Railway*, 3 H. L. Cas., 1.

Judgment accordingly, charging the property with the amount.

Bateman & Harper, for plaintiff; Cornell & Marsh, for defendant.

MASTER AND SERVANT—NEGLIGENCE.

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[Superior Court of Cincinnati, General Term.]

CHARLES McMANUS v. P., C. & ST. L. R. R. CO.

In an action to recover damages for a personal injury alleged to have been caused by the defendant's negligence, a motion, at the close of plaintiff's testimony, to withdraw the case from the jury and render judgment for the defendant, on the ground that no evidence of defendant's negligence had been produced, can not be granted if there be any facts proved from which the jury may be at liberty to infer negligence.

PECK, J.

On the trial of this case at special term, at the close of plaintiff's testimony, a motion to withdraw the case from the jury and to render judgment for the defendant was granted, whereupon plaintiff moved for a new trial, the consideration of which motion was reserved to the general term.

The action was brought to recover damages for a personal injury to plaintiff, alleged to have been caused by the negligence of the defendant's agents. The certified bill of evidence discloses the following facts: Defendant was engaged in removing an old building. Plaintiff was in defendant's employ as a laborer assisting in the work. In the course of that employment he was directed to go upon the floor of the old building, the walls of which had been removed, and shovel away certain loose bricks and other material. While engaged at this work under the direction of defendant's superintendent, or foreman, an iron post, or pillar, part of an iron door frame, which had constituted part of the old building, fell upon the plaintiff and seriously injured him. There was some evidence tending to show that this iron pillar or door post had been removed from the position in which it stood in the old building, and other to the effect that it stood in its original position.

The question is whether there was any evidence of negligence on the part of the defendant, to go to the jury. If there were *no* such evidence, the case was properly withdrawn from the jury, but if there were any testimony, however slight, which tended to show that the injury was caused by defendant's negligence, or any fact from which the jury would have been at liberty to infer negligence, then the case should have been left with them, under proper instructions.

"A motion to arrest the testimony from the jury and render a judgment against the party on whom the burden of proof rests, involves an admission of all the facts which the evidence tends to prove, and presents only a question of law for the court." *Dick v. Railroad Co.*, 38 O. S., 389.

There is a class of cases in which it is held that the mere fact of an injury from a particular cause is of itself evidence of negligence. Thus it is held that the fact that a passenger is injured by a collision of railway trains is of itself sufficient to raise a presumption of negligence on the part of the Company. *Railroad Co. v. Mowry*, 36 O. S., 418. In another case the fact that a berth in a sleeping car fell upon the head of a passenger sitting in his seat was held sufficient to warrant the jury in presuming negligence on the part of the railroad company. *R. R. Co. v. Walrath*, 38 O. S., 464. On the contrary it has been held that the mere fact that a

horse was killed by a train on a railroad track, did not tend to prove negligence on the part of the company; *R. R. Co. v. McMillan*, 37 O. S., 554.

If a person leave anything, a wall, a post, or a column, in such a position that it may fall and injure persons near by, that of itself *might* be evidence of negligence, and in the absence of any proof of effort to discover the facts as to safety or the reverse, or to warn persons that it was not safe, a jury might be warranted in finding that there was neglect of such precautions as should have been taken. If one engaged in tearing down a building should leave a wall standing, its supports having been withdrawn, and it fell upon a person passing by, that would of itself, under some circumstances, authorize a recovery for the injury so received. In this case there is no evidence that the company's officers took any steps to make the post safe, or to ascertain whether it was unsafe, or to warn the plaintiff as to its condition. It was placed there or left there, the brick work against which it stood having been removed, and it fell upon the plaintiff.

We cannot say with that certainty which ought to exist in order to authorize the withdrawal of a case from the jury that these facts have no tendency to prove negligence on the part of the defendant, and therefore the motion to set aside the judgment and order a new trial will be granted.

Harmon and Force, JJ., concur.

T. M. Hinkle and C. H. Blackburn, for the plaintiff.

Ramsey & Matthews, *contra*.

TAXES—INJUNCTION.

[Superior Court of Cincinnati.]

*S. B. HAYMAN ET AL. v. E. O. ESHELBY, CITY COMPTROLLER ET AL.

The sum required to be paid as license fees by the act of April 16, 1883, § O. L., 129, are not taxes or assessments within the meaning of sections 5848-50, Rev. Stat., and no summary power of collection being given by the law to the officer charged with the collection nor any lien upon property, persons required by said law to pay such license fees have a complete remedy at law and are not entitled to an injunction against the city comptroller.

HARMON, J.

Four petitions have been filed by different parties representing different lines of business, asking the court to enjoin the comptroller of the city from exacting the amounts required of them as licenses by the act of the general assembly, passed April 15, 1883. The plaintiffs are S. B. Hayman, proprietor of a livery stable; Harry C. Bussey, proprietor of a billiard hall; F. W. Gerstle & Son, undertakers, and Louis Fernberg, second-hand furniture dealer. The grounds laid in the petitions are that the act of the assembly is unconstitutional, and that an irreparable injury will be done the plaintiffs, unless the comptroller is restrained from collecting such license fees. No other officer is made defendant with the comptroller in some of the cases; in others the treasurer is joined.

The application is resisted, first, because the petitions do not, on their face, show grounds for relief upon a well known rule that a court of equity will not interfere by injunction where the party seeking the injunction has an adequate remedy at law. The plaintiffs reply that sections 5848 and 5850 of the revised statutes gives them a right to such injunction by providing that the superior courts and courts of common pleas shall have jurisdiction to grant injunctions to restrain the illegal levy or collection of taxes and assessments.

*This judgment was affirmed by the Supreme Court. See opinion, 45 O. S., 63.

It had become well settled in Ohio, prior to the passage of those sections, that courts of equity would not interfere to restrain the collection of taxes and assessments, on the ground that there was a remedy at law. *Stephan v. Daniels*, Treas., 27 O. S., 527.

It has been conceded in these cases that unless these actions come within those sections the plaintiff cannot maintain them. The terms of those sections give the court jurisdiction to enjoin the collection of "taxes and assessments." It may be said that the exaction of license fees may be an exercise of the general taxing power vested in the general assembly as well as of the police power. But it cannot be said that license fees are either taxes or assessments. Both taxes and assessments are levied upon property as such; both are to be collected by summary process; and the remedy was designed to be given in cases in which but for those sections it did not exist at all or was virtually useless. When the treasurer armed with the power of seizure proceeds against a citizen, the citizen has no day in court. He must pay or his property will be taken. Therefore the intention of the sections was to give a remedy in such cases as well as in those cases where the levying of an assessment by the auditor clouds the title of the owner. In these cases a reading of the law shows that neither the comptroller nor treasurer is armed with any power whatever, none even, so far as its express terms show, to bring suit for the collection of license unpaid and no right to enforce the collection in any way. The collection is left to be enforced by the police power. If this law be, as claimed, unconstitutional, the parties can set up that fact in defense to a civil action to recover the license fee or to a criminal prosecution for doing business without the license. The comptroller and treasurer have no power to do anything to interfere with plaintiffs and there is nothing to enjoin as to them.

This action not coming within the terms of sections 5648 and 5650, the sums whose collection is sought to be enjoined not being either taxes or assessments and there being an adequate remedy at law, the plaintiffs have no right to an injunction, and must be left to assert what rights they may have in some other way. The petitions will, therefore, be dismissed.

E. G. Hewitt and L. H. Swormstedt, for plaintiff.

J. M. Dawson, J. H. Perkins, and D. Wulsin, for defendants.

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1. A bailee, after conversion of the property of his bailor, cannot recover for the care and keeping thereof thereafter. *Crigler v. Gaff & Co.* 278

2. The bailor will be deemed to have waived any damages sustained by such conversion, beyond the sum remaining in the hands of the court. *Id.*

BANKRUPTCY—

1. A certified copy of a certificate of discharge in bankruptcy is admissible as proof of such discharge, without proving the loss of the original. *Berland v. Bell.* 27

2. A's agreement to indemnify B, if he will go on a bond for C to pay any future judgment against C, is not discharged by A's discharge in bankruptcy before judgment against C is rendered. *Greive v. Gibbous.* 605

BANKS—

Lien of a bank upon collections. *Hakman v. Schaaf.* 127

BASTARDY—

1. The presence in court of the plaintiff in bastardy is not absolutely necessary at the trial. *Smith v. Jones.* 165

2. If defendant insist on a trial it is within the discretion of the court to order the trial to proceed. *Id.*

3. Plaintiff in a bastardy suit need not be a resident of the county, a former requirement to that effect being omitted in the statute. *Knox v. Weber.* 138

4. Where, in a proceeding in bastardy against a minor, he has absconded, funds in the hands of his guardian may be garnisheed. *Arbaugh v. Myers.* 617

5. Where a married woman gave birth to a child during her marriage, but born after obtaining a divorce, and the evidence shows that her husband had deserted her several years previous,

a verdict and judgment that the child was a bastard and that defendant was his father, will not be disturbed. *Schaffer v. Mueller.* 751

BILL OF EXCEPTIONS—

1. The allowance of a bill of exceptions should appear of record. *Klugman v. Mauk.* 246

2. Bill of exceptions, the allowance of which does not appear on the journal, cannot be looked into. *Thacker v. Sheeran.* 104

3. Where it is necessary to review all of the alleged errors, to have all of the testimony, the bill of exceptions must state affirmatively that it contains all the evidence. *Buck v. Mills.* 246

4. Entry by clerk showing that a bill of exceptions was allowed as of a prior term. *Gould v. Life Ins. Co.* 525

5. Bills of exceptions taken before a justice in a pending trial must be entered at length on his docket, and until so done the reviewing court can take no cognizance of their contents. *Argo v. Belsar.* 475

6. Evidence cannot be heard nor statements of counsel received in the reviewing court to add to or strike anything from a bill of exceptions properly taken and filed. *Chatfield & Woods v. Swing & Mellen.* 5

7. It is not required by sec. 5302, in order to give a party thirty days from the end of the trial term to prepare his bill of exceptions, that an entry be made to keep the journal open for thirty days after close of trial term. *Williams v. Cameron.* 557

8. It is not approved practice for the entry of allowance of the bill to state in the body of the entry that it was made within the time. *Id.*

BILLS AND NOTES—

1. In a suit on a non-negotiable note, plaintiff sustains the burden of proof by producing the note and proving its execution. *Langhorst v. Dolle.* 140

2. When the execution is admitted, the production of the note makes a *prima facie* case and plaintiff is not required to prove considerations. *Id.*

3. It is no longer required in a pleading on negotiable paper, against other than makers or acceptors, to state the kind of liability upon which they are sought to be held. *Levy v. Trennel.* 121

4. Promissory note deposited as collateral security for a loan cannot be sold before maturity and proceeds applied to payment of debt. *Springer v. Purcell.* 139

5. If sold in violation of his duty the depositary is responsible for full value. *Ib.*

6. Forbearing to bring suit on a note until after death of maker, on his agreement that it should be paid out of his estate, is a good consideration for a contract and it will be enforced. *Williamson v. McGill.* 185

7. Where a bank check is made payable to the drawer himself without the words "order" or "bearer," and is endorsed by him in blank, and stolen, and, on presentation to the bank, is paid, the bank will be protected in the payment. *Bowden v. Bank.* 394

8. One who puts his name on the back of a note before it is given is an original promisor or surety in this state. *Fischer v. Penterman.* 540

9. The maker of a note may ante-date it, and in such case the note is due so many days from date, and may be sued on then, without waiting the same length of time from its execution. *Cochran v. Duffy.* 102

10. Endorsement over by the secretary of a corporation of a note to its treasurer may not show title in indorsee, without proof of authority, yet the defect is cured by other proof of ownership. *Gould v. Life Ins. Co.* 525

11. A petition on a note which alleges ownership, but fails to set out the endorsements or show title is defective. *Ib.*

12. The endorsee of a dishonored note must within a reasonable time after becoming the owner thereof, demand payment of the maker and give notice to such last endorsee of non-payment in order to hold him liable thereon. *Archer v. Solor.* 773

BOARD OF HEALTH—

The method of procedure against a physician for failure to report small-pox case to board of health must be by civil action. *State v. Chandler.* 322

BOARD OF TRADE—

1. Where a firm is a member of a chamber of commerce, whereby the members of the firm have the rights of members of the chamber, and charges of unmercantile conduct are preferred against the firm, the chamber has jurisdiction thereby to try the member of the firm who has been guilty of the conduct complained of, and exclude him from the chamber. *Blumenthal v. Chamber of Commerce.* 410

2. In the trial, in a Chamber of Commerce, of charges against a firm, such corporation is not bound to acquit or convict the whole firm but may

convict and punish the member of the firm which it finds to be guilty. *Blumenthal v. Cin. Chamber of Commerce.* 622

3. Charges of "unmercantile conduct in fraudulently charging purchaser with 300 or 400 pounds of meat to the car more than it actually weighed, and saying that was the weight actually bought of us," are sufficiently specific to render a sentence valid. *Ib.*

4. A provision in the constitution adopted by this corporation delegating the power to try and punish members, is legal. *Ib.*

5. Such corporation trying one of its members is not bound by the strict rules of evidence and a conviction is valid though hearsay evidence was admitted. *Ib.*

BOUNDARY—

Where one of the corners in a survey is fixed upon by agreement, and the plat denotes the corner calling it the "agreed corner," the plat itself is the best evidence, in the absence of any other writing, upon the question of the location of the corner. *Carthage v. Caldwell.* 91

BUILDING ASSOCIATIONS—

1. Computing the value of a building association mortgage upon foreclosure. *Windisch v. Korman.* 60

2. Distribution of the proceeds of sale under a building association mortgage. *Building Assn. v. Eggen.* 114

3. Suit and bond of a building association treasurer. *Bohe v. Moore Building Assn.* 164

4. Money paid to retiring members of a building association as profits is not open to the objection of usury. *Jungkuntz v. Building Assn.* 242

5. The association cannot withhold part of the money as retiring member is entitled to receive, until its winding up, for apprehension of ultimate insolvency, to relieve which the member would be obliged to contribute. *Ib.*

6. It is a liability only to be enforced in an action directly between creditors and the stockholder, and a counterclaim will not lie in favor of the association. *Ib.*

7. The withdrawal of borrowing members from a building association and the cancellation of their mortgages before maturity was regulated, by the by-laws of such association. *Windhorst v. Building Assn.* 286

8. By-laws of an association, like statutes of a legislature, are repealable. *Ib.*

9. The parties may agree that a right which had vested may be waived, or may be changed. *Ib.*

BUILDING ASSOCIATIONS—Con.—

10. The weekly installment of premium to be paid for shares purchased in a building association having been fixed in and secured by a mortgage on the property of a member purchasing, cannot be increased and covered by the mortgage by subsequent action of the association unless the constitution and by-laws of the association confer such authority in plain and unmistakable language. *Burke v. Home Bldg. Assn.* 341

11. Where settlements with and release of members of a building association by allowing payments in advance, etc., is contrary to the constitution, such payments and release, though made in good faith, will not release members where it turns out that there will be a deficiency as to non-retiring members. *McKeown v. Building Assn.* 17

12. Upon foreclosure of a building association mortgage, in determining the amount due on distribution, dues paid will not be credited with interest, as dues are entitled to dividends rather than interest. *Loan and Building Assn. v. Mueller.* 469

13. In estimating the time required to pay the shares, probable profits may be considered, for the dues for the future are being paid, discounting for the time in advance. *Id.*

14. The periods for the payment of profits are every six months from the organization of the society and not from the various dates of taking his shares. *Id.*

15. If interest is rebated annually, future interest is to be based on the amount of the shares less dues to date, as the principal at the beginning of the next year, from which dues and estimated profits for the next year will be deducted to form new principals for each succeeding year. *Id.*

16. A building association, incorporated under the law of 1868, has no power to purchase land on credit to be allotted among the members. *Vos v. Building Assn.* 682

17. Promissory notes of such association, given in part payment for such purchase, are void in the hands of holders chargeable with notice of the consideration therefor, and deriving title through persons chargeable with like notice. *Id.*

CARRIERS—

Payment of extra charges for changed delivery. *Railroad Co. v. Kahn.* 7

CERTIFICATE OF DEPOSIT—

An action will lie at the suit of the original owner of a certificate of deposit, payable on return thereof, lost after expiration of a reasonably short period, and the owner is not required to indemnify the maker. *Brown v. Bank.* 791

CHARGE TO JURY—

Refusal to give a series of special charges is not error if the general charge correctly and fully gives the law of the case. *U. S. Home & Dower Assn. v. Kirk.* 592

CHATTEL MORTGAGES—

1. Section 4155, regarding the filing of chattel mortgages, must be strictly construed. *Fought v. Hiet.* 1

2. In an action on a chattel mortgage, an answer that neither the mortgagor nor mortgagee had in view, or any idea of the number or kind of goods intended to be conveyed, states a defense. *Cochran v. Breen.* 103

3. The interests of a mortgagor and a mortgagee of chattels are in conflict, and they cannot join as plaintiffs in replevining them from a third person. *Lyons v. Geddes.* 197

COMITY—

Comity between states will not authorize the giving of greater rights to a foreign assignee than would be allowed to an assignee under a deed of assignment executed in this state. *Bank v. Fleming.* 545

COMPOSITION WITH CREDITORS—

1. A secret agreement by a debtor with one of the creditors of a composition agreement, to pay such creditor in full, and paying him in full, the other creditors settling for less, avoids the composition, and the other creditors may recover the balance of their claims from the debtor. *Brown & Co. v. Daugherty.* 371

2. An agreement by the creditors to sell their claims to a friend of the debtor for the stipulated percentage of their amounts, which agreement was procured by the debtor and signed at his request, or at the request of the preferred creditor, is such composition agreement. *Id.*

3. The surrender of certain securities held by the preferred creditor as part of the consideration does not alter the effect of the preference. *Id.*

CONFLICT OF LAWS—

1. What is necessary for a married woman to do to create a charge on land constituting a part of her separate estate, is to be determined by the

law of the place where the land sought to be charged is situated. *Hill v. Myers.* 694

2. Where a married woman executes a note in Indiana charging her separate estate in Ohio: *Held*, that the question whether the execution of the note operated as a charge on her Ohio land, is to be determined by the law of Ohio. *Ib.*

CONSTITUTIONAL LAW—

1. The legislature has no power to grant relief by assuming judicial powers and reversing, vacating, or modifying a judgment in favor of an individual. *Campbell v. Corry.* 88

2. Legislature may change course of descents during the life time of the owner. *Tarvin v. Broughton.* 451

3. Such laws are not retroactive nor impairing contract rights. *Ib.*

4. The constitution does not forbid the passing of a local act by the legislature. *State v. Commissioners.* 457

5. The act of April 20, 1881 (78 O. L., 403) authorizing the commissioners of Hamilton county to construct a road, is not unconstitutional, as a special act conferring corporate powers. *McGill v. Commissioners.*

6. The act of March 5, 1881, authorizing the auditor to value and put on the duplicate omitted property since the last decennial appraisal is constitutional. *Kleinschmidt v. Capeller.* 212

7. The legislature is authorized to select any agency they may see proper for tax purposes. *Ib.*

8. Section 2803, as amended 78 O. L. 47, authorizing the auditor to add back taxes in cases of mere improvements, is not unconstitutional; it created no new right, but merely provided a remedy. *Luken v. Staley.* 820

CONSUL—

1. A United States consul is *ex-officio* a notary public. *Bruce v. Gibson.* 31

2. His signature is not official as such, unless he affixes the words "notary public," or if he uses the word consul after his name, adds the words and "*ex-officio* notary public." *Ib.*

CONTRACTS—

1. A city contractor cannot sue a third party for damages to the streets of a city which the contractor is bound to repair, there being no privity between him and the third party. *Daly v. Street Ry.* 742

2. Construction of a contract by village adjoining city for lighting village, made with the city gas company.

Avondale v. Cincinnati Gas Light and Coke Co. 768

3. As a request for prices of merchandise, delivery to begin in January, and an answer merely giving prices, would give the seller until the end of the last day of January to begin shipments. *Hardware Co. v. Wire Co.* 657

4. If one party renounces an executory contract to sell goods, the other party treating it as at an end, may sue without waiting for the time of performance. *Ib.*

5. A contract made by the vendee of real estate not to use it during his ownership for saloon purposes may be enforced by injunction. *Taylor v. Becker.* 151

6. Parol evidence will be received to show that such agreement was a part of the consideration of the sale. *Ib.*

7. In an action for breach of contract, though the breach be proved, if the only evidence as to the amount of the damages rests upon a false hypothesis, and the error caused thereby cannot be ascertained, there is a failure of proof of damages. *Burckhardt v. Burckhardt.* 496

8. Where an employee is wrongfully dismissed from service before the expiration of the time of employment, his remedy is an action for damages for a breach of the contract, and he is limited to one recovery. *James v. Commissioners.* 677

9. A contract whereby plaintiff agrees to purchase of defendant all the coal it will require for a year, is not void for want of mutuality, as being a mere option. *Railroad Co. v. Coal and Mining Co.* 365

10. Under a contract with plaintiff, a railroad company, to furnish it coal free on board cars on the track, the defendant not being on the line of another than plaintiff's road, plaintiff is not obliged to furnish cars at defendant's mines. *Ib.*

11. Where the defendant agreed to furnish all the coal plaintiff would require for a year, plaintiff to pay monthly on or before the 20th of the month, and on the 14th of a month defendant refused to deliver, plaintiff is not in default for not having paid. *Ib.*

12. A promise to pay if promisee will introduce promisor to a widow, and secure renunciation of her right to administer her husband's estate, and have the promisor appointed, is against public policy, and void. *Swiggett v. White.* 452

CONTRACTS—Concluded—

13. Contracts for the sale and delivery of commodities at a future day if made in good faith with intention to deliver and receive the commodity are valid. *Bradley v. W. U. Telegraph Co.* 707

14. But if made without any intention to deliver and receive the commodity, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, are against public policy and invalid. *Ib.*

15. A contract which, on its face, is not unlawful, but being an essential part of an unlawful scheme renders the contract unlawful. *McBirney v. Lead Co.* 762

16. The unlawfulness may be shown by defendant if plaintiff makes out a *prima facie* case for recovery without developing the fact. *Ib.*

17. Enforcing the payment of the price agreed to be given for doing an unlawful thing after the thing has been done, is carrying out an unlawful agreement, and therefore it will not be enforced. *Ib.*

CORPORATIONS—

1. A corporation consolidated from other corporations succeeds by statute to all the other obligations of the original corporations. *Cincinnati Street R'y Co. v. Fullbright.* 361

2. A corporation, the maker of a note payable to another corporation, cannot show that the contract by which it was transferred to the plaintiff was *ultra vires*. *Gould v. Life Insurance Co.* 525

3. The individual liability of trustees of an incorporated benevolent association for "debts contracted by them," as prescribed by sec. 3261, is collateral and conditional to the principal obligation which rests on the corporation. *Walbrecht v. Pucketat.* 774

4. It is unnecessary in enforcing the liability of stockholders for debts of the corporations that a judgment should first be had against the corporation, when the corporation has made an assignment for creditors, and has not paid in full. *Wills v. Reed.* 29

5. A corporation cannot buy its own stock, and where it bought in stock of dissatisfied members, the sale is void, and such stockholders are liable for debts afterwards incurred. *Ib.*

6. The owner of stock in a corporation from whom the certificate has been stolen unindorsed, is entitled on proof of loss and offer of indemnity to the issuance of a new certificate for

which mandamus will lie. *Hof v. Bank.* 245

7. The property of a corporation is a trust fund for the benefit of creditors, which when the corporation has become extinct by a forfeiture of its charter or insolvency, or other cause, will be followed and applied by a court of equity until it passes to a *bona fide* purchaser. *Compton v. Railway Co.* 322

8. Where the constitution of a corporation provides that a certain article should in nowise be changed or amended, any amendment of it not unanimously adopted is void. *McKeown v. Building Association.* 17

CORPSE—

1. A husband or wife, relict, is entitled to the possession of the body of the deceased wife or husband, for sepulture, and in the fitness for burial in which death leaves it. *Farley v. Carson.* 119

2. This right is not infringed where the attendant physician makes a small incision to ascertain the extent of the cause of the decedent's death. *Ib.*

COSTS—

1. There is no mode of release of security for costs given by statute, and without defendant's consent; he can be saved from further liability only by dismissal of the action. *Standard Publishing Co. v. Bartlett.* 75

2. Moving for new security for costs by defendant does not waive the right to object to an erroneous discharge of the security unless new security is given. *Ib.*

COUNTER-CLAIM—

Where upon a counter-claim in equity a breach of contract is established, the court may order the plaintiff to pay a part of the costs, though the defendant furnishes no proof of actual damage. *Burckhardt v. Burckhardt.* 496

COUNTY—

1. County officers not turning money into the fee fund, sec. 1341, can not be sued personally in the name of the state or of the prosecuting attorney, although he is a fee commissioner. *State v. Cappeller.* 546

2. The county alone controls the fund, the county commissioners must be plaintiffs. *Ib.*

3. Where the employment of a janitor by the clerk of the courts is a necessary expense, it is the duty of the commissioners to make an allowance for the wages of such janitor. *Dalton v. Commissioners.* 770

4. The remedy is not by mandamus but by appeal to the court of common pleas. *Ib.*

5. Power of county commissioners to build new roads and use funds for that purpose. *McGill v. Commissioners.* 439

6. It shall be essential to the validity of every contract entered into by the commissioners, that the same shall have been assented to at a meeting of the board, and entered upon the minutes of the auditor; otherwise it is not binding upon the county. *Commissioners v. Wilder.* — 224

COURTS—

1. As the National courts follow the state courts in the interpretation of state laws, so the state courts follow the National courts in the interpretation of the acts of congress. *Keeler v. Snodgrass.* 490

2. Courts have no jurisdiction to instruct an administrant as to whether he shall reject or allow a claim, or as to whether a lease is valid. *Jackson v. Jackson.* 105

3. Under sec. 6709, the district court could review judgments of the superior court of Cincinnati, on petition in error, filed before the passage of the act of April 13, 1880. *Taylor v. Elder.* 65

4. Where the district court reverses the finding of the superior court in special term, this court in general term will regard the controversy as no longer open. *Miller v. Hurlbert.* 240

5. The superior court has no power to hear and determine proceedings supplemental to execution. *Amlingmeier v. Amlingmeier.* 713

6. Such proceedings are confided to the judges of the common pleas or probate court. *Ib.*

CURTESY—

A husband's estate by the curtesy is not protected after the death of his wife, by the act of March 23, 1866, from sale on execution to pay his debts. *Baird v. Van Evra.* 8

DAMAGES—

1. The court cannot weigh the damages, and defendant has a right to have the amount passed upon under a proper charge. *Kuchenmeister v. O'Conner.* 502

2. Under sec. 2326, the filing of a claim for damages with the city is not a condition precedent to the bringing of an action therefor against the municipal corporation where the damages did not arise during the construction of an improvement. *Scherer v. City.* 552

DECEIT—

1. Where a local agent repeats representations of a general agent, the latter's letters to him containing them are admissible in evidence in an action for deceit against a corporation. *U. S. Home and Dower Association v. Kirk.* 592

2. To prove that fraudulent representations were used to induce the signing of a contract, all that took place between the parties may be introduced in evidence to explain what transpired. *U. S. Home and Dower Association v. Reams.* 272

3. Evidence of plaintiff's loss of time, in an action for deceit in the sale of a business, or evidence of what sum plaintiff offered to re-sell to defendant, or the price at which he sold, are immaterial and it is not error to exclude such testimony. *Dokes v. Soards.* 621

DEDICATION—

1. Dedication of a strip of land as a public street. *Macneale v. Cincinnati.* 550

2. The acceptance of such strip by the public being complete, the municipal authorities may exercise their powers over the same as a public street. *Ib.*

DEEDS—

1. Where there is an absolute conveyance, and a lease back with privilege of purchase, executed at or nearly at the same time, the presumption is that both instruments are to be considered together as parts of the same transaction. *Miller v. Hulbert.* 44

2. There is not, however, in such case, any presumption that the transaction was a mortgage. *Ib.*

3. Such transaction must be held to be what it shows on its face, until shown by evidence that the parties to it intended differently. *Ib.*

4. Before such transaction can be held to have been intended to be a mortgage, it must appear from the evidence that the relations of a debtor and creditor existed between the parties. *Ib.*

5. A deed absolute on its face and a lease on the same premises should be construed together as parts of the same transaction. *Ib.*

6. There being no evidence inconsistent with the transaction as the parties made it, *held*, that it was a conditional sale and not a mortgage. *Ib.*

7. A voluntary conveyance made by a man in his last sickness, will be set aside when it appears that he did not know the significance of his acts,

DEEDS—Concluded—

and the nature of the act justifies the conclusion that he has been overcome by undue influence. *Gerke v. Gerke*. 249

8. Where a deed of land in fee to a married woman is placed in the hands of a third party to await simply the happening of some contingency or event, and then to be delivered to her, an interest from the first delivery vests sufficiently to constitute her the owner of a separate estate within sec. 3108, Rev. Stat. *Cook v. Niehaus*. 505

DEPOSITIONS—

1. Objection to the deposition of a party because his name does not appear in the notice is waived if not made as required by sec. 5284. *Crosby v. Hill*. 663

2. Section 481, Rev. Stat., authorizes stenographers appointed thereunder to take depositions in shorthand and transcribe them into longhand, and have the witnesses sign them. *Saunders v. Kinchler*. 386

DESCENTS—

1. Legislature may change course of descents during the lifetime of the owner. *Tarvin v. Broughton*. 451

2. Where a widow, who has property which came to her as sole heir of her deceased husband, earned by her during his life, dies intestate, leaving brothers and sisters of her own, and there are brothers or sisters of her deceased husband surviving, these latter take one-half the estate, under sec. 4162, Rev. Stat., although that section was enacted since the death of her husband. *Caruthers v. Tarvin*. 344

DEVISE—

1. A devise to a wife will be, in the absence of contrary showing, presumed to be in lieu of dower. *Corry v. Lamb*. 380

2. Where the payment of a legacy depends upon the discretion of the executor of a will, the legatee cannot recover it for himself, and it cannot be subjected to the payment of his debts. *Brinker v. Speer*. 755

3. Where a testator devised his real estate to his wife for life "and after her death to the heirs of her body begotten" a child born to him after the execution of the will is "provided for in the will" within sec. 5959. *Rhodes v. Weldy*. 662

DIVORCE AND ALIMONY—

1. A divorce obtained by fraud at one term may be set aside by the same court upon a petition filed at the following term. *Wellington v. Wellington*. 282

2. Failure to provide for many years, even though no proper effort to provide was made, is mere indolence and failure, not gross failure to provide. *Tiberghien v. Tiberghien*. 464

3. Mere default is not gross neglect, but it must be attended with circumstances of indignity or aggravation. 1*b*.

4. Mere failure of husband to provide for his family is not gross neglect of duty, the wife having her own means of support; nor is failure to support after separation, with the wife's consent.

Ferree v. Ferree. 405

Murphy v. Murphy. 406

5. Willful absence as a ground of divorce must be without the consent and against the will of the plaintiff; mutual separation is not sufficient. 1*b*.

6. Gross neglect of duty as a ground of divorce, is not sustained by proof of willful absence, which is a separate cause of divorce, although it be coupled with neglect to provide during the time of absence. *Nichols v. Nichols*. 463

7. Mere failure to provide, while not absent, is not gross neglect of duty. 1*b*.

8. Where a husband for several years willfully withheld support from his wife, or by gambling away his wages, leaving her with two small children, unprovided for, constitutes gross neglect of duty, entitling her to a divorce. *Holland v. Holland*. 460

9. The fact that she was enabled to eke out a support through the kindness of relatives or friends, does not mitigate the offense. 1*b*.

10. A separate action for maintenance of minor child, subsequent to a decree of a divorce cannot be maintained. *Hickman v. Hickman*. 602

11. The court first acquiring jurisdiction in a divorce case can alone decree as to the custody of the children. *Talbot, In re*. 744

12. A woman divorced from her husband by decree of another state, for her own willful absence, is not entitled to dower in his lands in this state after his death, under either dower or divorce acts. *Rogers v. Taylor*. 686

13. No appeal lies from an allowance of alimony *pendente lite*. *Braehle v. Braehle*. 345

14. The allowance and amount in such cases rest in the sound discretion of the court or judge. 1*b*.

15. A plaintiff in divorce and alimony is not entitled to a continuance on the ground that no summons has been issued, and served on defendant's

cross-petition, asking for a divorce. Young v. Young. 575

16. An action for alimony alone can be maintained in the courts of this state even though plaintiff, by an *ex parte* proceeding in another state, has already obtained a divorce *a vinculo* from defendant, the matter of alimony having been dismissed without prejudice by reason of defendant's non-residence, from said divorce proceeding. Waddle v. Woods. 701

DOWER—

1. Construction of an instrument in which a certain dower estate is sought to be releasd. Wagner v. Cox. 241

2. A devise to a wife will be, in the absence of contrary showing, presumed to be in lieu of dower. Corry v. Lamb. 390

3. Dower is allowed only to the widow who was the wife of the person dying at the time of his death. Rogers v. Taylor. 666

4. An action may be maintained against a widow, to subject to the payment of a judgment against her, the dower interest she holds in lands owned by her deceased husband, before the dower has been set off to her. Stoltz v. Boltz. 61

5. The common incidents of leasehold estates, so far as dower is concerned, yet obtain in Ohio. Kampmann v. Schaaf. 351

DURESS—

A mere threat of consequential imprisonment, or a threat to prosecute for perjury or any other criminal offense does not constitute duress. Herbst v. Manass. 215

EASEMENTS—

1. One owning land on both sides of a private way not dedicated to the public, common to all abutting proprietors, cannot be compelled by any of such proprietors to remove a building erected over, but so far above the way as not to obstruct the right of passage. Harrison v. Craighead. 35

2. Time will not be prevented from running in favor of adverse occupancy of a private alley by the fact that for an intermediate time it was used as an alley by parties not entitled to the use of it. *Ib.*

ELECTIONS—

1. Contests of election of mayor, except in Cincinnati, by sec. 1731, are like those of justices. State *ex rel.* v. Simpson. 68

2. If such contests are successful, the contestor is not inducted, but there is a vacancy. *Ib.*

3. The remedy for contest of an election upon the question of removal of a county seat is under the general statutes for contesting elections and mandamus will not lie to compel the clerk of the court to count a voting precinct which the canvassing board threw out. State *ex rel.* v. Stewart. 171

4. In the opening of returns and abstract of votes by clerk of court of common pleas and justices of the peace taken to his assistance, a candidate or his agent has a right to be present. State v. Ramp. 478

5. The right of a candidate to an inspection of the poll-books so long as time is open for notice of the contest, is a common law right not depending upon statute. State *ex rel.* v. Henderson. 112

6. A candidate for the office of justice of the peace after ten days for giving notice of contest have expired without his giving notice, has no more interest than any other citizen, to access to such books. *Ib.*

EQUITY—

1. Equity does not compel the execution of a naked power not coupled with a trust. Compton v. Railway Co. 322

2. Courts of equity cannot grant anything which a party cannot perform. Griffin & Co. v. Telegraph Co. 572

ERROR—

1. The act changing the time within which petitions in error must be filed, from three to two years, applies to all judgments before as well as thereafter rendered. Elwell v. Am. Life Ins. Co. 220

2. No petition in error lies to an order sustaining a demurrer to a petition, and holding that unless it is amended within ten days the action will be dismissed, until the action is dismissed. Brigel v. Cameron. 226

3. A petition in error will not be entertained from a party against whom no judgment is rendered, and whose substantial rights as a party are not affected. Corcoran v. Building Assn. 111

4. Only judgments, and final orders affecting a substantial right in an action are subject to review upon error. *Ib.*

5. A petition in error must be prosecuted by a party to the record and to the judgment sought to be reversed. *Ib.*

ERROR—Concluded—

6. Petition in error to reverse a judgment of the common pleas cannot be considered where there is no journal entry showing the allowance of a bill of exceptions. *Thacker v. Sheeran*. 104

7. A petition in error, will, on motion be dismissed but without prejudice to the filing of another petition, for the reason that no proper record or true bill of exceptions has been filed as required by the code. *Chatfield & Woods v. Swing & Mellen*. 5

8. Error in record not prejudicial to plaintiff in error is not ground for reversal. *O'Brien v. McDonald*. 104

9. Error in fact cannot be assigned upon the record of the common pleas. *Evans v. Jones*. 543

10. Error apparent upon the face of the record only may be assigned by petition in error in the district court, to reverse a judgment of the common pleas, in an action originally commenced in that court. *Ib.*

11. The want of an exception at the time to an order of court made on an *ex parte* application, will not deprive one not present at the hearing, and without notice, from seeking a reversal. *Standard Pub. Co. v. Bartlett*. 75

12. Submission of an immaterial issue to the jury by agreement of counsel is not error. *Crosby v. Hill*. 663

13. Refusal to give a series of special charges is not error if the general charge correctly and fully gives the law of the case. *U. S. Home & Dower Assn. v. Kirk*. 592

14. Refusal in a special finding of facts to find certain facts which would not have necessitated a different judgment is not reversible error. *Cook v. Niehaus*. 505

15. Where the court below decreed that plaintiff was entitled to property subject to a charge for the support of defendant and affirmed, and in remand of the case, judgment in favor of such defendant for his past support was rendered against plaintiff from the date of the decree, although plaintiff has been kept out of possession by the defendants taking the case to the supreme court: *Held*, such judgment is correct. Plaintiff's remedy is on the *supersedeas* bond given by the defendants on going up. *Bassett v. Bassett*. 70

ESTOPPEL—

1. A sublessee is estopped to deny his landlord's title. *Goodhue v. Jackson*. 356

2. The doctrine of estoppel can have no application to a public officer who acts beyond the power given him. *Commissioner v. Wilder*. 224

3. If one represent to a mercantile agency that he is a partner of another, he will be estopped to deny the truth of his representation, as against all subscribers of the agency to whom this representation may have been communicated by the agency. *Sohn & Freiberg*. 674

4. But the person setting up such estoppel must be a subscriber to the agency. *Ib.*

5. A conveyed to B a lot bounded on the south by an alley three feet wide. At the same time the ground on the south was owned by A, and was used as an alley in connection with B's lot: *Held*, that A and his assigns are estopped to deny that B and his assigns have a right of way in the ground described as an alley appurtenant to B's lot. *Kneisel v. King*. 581

6. An assignee of A purchasing at a time the alley is not used in connection with B's lot, but making no inquiry as to the reason, is not thereby relieved from this estoppel. *Ib.*

7. The doctrine of loss of easements by increase of burden, has no application to appurtenant rights of way. *Ib.*

EVIDENCE—

1. The clearest proof is required to prove a trust by parol evidence. *Orr v. Orr*. 227

2. In construing a will, parol evidence is admissible to prove how the testatrix designated her interest in an estate. *Williams v. Swift*. 258

3. In a suit on a bond held by a court of another state in a controversy as to the right of ownership of such bond, it is error for the court to admit a copy of such bond against defendant's objection. *Shillito v. Robbins*. 313

4. To a defense of payment, in that defendant was to surrender a note of plaintiff in payment and did so, plaintiff may show in rebuttal that the note was not to be used until adjustment of some mutual accounts. *Heisel v. Heisel*. 653

5. The presumption from payment of money, that it was paid in discharge of a legal obligation, may be rebutted by proof. *Conahan v. Manix*. 161

6. Prior negotiations are only excluded on the issue of a contract and its terms, and not where the issue is whether money was obtained by fraudulent representations, and the representations are provable. *U. S. Home & Dower Assn. v. Kirk*. 592

7. The question of the admissibility of evidence admitted by consent, but subject to objection, must be raised by a motion to rule it out. *Pross v. Bradstreet.* 731

8. In a suit on a non-negotiable note, plaintiff sustains the burden of proof by producing the note and proving its execution. *Langhorst v. Dolle.* 140

9. When the execution is admitted, the production of a note makes a *prima facie* case and the plaintiff is not required to prove consideration. *Ib.*

EXECUTIONS—

1. It is the sheriff's duty to levy executions in the order in which they are delivered to him. *Weber v. King* 346.

2. Pointing out property whereon to levy, does not give the holder of the second execution prior rights over the first execution. *Ib.*

3. Property owned by the city and used for a long time as a fire engine house, is not subject to levy under a judgment against the city. *Cincinnati v. Frost.* 107.

4. An estate in possession can be levied on by execution, and the possession being seized draws with it the equity the tenant in possession has. *Shorten v. Drake.* 184

EXECUTORS AND ADMINISTRATORS—

1. An executor having given bond as an executor, it is also necessary for him to give bond on an appeal in a matter of an account of the estate. *Taylor v. McCullom.* 66

2. Where an executor has, by will, power to sell real estate, no limitation on his liability for specific performance of his contract to sell is to be found in the fact that the power is not coupled with an interest, or that the title is incumbered. *Jones v. Lewis.* 368

3. Under an authority in a will to executor to invest, manage and control the estate as in his judgment will be best calculated to combine safety with productiveness, the executor may make contracts for the sale of unproductive property. *Sargent v. Sibley.* 434

4. A petition in a suit to enforce such a contract must allege that plaintiff could deliver possession at the time of tendering deed. *Ib.*

EXTRADITION—

1. Extradition does not depend upon guilt, but upon flight from charge of guilt, and the prisoner cannot, by proof of his innocence of the

charge, deprive the governor of his jurisdiction to extradite him. *Laruey ex parte.* 348

2. Nor will proof that he was never in the demanding state, for as an accomplice, or otherwise, he may have been constructively a fugitive from such state. *Ib.*

3. By proof of an *alibi* at the time laid in the charge, is not proof of innocence or absence at the time of the crime, for the time at which the crime is laid is an immaterial part of the charge. *Ib.*

FACTORS AND BROKERS—

When goods are consigned to be sold on arrival the consignee is not liable for damages for non-sale when he uses all reasonable diligence to do so and is unable to effect a sale. *Burnard & Co. v. Voss & Co.* 221

FINDINGS BY COURT—

When the error complained of is that the trial court erred in its findings of facts, the reviewing court cannot make a new finding upon the same evidence and enter a modified judgment thereon. *Specker v. Herzog.* 561

FORCIBLE ENTRY—

Forcible entry and detainer is a civil action, and it is error in the justice to refuse a demand for a jury on the trial day, but some days after the return day. *Hill v. Hollister.* 116

FORFEITURES—

Before a fine or forfeiture can be enforced for violation of the rules of an association, the party complained of must have notice of the charges, and the time when they will be heard, and the hearing must be before the tribunal provided by the articles of the association. *Stein v. Sherlock.* 186

FRAUD—

Petition to set aside a judgment for frauds. *Fakler v. Society.* 56

FRAUDULENT CONVEYANCES—

1. Defendant is not entitled to a jury in an action by a creditor under sec. 6344, Rev. Stat., to set aside a fraudulent conveyance, the claim being reduced to judgment. *Schmelz v. Michelson.* 538

2. Where the parties stand in a fiduciary relation to each other, the law will permit the injured party to obtain relief. *Ib.*

3. In a conveyance where good faith is not doubted, but which in fact hinders, delays or prejudices creditors, fraud will be implied. *Brannon v. Purcell.* 159

FRAUDULENT CONVEYANCES— Concluded—

4. It will, however, only be set aside on the application of the parties actually prejudiced thereby. *Ib.*

5. Conveyance of real estate to enable party to go on bond of indicted persons, with condition to reconvey as soon as a prisoner is released on the bond, is a fraud on the court, and reconveyance cannot be enforced by suit. *Sewell v. Lovett.* 157

6. The assignment by a husband to his wife of a policy of insurance upon his life payable to himself, and upon which he has paid the premiums, is voidable as to creditors, if made with intent to defraud them. *Child v. Graham.* 294

7. When such assignment is set aside at the suit of creditors, the proceeds of the policy inure to the creditors, when the insurance permitted by sec. 3628, has been received by the wife. *Ib.*

8. In an action to set aside a conveyance by defendant, to one F., as made after a judgment in favor of plaintiff against F. and one W., to defraud creditors, where the petition does not show that W. has any interest in the property conveyed, nor is any relief asked against him, a motion to make him a defendant, as being a necessary party, will be denied. *Constable v. Weaser.* 339

9. When property is purchased and paid for by a husband, but conveyed to his wife, to defraud creditors, it is not such a transfer or conveyance as is "utterly void and of no effect" under sec. 4196. *Mason v. Eichels.* 436

GAMBLING—

1. Owners of separate buildings in which separate sums were lost at gambling cannot be joined as defendants. *Bobb v. Hetsch.* 245

2. The liability of the owners of the property wherein gambling is carried on, to one who has lost money therein is created only after judgment obtained. *Ib.*

GOOD WILL—

1. The seller of the good will of a business relinquishes the right to represent afterwards that he is continuing the old business. *Burckhardt v. Burckhardt.* 496

2. One may require, at least against his own servants, property rights in established routes or lists of customers, so as to be entitled to injunction against a conspiracy by such servants to leave their employer and divert his trade into a rival establishment started by him. *Smith v. Kernan.* 32.

3. An agreement on sale of a business not to engage "directly or indirectly," in the same business for five years in such city, is broken by acting as manager or employe in a competing business in the same city or in other places where the articles made are designed for sale in such city. *Empson v. Bissinger.* 629

4. If a man's wife carry on such business, employing him on a salary or giving him support in lieu of salary, is a mere evasion, and he will be enjoined from assisting her and she from employing him or selling goods made by him elsewhere. *Ib.*

5. A person may always use his own name in his own business even though it interferes with the business of another who has the same name, but he cannot so combine it with other words not incident to it as to lead other persons to believe that his business is identical with that of another who has built up a business upon the name and words combined. *Backus Oil Co. v. Backus Oil and Car Grease Co.* 93

GRANT—

1. The 500,000 acres granted by congress to new states for internal improvements cannot be converted into school lands by the state without the consent of congress. *King v. Railroad Co.* 187

2. The conversion of these lands into school lands by the constitution of Kansas, without consent of congress, is invalid. *Ib.*

3. The title to these lands remained in the state for internal improvements. *Ib.*

GUARANTY—

1. A guaranty of the payment of a note and costs of collection, not restricted to any one person, may be sued on by any subsequent indorsee of the note. *Bank v. Sewell.* 210

2. A guaranty to the contractor who is building a railroad of the payment of the monthly estimates, in accordance with the contract, does not bind the guarantors to pay the final estimate. *Rutherford & Co. v. Brachmann.* 109

GUARDIAN AND WARD—

1. Sale of land in another state by the guardian. *Bradstreet v. Shank.* 57

2. Where a guardian sold his ward's real estate, and invested the money in lands in his own name, and they were afterwards allotted to his wife as alimony; after divorce from such guardian, the ward cannot charge the property with a lien for the money expended to purchase it. *Pottenger v. Bailey.* 106

3. Where a road or right of way is owned by ward; who have guardians appointed, the guardians are authorized to act for them in granting the right of public way over their lands. *State v. Commissioners.* 457

HABEAS CORPUS—

1. A court in one county having obtained jurisdiction in a divorce proceeding may send its process in *habeas corpus* into any county of the state. *Talbot, In re.* 744

2. The court will entertain an application in *habeas corpus* on behalf of the mother for the custody of the child pending the case for divorce. The father being not equally fit to claim the custody of the child. *Id.*

HOMESTEAD—

1. Widower with no other family than an unmarried daughter living with him, is entitled to the homestead exemption provided in sec. 5435. *Boettger v. Fischer.* 776

2. On decree for sale by the probate court on administrator's petition to pay debts, the omission of the widow to ask assignment of a homestead by metes and bounds, before sale, does not give the entire proceeds to creditors, but the court may grant an allowance out of the proceeds. *Evans v. Staggsman.* 244

HUSBAND AND WIFE—

1. A husband who has paid alimony for his wife, is not responsible for her board. *Knagge v. Pfeiffer.* 122

2. The funeral expenses of a married woman are a separate charge on her separate estate. *Helmkamp v. Kater.* 667

3. Note of married woman charging her separate property, given in consideration, of extension of time and the withdrawal of a threatened attachment against household goods and furniture, will be enforced against her separate property, notwithstanding that it was given under a statute which provided, that, "a married woman shall not in any manner encumber her separate property acquired by gift, as security for a debt or liability of her husband" *Hill v. Myers.* 793

4. The separate property of a wife is liable for rent under a lease assigned her before marriage, she and her husband continuing in possession. *Poor v. Scanlan.* 275

5. Rents accruing during continuance upon such occupation are liabilities arising on a contract of the wife subsisting at the time of marriage. *Id.*

6. In such case an action at law will lie against her during coverture, but under sec. 4996, the husband must be joined. *Id.*

7. The ordinary engagements of a married woman competent to bind her estate, are not within sec. 4981, prescribing a limitation of six years to the bringing of an action on an unwritten contract. *Mathers v. Hewitt.* 616

8. An action to subject her estate on such an engagement is in substance not an action at law, but in equity, and is governed by sec. 4985, limiting the time for bringing actions for relief to ten years. *Id.*

9. A married woman having a separate estate, may charge the same in equity, by the execution of a promissory note as surety for the pre-existing debt of her husband or another. *Corwin v. Cook.* 432

10. Where there is an express declaration in the instrument of an intention to charge her separate estate, the same cannot be contradicted or controverted in the absence of fraud or undue influence to obtain the wife's signature thereto. *Id.*

11. Where there is such express declaration of the intention to charge such separate estate, it is not necessary to show that the debt was contracted for the wife's direct benefit, or the benefit of her separate property. *Id.*

INFORMATION—

1. An information for violation of the act of April 15, 1882, (78 O. L., 128,) against keeping places where liquor is sold open on Sunday, is sufficient if it charges the keeping open of a certain room. *State v. Shuman.* 373

2. Keeping part of place open is a violation of the statute. *Id.*

3. That the affidavit on which the information is based describes the place as a house is immaterial. *Id.*

4. Strict conformity between the affidavit and information is not necessary. *Id.*

5. That a lawful business, as an eating-house, is combined with the unlawful conduct is no defense. *Id.*

INJUNCTION—

1. The district court should not grant a restraining order, pending a hearing on a petition in error, unless the rights of the parties were pretty clearly ascertained. *State v. Commissioners.* 457

2. Recovery on an injunction bond can not be defeated on the ground that the injunction was allowed by consent of parties, where the consent entry allowing it was also conditional to take effect on the execution of the injunction bond. *Bishop v. Bascoe.* 654

INJUNCTION—Concluded—

3. An injunction bond in a suit to prevent one from prosecuting forcible entry and detainer against plaintiff before a justice, or in any one interfering with his possession, may be sued upon, although the magistrate would have no jurisdiction of the forcible entry proceedings. *Bishop v. Bascoe.* 423

4. Interlocutory mandatory injunctions, prohibitory in form, but in substance requiring some positive act to be done, will not be understood to be prohibited by the Code, unless clearly inconsistent therewith. *Harrison v. Craighead.* 35

5. A mandatory interlocutory injunction requiring the removal of an alleged nuisance, will not be granted before trial, unless the injury is irreparable. *Railroad Co. v. Cincinnati.* 554

6. An injunction will be granted to one partner against his co-partners, restraining them from engaging during the term of the partnership contract in a business competing with that of the partnership. *Halladay v. Faurot.* 633

7. A contract made by the vendee of real estate not to use it during his ownership for saloon purposes may be enforced by injunction. *Taylor v. Becker.* 151

8. A permanent stand for hacks on the street in front of private property, is as to the owner of such property an invasion of his right of access to the street and of his right in the street which may be prevented by injunction at his suit; and the owner of property rented out as stores is a proper person to bring about such suit. *Hotel Co. v. Branahan.* 305

INNKEEPER—

A person calling at a hotel and engaging a room, and depositing with the clerk a package containing money, but without registering left the hotel, and afterwards returning when he found the money and the clerk had disappeared: *Held*, that he was a guest, and the hotel-keeper was liable for the loss. *Wiatt v. Hotel Co.* 570

INSURANCE, FIRE—

1. Where a policy provides for notice forthwith of loss or damage by fire, forthwith is held to mean within a reasonable time under all circumstances after the loss. *Kirk & Co. v. Ins. Co.* 182

2. When the policy contains a provision that a loss is payable within a certain time after presentation of proof

of loss, the limitation of time does not begin until the proof is furnished. *Id.*

3. A policy of insurance will not be rendered void where the tenant moves out and the owner or another tenant moves in within such time as would usually and reasonably be required for that purpose. *State v. Tuttingerding.* 74

4. A clause in a policy of insurance that no action should be brought until the amount of loss or damage should have been appraised, is valid to fix the amount of loss, but not to fix the liability, but is wholly abrogated where there is but one policy of insurance. *Cincinnati Coffin Co. v. Home Ins. Co.* 422

5. Receiving an application by a local agent, who forwarded it to another agent, who did not act upon it, as he was absent from home, does not constitute a contract to issue a policy. *Krumm v. Jefferson Fire Ins. Co.* 103

INSURANCE, LIFE—

1. Action to reinstate a policy declared forfeited by the company. *Tulledge v. National Life Ins. Co.* 222

2. An answer to a question in an application for insurance, as to whether the applicant had any sickness or disease in the last seven years constitutes a representation and not a warranty, and is sufficient if substantially and not literally true. *Cheever v. Cent. Life Ins. Co.* 175

3. The truth of answers in the application, is made material by the act of the parties, and its materiality cannot be left to the jury.

4. Where an insurance on written application is issued in consideration of the representations in the first application, and contains a condition that the statements in the application for this policy are true, such application is to be deemed the application on the faith of which the new policy was issued. *Id.*

5. In an action on a policy of life insurance, the company is not relieved from paying interest on the policy, and, therefore, interest is recoverable as part of the debt. *Bonner v. Continental Life Ins. Co.* 697

6. Representation that applicant resided at C. during the last ten years, is not false on the ground that the party served as a surgeon during the war of the rebellion, C. having been his home during the period. *Id.*

7. Where the policy is merely voidable, which being for the benefit of the company, the assured cannot claim that his own misrepresentation must avoid the policy, the premiums already paid

cannot be recovered back. *Low v. Life Ins. Co.* 247

8. A misrepresentation in applying for life insurance, as to the age of a person making it, nine years out of the way, is material, although not willfully made. *Id.*

9. The assignee of a policy of life insurance is not, in the absence of an express stipulation to the contrary, obliged to pay the annual premiums thereon, where he holds it as security for a debt. *Van Duersen v. Scanlan.* 362

INTOXICATING LIQUORS—

1. Information for violations of act of April 15, 1882, 78 O. L., 128, against keeping places where liquor is sold open on Sunday, is sufficient if it charges the keeping open of a certain room. *State v. Shuman.* 373

2. Keeping part of place open is a violation of the statute. *Id.*

3. That a lawful business, as an eating house, is combined with the unlawful conduct, is no defense. *Id.*

INTEREST AND USURY —

1. The mere payment of interest in advance does not imply an agreement to extend the time for payment of the principal as matter of law. *Penterman v. Dorman.* 391

2. In an action and policy of life insurance, interest is recoverable as part of the debt. *Bonner v. Continental Life Ins. Co.* 697

3. In an action to assess damages resulting to property owners from a proposed improvement, under secs. 2317-8-9, the judgment will bear interest from the time work is begun. *Cincinnati v. Williams.* 716

4. Money paid to retiring members of a building association as profits is not open to the objection of usury. *Jungkuntz v. Building Assn.* 242

5. Under what circumstances payment of interest in advance on a note will not discharge the surety. *Fischer v. Penterman.* 540

6. Bond given for a loan of money, drawing interest at 8 per cent. per annum, payable semi-annually, and the semi-annual installments of interest also drawing interest at the rate of 8 per cent. per annum is usurious. *U. S. Mortgage Co. v. Saff.* 50

7. The first section of the act of May 4, 1869, is not intended to restrict parties in contracts for interest, except as to the amount that may be contracted to be paid in one year. *Id.*

8. Contracts to pay interest at the rate of 8 per cent. per annum, payable semi-annually are not usurious. *Id.*

9. Where money is loaned on usurious interest, and the interest is added to the principal for several years, and notes for the aggregate given bearing interest at 8 per cent., the balance of the principal of such notes, after deducting the usurious part, does not bear 8 per cent. interest but only 6 per cent. can be recovered. *Bottenhorn v. Grotenkemper.* 387

JUDGMENT—

1. Petition to set aside a judgment for frauds. *Fackler v. Society.* 56

2. Withholding a judgment for two days, after a demurrer has been sustained and no leave to amend is taken, is not to the prejudice of the losing party. *Lyons v. Geddes.* 197

3. A judgment by default being rendered against a married woman and her husband on a note, the record nowhere showing that the woman was a *feme covert*, she may file a petition in error to reverse the judgment. *Evans v. Jones.* 427

4. In an action for money, and also to subject funds of the defendant in the hands of another, a judgment finding for the amount and ordering the third person to pay it over, will be reversed. *Karr v. Veach.* 107

5. Action to recover money overpaid on a judgment, by mistake, and for the surrender of a promissory note executed under a mistake of facta. *Selby v. Bumcrats.* 106

6. A party cannot be permitted to voluntarily take the benefit of a judgment, and afterwards attempt to reverse it. *Dreyer v. Bigney.* 562

7. Where there is any evidence to sustain the plaintiff's claim, a justice's judgment will not be reversed as against the evidence. *Railroad Co. v. Wright.* 105

8. A joint judgment against husband and wife, and an order to sell the separate properties of both as one, void as to her for coverture, may stand as to him because the error is not prejudicial. *O'Brien v. McDonald.* 104

9. In an action to assess damages resulting to property owners from a proposed improvement, under sec. 2317-8-9, the judgment will bear interest from the time work is begun. *Cincinnati v. Williams.* 716

JUDICIAL NOTICE—

The proceedings of a decennial board of equalization does not constitute judicial notice. *Luken v. Staley.* 320

JUDICIAL SALES—

1. Effect of sales made by a master where several orders of sales have issued, and no objection made until confirmation is asked. *Mathers v. Kinney.* 516

2. Where, in a foreclosure case, after decree ordering sale of an undivided share in property, by partition in another case, certain parts of the parts of the property are aperted to the mortgagor in severalty, the court can order the sale of those parts, instead of the undivided share in all. *Ib.*

3. An order of sale pursuant to a decree rendered by the district court in a case brought there by appeal must issue from the district court. *Campbell v. Corry.* 88

4. Ordinarily it is too late to object that an appraisement is too low after a second order of sale has been had and acted on under it without objection. *Ib.*

5. Where, after decree of sale in foreclosure, the land becomes delinquent for taxes, the court may discharge the taxes and penalty out of the proceeds of the sale, but the penalty on the purchase will not be distributed to the purchaser. *Walker v. McGechin.* 222

JURY—

1. Power of a court to discharge a jury. *State v. Hoffman.* 128

2. A person on trial under a municipal ordinance for an offense, substantially made a misdemeanor by the statute, is entitled to a jury trial. *Hoffner v. Oberlin.* 710

3. An objection to the competency of a juror, on the ground that he could neither understand nor speak English, is waived unless such juror is examined and challenged. *Dokes v. Soards.* 621

4. Defendant is not entitled to a jury in an action by a creditor under sec. 6345, Rev. Stat., to set aside a fraudulent conveyance, the claim not being reduced to judgment. *Schnells v. Nicholson.* 538

5. The provisions of sec. 5173, in regard to issuing special *venires* for talesmen jurors govern in such cases in trials before justices of the peace. *Rogam v. Maley.* 16

6. Where from challenge or other cause the panel is not full, the constable may fill it in the same manner as the sheriff, by calling talesmen from the bystanders.

7. A verdict will be set aside on the ground of misconduct of a juror during the trial. *Railroad Co. v. Phelps.* 11

8. A juror in the police court, on the trial of a misdemeanor, is entitled to his fees out of the county treasury. *State v. Cappeller.* 59

9. Mandamus against the auditor to compel payment will be refused, where the certificate of the clerk of the police court does not show whether the juror was a regular juror or a talesman, the fees of whom are not the same. *Ib.*

JUSTICE OF THE PEACE—

1. The authority of a magistrate cannot be collaterally attacked. *Caldwell v. High.* 183

2. A resident of one township being sued before a magistrate in another township, going to trial on the merits of the case without objection to the jurisdiction of the magistrate over him, will be taken to have waived his right to so object. *Ib.*

3. The liability of a justice for the acts of a special constable appointed by him obtains in replevin where such constable took an insufficient bond. *Dummick v. Howitt.* 196

4. Failure of plaintiff to object to the bond within twenty-four hours does not alter the liability. *Ib.*

5. An attachment for contempt issued by a justice to the marshal of a village is void, and an arrest by such officer is unauthorized. *Ex parte Heister.* 41

6. A justice of the peace may have jurisdiction of a suit to recover the consideration due on a conveyance of real estate. *Green v. Sewell.* 69

LANDLORD AND TENANT—

1. Lessees of premises holding over after expiration of term are presumed to hold upon the same conditions as under the previous term. *Stevenson v. Almes.* 566

2. In determining the intention of the parties all the circumstances may be considered as that they were building another store to go into, which lessor knew. *Ib.*

3. A sublessee is estopped to deny his landlord's title. *Goodhue v. Jackson.* 356

4. In a lease of ministerial lands, the sub-lessee's ability to pay rent to lessee cannot be avoided by direct conveyance by township trustees to sublessee without consent of original lessee or his representatives under an act of the legislature. *Ib.*

5. Acts which do not work a merger of the ground rent due from the original lessee of ministerial section 29. *Wilson v. Tischbein.* 612

6. A lessor in order that he may enforce a lease, must, as a condition precedent, satisfy all its conditions. *Brown v. Elevator Co.* 148

7. Holding over, not necessarily an election to renew. *Ib.*

8. In the renting of premises by a landlord, unless there be an express covenant that the building is suitable for occupancy, and is safe, no implied covenant accompanies the lease to that effect. *McNeal v. Emery's Sons.* 513

9. A lessor, who, by arrangement with the lessee, is to allow a present tenant to remain for a year, suspending the lessee's possession until then, has sufficient possession to prosecute forcible entry, after the year, against the tenant, in order to be able to give possession to the lessee. *Cahn v. Hammoud Building Co.* 658

10. In such an action the tenant is estopped to deny the landlord's possessory title, although the lessee could have assumed the burden of the action. *Ib.*

11. While one occupying premises as assignee, is liable to pay rent according to the provisions of the lease, yet this liability is not upon the covenant therefor, but upon an implied contract. *Poor v. Scanlan.* 275

12. The marriage of a single woman in possession as assignee of a lease, in which she and her husband continued in joint occupancy, does not affect her continued liability for rent. *Ib.*

13. The equitable assignee of a lease in possession held liable for rent, and not the party in whom is the naked legal title. *Rothschild v. Hudson.* 259

14. Where a lessee is a minor and assigns the remainder of the term, the assignee is liable to pay rent to the lessor during his occupancy, until the minor disaffirms the assignment by him. *Ib.*

15. The right of re-entry secures a lien for payment of rent. *Countee v. Armstrong.* 531

16. Where defendants bought out the business of one holding under a five years' lease, at a monthly rent, and were to remain on the property if they paid the back rent of their predecessor, but no definite time was agreed upon, they are tenants from month to month. *Rivett v. Brown.* 225

17. Under the Illinois law the landlord is entitled to a month's notice of their intention to leave, and if they leave in the middle of the month without giving such notice, he is entitled to rent for the following month. *Ib.*

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LIBEL AND SLANDER—

1. Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be the plaintiff. *Joseph v. Christy.* 476

2. Words cautioning persons against using certain apparatus are not actionable. *Ib.*

3. To say of a lawyer that, "he is crazy, has a soft spot in his head, not in his right mind, etc.," not actionable *per se* unless spoken of him in his profession. *Goldrick v. Levy.* 146

4. Such language when spoken of him generally, without reference to his profession, is mere vituperation and abuse. *Ib.*

5. But to say of a lawyer that, "he has never been admitted to the bar; he has no right to practice law; is an impostor and is imposing on the courts;" is actionable *per se* because these statements necessarily refer to him in his profession and are calculated to prejudice and injure him therein. *Ib.*

6. Under the general denial in an action for libel the defendant may prove the truth of the charge, not as a defense, but in mitigation, not only of punitive, but also of compensatory damages. *Halstead & Co. v. Schemp.* 204

LIEN—

Rights under a lien acquired *pendente lite* *Markley v. Michael.* 269

LICENSE—

1. Under sec. 2669, Rev. Stat., as amended (77 O. L. 74), the council may delegate to the mayor the authority to fix the amount of license fees within limits fixed by the council. *Ryan ex parte.* 299

2. Even if such delegation were not so authorized, an ordinance is not rendered invalid thereby, in so far as it makes the giving of performances without license invalid, the ordinance would still be lawful, and persons who would avoid its penalties should pay the license fee and sue to recover it back, if unlawfully exacted. *Ib.*

3. The court, upon *habeas corpus*, will not presume that the mayor has exacted any or more than the minimum fee fixed by the ordinance. *Ib.*

LIMITATIONS—

1. Statute of limitations does not run against an agent so long as he follows his principal's instructions. *Brush v. Herlihy.* 104

LIMITATIONS—Concluded—

2. The general statute of limitations that an action for fraud must be brought within four years after discovery of the facts, does not apply to an action by a ward to review a guardian's account for fraud. *Shierberg v. Shierberg.* 115

3. The use of a private alley by strangers for a time does not interrupt the continuity of an adverse possession of it. *Harrison v. Craighead.* 35

4. The ordinary engagements of a married woman, competent to bind her estate are not within sec. 4981, prescribing a limitation of six years to the bringing of an action on an unwritten contract. *Mathers v. Hewitt.* 616

5. An action to subject her estate on such an engagement is in substance not an action at law, but in equity, and is governed by sec. 4985, limiting the time for bringing actions for relief to ten years. *Id.*

6. The liability of stockholders of an insolvent corporation is barred by the six years statute of limitations after the corporation becomes insolvent. *Baldwin v. Atwater Coal Co.* 533

7. The right to foreclose a mortgage is not barred until after the lapse of twenty-one years after adverse possession by the mortgagor, which presumptively begins with the breach of condition. *Dater v. Brunner.* 699

MECHANIC'S LIEN—

A verbal agreement for a lease and renewal, under which the lessee has made valuable improvements, can be subjected to a mechanic's lien for the improvements. *O'Brien v. Myers.* 777

MORTGAGE—

1. A mortgage executed by a wife as security for her husband's debt and used for other purposes without mortgagor's consent, will be released thereby. *People's Ins. Co. v. McDonnell.* 302

2. Where a loan of money is secured by a deed of property and a lease back, the lease is a mere mortgage, although there is no personal liability for the debt. *Coleman v. Miller.* 179

3. If the rent reserved in such lease is ten per cent. of the loan, and the law allows but six, a subsequent settlement and new lease at a ten per cent. rent, the law having been changed so as to allow that rate, discharges the original obligation, and the excess of interest cannot be credited upon the principal. *Id.*

4. The decree in the case, which was brought to foreclose the lien for unpaid rent, must be for the sale of the whole property, and not the leasehold merely, unless the amount found necessary to redeem be paid. *Id.*

5. When the only promise to pay is the ordinary defeasance clause in a mortgage which is neither acknowledged or recorded, plaintiff is not entitled to a personal judgment for the amount. *Hardinger v. Ziegler.* 214

6. A widow has no vendor's lien for the purchase money when the right sold is a claim for dower which has not been assigned. *Id.*

7. A mortgage executed by an insane person is valid and enforceable, so far as the consideration was for the benefit of, or, on account of the mortgagor. *Mahoney v. Goepper.* 154

8. Computing the value of a building association mortgage upon foreclosure. *Windisch v. Korman.* 60

9. In foreclosure suits, claims may be filed at any time up to the time of distribution. *Loan and Building Co. v. Mueller.* 402

10. Executors alone can foreclose a mortgage, though it was in form a deed and lease back. *Miller v. Hulbert.* 240

11. The right to foreclose a mortgage is not barred until after the lapse of twenty-one years after adverse possession by the mortgagor, which presumptively begins with the breach of condition. *Dater v. Bruner.* 699

12. A foreclosure sale should not be set aside for the reason that the decree included a finding of an amount due and awarded an order of sale to one on whose answer and cross-petition no summons had been issued against the mortgagor. *Dreyer v. Bigney.* 562

MUNICIPAL CORPORATIONS—

1. A municipal corporation has no inherent power to tax and can levy taxes only for such purposes as the state has permitted, and a tax for other purposes may be restrained by the courts on proper application. *Morehouse v. Norwalk.* 199

2. The mayor and police may arrest the proprietor of a variety show and performers for a violation of any of the ordinances of the city or laws of the state, but cannot take possession and close his place of business. *Ryan v. Jacob, Jr.* 167

3. The power of licensing theaters, etc., being vested in the city council, that body being a legislative body, cannot delegate the function to the mayor, so as to be a discretionary and not

ministerial duty by him. *State ex rel. v. Jacob.* 23

4. An ordinance establishing a street railroad route falling within the meaning of sec. 1666, Rev. Stat., in that it originates or creates a right, must, before it can take effect, be submitted to, and receive the approval of, the mayor. *State v. Henderson.* 483

5. The legislature cannot authorize a city to convert streets into a market-place, nor to rent out space along the curb of such street to the obstruction of travel or of access to abutting property. *Hites v. Dayton.* 170

6. In improving its streets, a city is not liable to an abutting lot owner on account of a grade or fill, unless the city has formerly fixed a grade, and the owner has improved his property in conformity thereto. *Cincinnati v. Williams.* 718

7. Damages are limited to the injury to the improvements, whether they are houses, fences or hedges. *Id.*

8. General benefits, which the rest of the neighborhood also got, by reason of the improvement of the whole vicinity, are not to be off-set. *Id.*

9. Country owners have the same rights in the grades of adjacent turn-pikes, which have been permanently adopted, by improvement and long usage, as city owners have in the streets they abut. *Id.*

10. A book of levels from a civil engineer's office, though admissible to prove the levels as taken, is not admissible to prove an established grade of a street, which grade had not been established by ordinance. *Cin. & Clifton Incl. Pl. Ry. Co. v. Pfau.* 691

11. The right, under secs. 2676 and 2677 to excavate to a depth of nine feet below grade in cities must be exercised with reasonable care and skill so as to avoid unnecessary injury to buildings. *Id.*

12. And if due care under circumstances requires the excavating to be done in sections, and not continuously, it should be done in that manner. *Id.*

13. This rule does not impose upon defendant the duty of shoring up plaintiff's building. *Id.*

MUTUAL BENEFIT SOCIETY—

1. Action to recover death benefits. *Springmeier v. Benevolent Assn.* 89

2. The right to benefits in a benevolent society is concluded by a decision of the body to which, under the articles of association, it is left. *Cincinnati Lodge No. 3, I. O. O. F. v. Littlebury.* 194

NEGLIGENCE—

1. If plaintiff's testimony shows injury by defendant's negligence, and does not raise an implication that his own contributed to it, the burden of proving contributory negligence rests upon the defendant to defeat the claim. *Coursel v. Railway Co.* 174

2. A party is bound to exercise ordinary care, and not attempt to jump from a train when it is in motion. *Id.*

3. In an action to recover damages for a personal injury caused by defendant's negligence, a motion to withdraw the case from the jury and render judgment for defendant, can not be granted if there be any facts proved which the jury may be at liberty to infer negligence. *McManus v. Railroad Co.* 795

4. The jury should first find as a fact, whether the negligence was so gross as to show reckless indifference to life, or wantonness, or ill-will, and they may then add exemplary damages. *Kuchenmeister v. O'Connor.* 502

5. It is error to charge the jury that contributory negligence of plaintiff would not be a defense, if defendant became aware of plaintiff's danger in time to have avoided it in any way. *Id.*

NEW TRIAL—

1. Allegations necessary in a petition for a new trial, after the term. *Brock v. Becker.* 763

2. Where in a suit for foreclosure of a mortgage, an excessive amount is found due by reason of an erroneous method of calculating interest, and this is not discovered until after the term, a petition for a new trial lies under sec. 5305. *Id.*

3. Such petition must affirmatively show that it is filed not later than the second term after the discovery of the error. *Id.*

4. Surprise as to what the opposite party swears to is not legal surprise as a ground for a new trial. *Heisel v. Heisel.* 653

5. It is not an abuse of discretion to overrule a motion for a new trial, on the ground of surprise and newly discovered evidence. *Dokes v. Soards.* 621

6. A motion for a new trial is necessary to have been filed in the court below before a reviewing court will re-examine a question of fact. *Werk v. Voss.* 205

NOTARY PUBLIC—

In an arbitration under the statutes, the oath to the witness cannot be administered by a notary public. *Pross v. Bradstreet.* 550

NUNC PRO TUNC ENTRY—

1. The court, after trial on merits and verdict for plaintiff, where no reply had been filed to a plea of payment, may allow a *nunc pro tunc* entry of a reply, filed as of the day of trial. *Neely v. Cummins.* 478

NUISANCE—

1. A permanent right to maintain hack carriages on a street, though next the sidewalk and leaving room for passage in the rest of the street, is a nuisance. *Hotel Co. v. Branahan.* 305

2. A mandatory interlocutory injunction requiring the removal of an alleged nuisance, will not be granted before trial, unless the injury is irreparable. *Railroad Co. v. Cincinnati.* 554

OFFICE AND OFFICER—

1. Section 20, art. 2 of the constitution, against affecting the salary of an officer during his existing term, unless the office "be abolished," contemplates a fixed term for all officers. *Woehler v. Toledo.* 206

2. Holding over is not under original term, and during such holding over the salary may be changed at will. 16.

3. One person cannot hold the offices of treasurer and president of a school board. *State ex rel. v. Heddleston.* 77

4. A city treasurer, being *ex-officio* treasurer of the school fund, for which he cannot have compensation, is required to serve until his successor is qualified, and, therefore, such treasurer is not entitled to any compensation for serving from the time his office expired until his successor qualified. *Knorr v. Bd. of Ed.* 672

5. A marshal is the ministerial officer of a mayor's court. *Ex parte Heister.* 41

6. The constable is the ministerial officer of a justice's court. 16.

PARENT AND CHILD—

1. The presumption that a party is the parent of a child, arising from her acts, treatment and acknowledgment of a child, may be rebutted. *Kendall v. Kendall.* 428

2. A contract made between father and mother of a child born out of wedlock, that the mother would surrender to the father all her claim to the custody and control of the child, in consideration that he would take the child into his family, raise him and give him a share of his property equal with the rest of his children, when clearly and satisfactorily made out by proof, will sustain the claim of the child for an heir's portion of the father's estate. *Ewing v. Richards.* 357

3. The right of action to the child to recover such share accrues upon the death of the father. 16.

PARTIES—

1. Owners of separate buildings in which separate sums were lost at gambling cannot be joined as defendants. *Bobb v. Hetsch.* 245

2. A motion to make a person interested in property alleged to be fraudulently conveyed, a party to a suit, must allege that he has an interest in the property, or relief must be prayed against him. *Constable v. Weser.* 247

3. A petition for conversion of plaintiff's property by a married woman should join her husband with her as co-defendant. *Dunning v. Choate.* 316

4. Defect of parties presents a ground for special demurrer not reached by a general demurrer to the petition. 16.

5. The interests of a mortgagor and mortgagee of chattels are in conflict, and they cannot join as plaintiffs in replevining them from a third person. *Lyons v. Geddes.* 197

6. Where the tracks of a railroad are laid through the streets and avenues of a municipal corporation, the city is the proper party to sue for injury to abutting property. *English v. Tr. Cincinnati So. Ry.* 442

7. In suing on the guaranty of payment, made by a husband and wife, she having separate estate, the husband having died, the wife and the husband's administrator are proper parties defendant; but the husband's heirs are not proper parties. *Bank v. Sewell* 210

PARTITION—

1. Partition under the statute cannot be asked where the title is in controversy, but the title must be first established at law. *Delaney v. McFadden.* 381

2. The provision that a guardian may do any act in reference to the partition of an estate that the ward could do if of age (Rev. Stat., secs. 5756, 5772,) authorizes the guardian to bring the action. *Lang v. Barnard.* 243

PARTNERSHIP—

1. If one represent to a mercantile agency that he is a partner of another, he will be estopped to deny the truth of his representation, as against all subscribers of the agency to whom this representation may have been communicated by the agency. *Sohn v. Freiberg.* 674

2. But the person setting up such estoppel must be a subscriber to the agency. *Id.*

3. Indebtedness due a co-partnership cannot be garnisheed to pay the separate debt of either partner, nor the debt of another firm of which a member of the first co-partnership is also a member. *Buchanan v. Mitchell.* 437

4. Entering appearance by one partner of a dissolved firm for his non-resident co-partners is not authorized so as to warrant personal judgment against them. *Sarver v. Scarlett.* 765

5. When, after a firm has been dissolved and all the assets disposed of, a member thereof by his separate petition and proceeding in bankruptcy obtains a discharge, such discharge is effectual as to partnership as well as individual debts. *Keeler v. Snodgrass.* 490

6. An injunction will be granted to one partner against his co-partners, restraining them from engaging during the term of the partnership contract in a business competing with that of the partnership. *Halladay v. Faurot.* 633

7. The joint creditors must be confined to the partnership fund, and the individual creditors take the whole individual fund. *Scovill v. State.* 54

8. A surviving partner purchasing under, and according to the terms of the act of March 21, 1861 (58 O. L., 36), does not assume and become solely liable for liabilities of the firm which are unknown, and not taken into account at the time of the purchase. *Mitchell v. Schultz.* 78

9. An action to subject the interest of one partner in the partnership property, to the payment of a judgment against him, the other partners being non-residents, is a proper case for service by publication or by personal service out of the state. *Nye v. Rutherford.* 224

PARTY WALL—

1. When a "party" or "common wall" may be taken down. *Duhme v. Voss.* 757

2. Injunction of an adjoining owner. *Id.*

PAYMENT—

1. Payment to a broker is not payment to his principal where the latter has not authorized the broker to receive payment, or contract in his own name. *Crosby v. Hill.* 663

2. The presumption from payment of money, that it was paid in discharge of a legal obligation, may be rebutted by proof. *Conahan v. Mannix.* 161

3. A voluntary payment of back taxes for property alleged to be omitted on the tax duplicate on representation of agent employed by county commissioners, cannot be recovered back. *Dewald v. Staley.* 376

PENDENTE LITE—

Rights under a lien acquired *pendente lite.* *Markley v. Michael.* 269

PERJURY—

Where an accused is charged with having committed perjury in falsely making an affidavit in replevin before a justice, that affiant owned, and had a right to possess, certain property, and the proof is of the preliminary affidavit, this is a variance, for it is not made in a pending action, and such variance is material. *State v. Hayes.* 454

PLEADINGS—

1. A petition on a note which alleges ownership, but fails to set out the endorsements, or show title, is defective. *Gould v. Life Ins. Co.* 525

2. A petition by a passenger of a street railway company to recover for injuries caused by the negligence of the railway company, need not aver the exercise of due care by plaintiff. *Cincinnati St. Ry. Co. v. Fullbright.* 361

3. A plaintiff seeking a single recovery upon two grounds, both of which may be true, may state both grounds in a single cause of action. *Bank v. Railroad Co.* 788

4. In such case when plaintiff does not know which one is true, he may state them as separate causes of action, stating them in the alternative, in one petition. *Id.*

5. Petition in an action for damages for refusal of a corporation to transfer to him his shares of stock, is not multifarious, when. *Id.*

6. Such petition may state as a cause of action the refusal of defendant to transfer the shares on the books of the company. *Id.*

7. It may also state as another cause of action, damages for misleading to purchase if the shares are in fact invalid. *Id.*

8. In an action for the conversion of part of property left on storage by plaintiff with defendant, an answer that the goods not returned were sold in an attachment suit brought by defendant against plaintiff for storage of the goods, and levied on the part of the goods not returned, needs no reply. *Dunning v. Choate.* 316

9. A petition for conversion of plaintiff's property by a married woman should join her husband with her as co-defendant. *Id.*

PLEADINGS—Concluded—

10. Where an original petition set up a special partnership for certain designated purposes between the parties, and asked an account, an amended petition setting up a general partnership is not to be disallowed on the ground that it states a different cause of action. *Weber & Co. v. Kemper Bros.* 403

11. If the causes of action are different, the amended petition would be allowed to prevent multiplicity of suits and amounting merely to beginning a new case. *Id.*

PLEDGE—

1. Promissory notes deposited as collateral security for loan cannot be sold before maturity and proceeds applied to payment of debt. *Springer v. Purcell.* 139

2. If sold in violation of his duty, the depository is responsible for full value. *Id.*

PRACTICE—

1. The question of the admissibility of evidence admitted by consent, but subject to objection, must be raised by a motion to rule it out. *Pross v. Bradstreet.* 731

2. In foreclosure suits, claims may be filed at any time up to the time of distribution. *Loan and Building Co. v. Mueller.* 402

3. A motion made at one term and continued until another term, when it is decided, is, in contemplation of law, as if decided at the term when made. *Building Ass'n v. Eggen.* 114

PROSECUTING ATTORNEY—

1. Compensation to attorney employed to assist the prosecuting attorney in a criminal case. *Weldy v. Commissioners.* 767

2. No appeal lies to the action of the court approving or the commissioners allowing such compensation. *Id.*

3. A court presiding over a criminal trial has power in a proper case, where the prosecuting attorney is guilty of misconduct, to relieve him of further part in the trial and allow the assistant prosecuting attorney to conduct the trial. *State v. Smith.* 136

RAILROADS—

1. Where a portion only of a tract of land sold to a railroad is needed for the use of the road, in enforcing payment of the unpaid portion of the price, the part of the land not needed for the road will first be offered for sale, and only where it does not bring

sufficient to satisfy the claim, will the entire road be sold. *Seasongood v. Railroad Co.* 739

2. The right to fix a terminus of a railroad in a city does not imply the power to cross intervening streets without consent or condemnation. *Railroad Co. v. Cincinnati.* 554

3. The trustees of the Cincinnati Southern Ry., may institute proceedings to condemn land though leased to another corporation. *Trustees Cin. So. Ry. v. Handy.* 576

4. The statute authorizing the consolidation of railroads considered and construed with reference to the power of the corporation entering into the consolidation by agreement to create for the benefit of their creditors a lien upon their property in the hands of the consolidated company. *Compton v. Railway Co.* 322

5. A railroad company entered into an agreement of consolidation with other companies, whereby was created a new corporation. The old companies, upon consolidation of the new company, ceased to exist; the new company succeeds to all the rights of the old, hence no vendor's lien for the value of the property of the old company is retained by it, to be reached by creditors. *Id.*

6. The statute relating to the execution and record of mortgages does not prevent the existence of such lien, or a priority over a subsequent mortgage, where the mortgagee has notice of its existence. *Id.*

RECEIVER—

1. A right of re-entry which gives a lien for rent and non-payment and an allegation of waste and consequent danger of injury to the reversion authorizes the appointment of a receiver. *Countee v. Armstrong.* 531

2. Construction of a track to a stockyard may be required of a receiver by the court if the profits will in time pay for it and the public interest make it desirable. *Stock Yard Co. v. Stock Yard Co.* 395

RELIGIOUS SOCIETY—

1. Obligations incurred by the priest without concurrence of the trustees of an incorporated church, do not personally bind the trustees who did not personally participate in incurring such obligations. *Le Saint v. Fisler.* 216

2. A court of equity has no jurisdiction to inquire into the validity of an election of the officers of an incorporated church or to try their title or eligibility. *Messinger v. Wardens, etc.* 227

3. Nor can an appeal to the civil court be had on the ground that the conduct of the church officers is resulting in dividing the church into factions, depreciating its property, reducing its revenues, and emptying its pews, unless it is shown that their acts are illegal. *Id.*

REMOVAL OF CAUSES—

State court will not resume the consideration of a case that has been removed to the United States circuit court, in which a judgment was rendered that no further proceeding be had in that court, after which proceedings were begun for a review in the Supreme court of the United States, of the judgment of the circuit court. *Bruce v. Gibson.* 369

REPLEVIN—

Where a judgment creditor levies execution on property alleged to be that of the debtor, but which the debtor has sold to another, who replevies it from the officer holding the execution, the creditor cannot bring an action to set aside the sale by the debtor to the plaintiff in replevin as being in fraud of creditors while the execution subsists. *Rodgers v. Kinsey.* 308

SALES—

1. To constitute a sale of personal property, there must be a subject of sale and an agreement between the parties, a meeting of minds, and certainly an agreement as to who are the contracting parties, who is the vendor and who is the vendee, between whom the property passes. *Brockhaus & Bro. v. Klein & Co.* 487

2. In an action to recover the price of certain goods sold by plaintiff, he must show that the purchase was directly made by defendant, or by the defendant's recognized agents. *Wilkerson v. Vorhees.* 418

3. One who leases a piano on terms that, after a certain time it shall be the lessee's property, cannot be held accountable to the lessee for having resumed possession, although a large part has been paid. *Watters v. Wurlitzer & Bros.* 166

4. Where on a purchase of iron the contract is that it is not to be paid for until delivered and weighed, the delivery is not complete until so delivered and weighed. *Mowry Car and Wheel Works v. Shorter.* 290

5. If before all the iron is delivered and weighed, a portion of it is attached on proceedings against the seller, the purchaser is not required to replevin the iron as his own, but may

leave it in the hands of the officer as the property of the seller, and not delivered to him. *Id.*

6. Such purchaser is entitled to a reasonable time to examine whether it be of the quality purchased. *Id.*

7. Payment of freight by the purchaser on presentation of the bills of lading before the iron reaches the place of delivery does not estop him from denying that it never was delivered, nor of the quality purchased. *Id.*

8. A sale by a debtor in failing circumstances of his entire stock in trade and business for an adequate consideration in notes, which are used to pay creditors, cannot be set aside as fraudulent. *Rodgers v. Kinsey.* 308

SCHOOLS—

1. The board of education have power to expel a newspaper reporter for misconduct, from the floor of its sessions. *Corre v. State.* 715

2. Sections 3946, 3947, 3948, do not authorize the changing, by a township board of education, or in their default by the probate court, of the lines of special school districts, as between each other. *Bd. of Ed. v. Bowen.* 348

3. One person cannot hold the offices of treasurer and president of a school board. *State ex rel. v. Heddleston.* 77

SEAL—

Any character or mark intended as a seal to an instrument requiring a seal is sufficient. *Bobe v. Moon Building Ass'n.* 164

SELF DEFENSE—

1. To justify killing in self-defense there must be both a belief in the existence of the necessity, and the occasion must be such, from the slayer's standpoint, as to reasonably warrant the belief. *State v. Snelbaker.* 466

2. To determine the existence of this belief, previous occurrences and communicated threats may be considered. *Id.*

3. Outward act or demonstrations of violence reasonably inducing the belief of the necessity are necessary. *Id.*

4. There must be, however, not only a seeming intent on the part of the deceased, but also a seeming capacity, and to determine this the presence and acts of others at the time may be considered, and the place and all its surroundings. *Id.*

SELF DEFENSE—Concluded—

5. It is not necessary for the person attacked to retreat or fly if he was lawfully attending to his own business when assaulted, and the apparent purpose of the assault was to take his life or do him great bodily harm. *Ib.*

SEWERS—

Construction of specifications for building sewers. *Cincinnati v. Anchor White Lead Co.* 578

SHERIFF—

The sheriff is liable if he does not levy executions against the same person in the order he gets them. *Weber v. King.* 346

SPECIFIC PERFORMANCE—

1. An owner of one undivided half as her own, and the other half in trust with power to sell, by signing a general contract to sell, not mentioning the trust for the power, binds herself in both capacities. *Coles v. Kearney.* 733

2. The contract need not show an intent to exercise the power, for it can not be carried out without. *Ib.*

3. A suit for specific performance to convey lands may be sustained against one to whom the party agreeing to convey had subsequently conveyed the land with notice. *Jones v. Lewis.* 368

STATUTES—

1. A statute will be construed according to its obvious intention, although the collocation of the different branches of the provision is so arranged by mistake as to lead to a different conclusion. *State ex rel. v. Hornberger.* 96

2. A repeal or amendment of a statute shall not affect existing causes of action. *McClurg v. Cole.* 42

3. The qualifying clause of sec. 5114, authorizing amendments to conform pleadings to the facts proven, does not refer to the form of the remedy, but only to the claim of defense. *Poor v. Scanlan.* 275

4. Secs. 3946-3948 do not authorize the changing, by a township board of education, or in their default by the probate court, of the lines of special school districts, as between each other. *Board of Education v. Bowen.* 548

5. Section 4155, regarding the filing of chattel mortgages, must be strictly construed. *Fought v. Hiet.* 1

STATUTE OF FRAUDS—

1. A contract for service as agent in the sale of land, not being a contract for sale of land, need not be in writing, unless it is an agreement that is

not to be performed within a year. *Koehler v. Hunt.* 404

2. If the promise be an original promise, the promisor is bound to perform it; if a collateral or conditional promise, then the statute of frauds is a defence. *Fritz v. Lamping.* 520

3. A verbal contract for services for a year is not void under the statute of frauds, simply because performance under it was not begun for a few days after the time, where the time of performance was not extended beyond a year. *Wolff v. Warrington.* 219

4. The authority of an agent to sign a written agreement to sell lands may, under the statute of frauds, be conferred by parol. *Jones v. Lewis.* 368

STREETS AND ROADS—

1. The care and control of streets and the duty to keep them free from nuisance, is vested in the council, by virtue of sec. 2640. *Railroad Co. v. Cincinnati.* 554

2. An abutting property owner is entitled to direct unimpaired access from his lot to the portion of the street in front in use by the general public. *English v. Tr. Cincinnati So. Railway.* 442

3. If, in order to reach that portion of the street in use by the general public, he is compelled to go to a point beyond the lines of his lot, he suffers thereby an inconvenience and injury not common to the public, for which he is entitled, under the constitution, to compensation. *Ib.*

4. Power of county commissioners to build new roads and use funds for that purpose. *McGill v. Commissioners.* 439

5. Where a city, in improving a street to an unreasonable grade, injures a lot by removing a lateral support on a street which the lot did not abut, the owner of the lot cannot recover on account of the unreasonableness of the grade, as to which he is interested only in common with the public. *Birchwhistle v. Cincinnati.* 453

6. But if the injury was caused to the improvements by negligence on the part of the city in the manner of doing the work, he can recover. *Ib.*

7. Though the fee of a street in a city be in the city, and not in the abutting proprietors, the city holds it in trust for such uses only as come fairly within the intentment of the original grant for such uses, and, without obtaining the abutter's consent, or acquiring his interest, no other use can be imposed upon the street. *McLean v. Brush Electric Light Co.* 619

8. Therefore, without acquiring such interest, the city cannot give to an electric light company, the right to plant poles in the sidewalk in front of each abutter, against his consent. *Ib.*

9. It is no answer that a single pole does no material injury, for, if the right to plant one pole can be given, other companies could receive the same right, and the property might, by successive grants, be shut in as by a picket fence. *Ib.*

10. The fact that the commissioners in laying out a road occupy a portion of an existing road, does not invalidate the road laid out by them. *State v. Commissioners.* 457

SUMMONS—

1. A motion to set aside a sheriff's return, attacks the truth of the facts stated in the return, and not their sufficiency; and if they are not shown to be untrue the motion will not be quashed. *Goodrich v. Hamer.* 441

2. A motion to quash the service attacks the sufficiency of the return and calls for a decision as to whether, admitting the return to be true, the defendant has been legally served. *Ib.*

3. Where the return of the sheriff states that he has served defendant with a true copy of the writ, it is equivalent to a return of service by a copy "with the endorsement thereon." *Ib.*

4. The courts of Ohio are open to the suits of non-residents against non-residents who may be reached by their process. *Mohr & Mohr Distilling Co. v. Lamar Insurance Co.* 421

5. Jurisdiction of a cause against a foreign insurance company will be acquired by service on a resident agent, the chief officer of the agency in the jurisdiction, no chief officer of the company being within reach of process. *Ib.*

6. The special modes of service on insurance companies provided by statute are cumulative, and not exclusive. *Ib.*

SURETIES—

1. Under what circumstances payment of interest in advance on a note will not discharge the surety. *Fischer v. Penterman.* 540

2. A surety, on an undertaking for an appeal from the judgment of a justice of the peace, taken in conformity to the statute, where the terms thereof are clear and certain, may stand upon the terms of his undertaking. *Marsh v. Rymes.* 426

3. The surety is not liable in his undertaking to satisfy a judgment against one only, when the undertaking was given on behalf of three defendants. *Ib.*

4. Payment of interest in advance does not imply an agreement to extend the time for payment of the principal as matter of law. *Penterman v. Dorman.* 391

TAXES—

1. A house erected on leased lands, the rent of ground only being appropriated for support of free education, is subject to taxation. *State v. Capeller.* 219

2. Laws exempting property from taxation must be strictly construed. *Ib.*

3. Effect of a decree of sale for the wrong land. *Sibley v. Challen.* 209

4. Where property has been erroneously listed for taxation and taxes have been paid, the error should be corrected and the over-payment of taxes remitted. *Harrison v. Commissioners.* 256

5. A municipal corporation has no inherent power to tax and can levy taxes only for such purposes as the state has permitted, and a tax for other purposes may be restrained by the courts on proper application. *Morehouse v. Norwalk.* 199

6. The act of March 5, 1881, authorizing the auditor to value and put on the duplicate omitted property since the last decennial appraisal is constitutional. *Kleinschmidt v. Capeller.* 212

7. The legislature is authorized to select any agency they may see proper for tax purposes. *Ib.*

8. Section 2803, as amended 78 O. L., 47, authorizes the auditor to add back taxes in cases of mere improvements. *Luken v. Staley.* 320

9. Payment of taxes not voluntary payment. *Ib.*

10. Proceedings of the decennial board of equalization is not judicial notice. *Ib.*

11. If the value of an old building torn down is not deducted by the auditor in fixing the value of the new, and taxes are paid for several years, a subsequent auditor cannot correct the duplicate nor the commissioners refund. *Sandheger v. Commissioners.* 569

12. An agreement by a bank to pay the taxes assessed on the shares of stockholders does not make the bank liable for assets not returned or admitted by the bank or stockholders to be assessable, nor for any other than the current tax on the duplicate. *Miller v. Bank.* 785

13. The sum required to be paid as license fees by the act of April 16, 1883, are not taxes or assessments within the meaning of secs. 5848-50. *Hayman v. Eshelby.* 796

TAXES—Concluded—

14. Persons required by law to pay such license fees have a complete remedy at law and are not entitled to an injunction against the city comptroller, restraining him from collecting such fees. *Ib.*

15. A fire insurance company, in making return of its credits for taxation, has no right to make any deduction on account of outstanding risks. *Amazon Ins. Co. v. Cappeller.* 493

16. The estimated amount of premiums "unearned" or "reinsurance fund" is not a "legal *bona fide* debt owing it" by such company within the meaning of sec. 2730, Rev. Stat. *Ib.*

17. When such deductions have been made openly and by name upon the face of the returns which were otherwise full, true and correct, they are not false returns within the meaning of sec. 2781-2. *Ib.*

18. The auditor has no authority to add to the taxes of the current year any taxes on account of such deductions in former years. *Ib.*

19. In such case it is his duty to correct the duplicate for the current year by making it correspond with the return for that year, ignoring such improper deductions. *Ib.*

20. Taxes voluntarily paid under a mistake of law, cannot be recovered. *Bridge Co. v. Commissioners.* 564.

21. Section 1038, Rev. Stat., affords relief only in case of clerical errors. *Ib.*

22. A voluntary payment of back taxes for property alleged to be omitted on the tax duplicate on representation of agent employed by county commissioners, cannot be recovered back. *Dewald v. Staley.* 376

23. Where, by an error, a piece of property is valued during ten years, for less than it should have been, the auditor has no authority to add on the duplicate the accumulated taxes on the omitted value for the past ten years. *Draude v. Staley.* 265.

24. The powers of the auditor with respect to taxation are only such as are conferred upon him by statute. *Ib.*

TELEGRAPH COMPANY—

1. The business of collecting and selling "commercial news," is not part of the public duty of a telegraph company, as carrier of messages for hire. *Bradley v. W. U. Telegraph Co.* 707

2. The court will not enjoin it from discontinuing to furnish such "commercial news" to one of its customers, or from removing from his office the ticker through which the quotations are furnished. *Ib.*

3. A telegraph company will not be enjoined from resuming possession of its ticker located in a bucket shop—when. *Griffin Co. v. W. U. Telegraph Co.* 572

TELEPHONE COMPANY—

1. A telephone company has power to adopt a regulation that the use of improper language shall be ground for cutting off a subscriber's use of the telephone. *Pugh v. Telephone Assn.* 644

2. It is sufficient notice to such subscriber of such regulation that the same was printed on the contract and on the pamphlet list of subscribers. *Ib.*

3. The word "damned" is improper language. *Ib.*

TENANTS IN COMMON—

Possession of one tenant in common is not deemed adverse to his co-tenant unless clearly adverse, and the co-tenant becomes advised of it actually or constructively. *Elsenheimer v. Sieck.* 101

TRADE MARK—

1. A name attaching not to the business, but to the place where business is carried on, is not a trademark. *Mueller v. McDonough.* 310

2. There is no property in a trademark or trade name. *Backus Oil Co. v. Backus Oil and Car Grease Co.* 93

3. But a party may acquire such a right to it that nobody else shall use it. *Ib.*

4. The name "domestic" applied to bread, may become a trade mark, the piracy of which will be enjoined. *Smith v. Kernan.* 32

5. A name representing that an article is the manufacture of a certain person is not a valid trade-mark, nor assignable apart from the business with which it originated. *Wiltberger v. Walker.* 588

6. The mere description of a kind of business or quality or class of goods sold, by words in common use, as "misfit parlors," adopted by one selling misfit clothing, does not constitute a trade name for which he can enjoin the use by a competitor. *Cohn v. Kahu.* 472

7. But where the competitor adopts the names and opens a store on the same street and imitates the signs, cards and notices of a tradesman, and by misrepresentations, seeks to mislead customers to suppose they were dealing with the latter, when in fact they were not, the imposition will be enjoined. *Ib.*

TRIAL—

1. Misconduct of one of the counsel during the trial. *Rothschild v. Hudson.* 259
2. The presence of plaintiff in bastardy is not absolutely necessary at the trial. *Smith v. Jones.* 165
3. If defendant insists on a trial, it is within the discretion of the court to order the court to proceed. *Ib.*
4. Where a cause triable by jury has been set in a submitted room and no notice of its setting is given to the opposite counsel, it is error in the court to render judgment by submission. *Byrne v. Wood.* 760

TRUSTS—

1. Probate court may remove municipal corporation from trusteeship. *Wilson v. Tischbein.* 612
2. Power of trustee to create a lien. *Purcell v. Kuehn.* 73
3. Trustees will be allowed to reimburse themselves, out of trust funds, for all reasonable expenses incurred by them in the defense of suits, in their trust character, concerning their trust. *Mitchell v. Schultz.* 78
4. And this will be so, notwithstanding their own personal characters for competency and honesty, as trustees, may be involved in the controversy. *Ib.*
5. Nor will it alter the rule if the transactions in question have resulted in their private gain and advantage, provided they were valid and proper for them to engage in, as trustees. *Ib.*
6. Trusts are matters of honor and confidence, to be undertaken with humane or friendly or charitable, rather than mercenary views. *Ib.*
7. These characteristics of a trust should be borne in mind in determining the compensation to be allowed trustees for their services. *Ib.*
8. The clearest proof is required to prove a trust by parol evidence. *Orr v. Orr.* 227

TURNPIKES—

- Where a statute (93 O. L. 96, sec. 8), provides that special taxes for the construction of a free turnpike road shall be levied on lands on each side of the road, except that when there is another road on either side, within two miles, only property half the distance to such road shall be taxed. *Bowler v. Turnpike Co.* 237

VENDOR AND PURCHASER—

- A contract to convey a perpetual leasehold may be enforced by the vendor without his wife's signature. *Kampmann v. Schaaf.* 351

VENDOR'S LIEN—

- A "vendor's lien" in Ohio is a lien for the protection of the vendor, and not transferable, although it may descend or be devised, and where not released by the vendor, may be subjected by a judgment creditor to the payment of his judgment in an action for that purpose against the vendor and vendee. *Compton v. Railway Co.* 322

VERDICT—

- A verdict will be set aside on the ground of misconduct of a juror during the trial. *Railroad Co. v. Phelps.* 11

VERIFICATION—

- An answer filed by leave will not be set aside because the verification was made before the defendant's counsel as notary. *Broemer v. Nordhoff.* 211

WILLS—

1. In construing a will, parol evidence is admissible to prove how the testatrix designated her interest in an estate. *Williams v. Swift.* 258
2. A compromise of a will contest by attorneys does not bind non-contesting clients and such verdict and judgment will be. *Jordan v. Russell.* 467
3. Construction of a will granting a life estate to and authorizing the widow "to dispose of all the above property to my heirs as she thinks best." *Shenket v. Dewit.* 574

WITNESS—

- Where a surviving partner brought action on a note made to his firm against two makers as individuals and not as partners, and one of them is in default for answer and makes no defense, he is a competent witness for the other as to transactions with the deceased partner. *Brinker v. Schreiber.* 759

WORDS—

- The phrase "fiduciary character" in the bankruptcy act of 1867, does not include the relation of factor or commission merchant to his principal or consignor. *Keeler v. Snodgrass.* 490

WORKHOUSE—

1. Under sec. 2099, Rev. Stat., it is discretionary with the court whether a minor under 16 years of age shall be confined in the workhouse or house of refuge. *Walker, Ex parte.* 480
2. The board of directors of the workhouse of Cincinnati cannot discharge a person committed thereto, unless the order therefor be made at a meeting of said board, at which a majority is present uniting in the action thereof. *Ib.*





